

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

I.A. No. 7 of 2009
IN
Appeal No. 10 of 2008

Dated: 5th March, 2009

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member

IN THE MATTER OF:

1. Shahlon Industrial Infrastructure Pvt. Ltd.
3rd Floor, Dawer Chambers,
Near Sub mail, Ring Road, Surat – 395002

... Petitioner in I.A. No. 7 of 009/
Respondent No. 8 in Appeal No. 10 of 2008

Versus

1. Dakshin Gujarat Vij Company Ltd.
Corporate Office, Nana Varchha Road
Kapodara Char Rasta, SURAT – 396006 (Gujarat)
2. Madhya Gujarat Vij Company Ltd.
Corporate Office, Sardar Patel Vidyut Bhavan,
Race Course, VADADRA – 390007 (Gujarat)
3. Uttar Gujarat Vij Company Ltd.
Corporate Office, visnagar road
MEHSANA {Gujarat} – 384001
4. Paschim Gujarat Vij Company Ltd.
Corporate Office, Laxminagar
Nana Mava Road, Rajkot (Gujarat) – 360004
5. Gujarat Energy Transmission Corporation Ltd.
Corporate Office, Sardar Patel Vidyut Bhavan
Race Course, VADODRA – 390007 (Gujarat)

..... Respondents in I.A. No. 7 of 2009/
Appellants in Appeal No. 10 of 2008

6. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower,
Opp. Nehru Bridge, Ashram Road
Ahmedabad – 380009
7. Chief Electrical Inspector
Udyog Bhavan, Near NH-4,
Gandhinagar – 382011
8. Surabhi Infrastructure Services LTd.
Plot No. 4209, Road No. 24,
GIDC, SAchin, District Surat – 394230
9. M/s Kadodra Power Pvt. Ltd.
Plot NO. 210, Kadodara Char Rasta,
Te: Palsana, Distrcit Surat – 934327
10. M/s Gayatri Shakti Paper & Boards Ltd.
Plot No. 799/1, Phase-III, GIDC, VApi,
District Valsad – 396195
11. P..I. Industries Lt.
Plot NO.1 237, GIDC, Panoli
District Bharuch + 394001
12. M.A. Group Industrial Cooperative Services Society Ltd.
Plot NO. 11, Zainab Society
Near Subhanm Park
Adajan Patiya, Surat – 395009
13. Nangalia Group of Association
Sr. No. 150, Plot NO. 113, A-3,
Mota Borasara, Taluka: Mangrol, Dist. Surat – 394110

.... Respondents in I.A. No. 7 of 2009/
Respondents in Appeal No. 10 of 2008

Counsel for the Respondent /
Appellant(s) :

Mr. I.J. Desai
Mr. M.G. Ramachandaran with
Mr. Anand K. Ganeshan and
Ms. Swapana Seshadari
Ms. Utra Babbar with

Counsel for the Respondent(s):

Mr. Somnath,
Ms. Hemantika Wahi and
Mr. Satyendra R. Pandey,
Legal Advisor, GERC for GERC
Mr. Habibur Rahman for
Mr. S. Ahmed, Govt. Counsel
Mr. Ehtesham Hashmi for
Mr. Saleem Ahmed for Resp. 2.
Mr. Laliet Kumar & R. K. Tilak for
Resps. 3, 4, 5, 7, 8 & 9.
Mr. Manish Jajoo for Resp. 4
Mr. Gunjan Kumar &
Mr. Rajeev M. Roy for Resp. 6
Ms. Meenakshi Arora with
Mr. Mohit D. Ram for Resps. 4 & 9

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

Shahlon Industrial Infrastructure Private Limited, Surat, who is the Respondent No.8 in Appeal No. 10/08 filed by the Distribution Licensees, the appellant has filed this Petition in I.A.No. 7/09 questioning the very jurisdiction of the State Commission which had gone into the issue raised by the Appellants before it and praying to decide the said question as a preliminary issue.

1.1 Since the preliminary issue, relating to the jurisdiction of the State Commission which has been raised in this petition i.e. I.A.No. 7/09 by R-8 in this Appeal goes to the root of the matter, we deem it fit to hear the Counsel for the parties in I.A.No. 7/09 with regard to the said issue before hearing the Counsel for the parties on the merits of the Appeal.

2. The short facts of the case are as follows:

2.1 The Distribution licensees and the Transmission licensee, the Appellants herein, filed a petition before the State Commission seeking for clarification on the issue of establishment and operation of captive generating plants and praying for initiating action against various Respondent Companies for violation of conditions of operation and maintenance of captive generating plants and utilization thereof.

2.2 The State Commission entertained the said Petition and issued notices to the parties concerned. After hearing both the parties and on considering the materials placed through the Report filed by the **Chief** Electrical Inspector, the State Commission by the order dated 22/10/07 directed the **Chief** Electrical Inspector to monitor the functioning of some of the Respondent companies holding that the said companies have not complied with the requirements to be fulfilled for being termed as captive generating plants. It also held that some of the other Respondent companies are not required to obtain a license under the provisions of the Act to distribute, supply and deliver electricity to the captive users.

2.3 The Distribution and the Transmission licensees who are the petitioners before the Commission i.e. Appellants 1 to 5 herein have filed this Appeal in No. 10/08 challenging the one portion of the order relating to the findings that some of the respondent companies are not required to obtain the license under the Act to distribute, deliver and supply to the captive users. As against the other portion of the finding to the effect that some of the other

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respondents have not fulfilled the requirements to satisfy the status of captive generating plants, those respondents have filed the cross appeals in Appeals No. 171/08 and 172/08.

2.4 Since all the parties have filed the appeal as well as the cross appeals, as against the single impugned order they were taken up together for hearing. At that stage, the Shalton Industrial Infrastructure Private Ltd., who is R-8 in Appeal No. 10/08 has filed this separate application in I.A.No. 7/09 raising the jurisdiction issue and requesting this Tribunal to decide the same at the first instance itself as according to them, the State Commission passed the impugned order without jurisdiction.

2.5 The Counsel for the Appellants in this Appeal opposed the said move, contending that the Petitioner in I.A.No. 7/09 should not be allowed to raise this question of jurisdiction now before this Tribunal as it has never been raised before the Commission.

2.6 However, as correctly pointed out by Shri Desai, the Learned Counsel for the Petitioner in I.A.No. 7/09, it is settled law that there is no bar in law for raising such a preliminary objection regarding the jurisdiction even at the Appellate stage as laid down by the Supreme Court in *2007 Vol.2 SCC 355* in 'Hassam Abbas Sayyad Vs. Usman Abbas Sayyad and Others.' Hence, we permitted the Learned Counsel for the Petitioner in I.A. No.7/09 to raise this issue in order to understand the nature of the preliminary objection with reference to the jurisdiction. Accordingly, Shri Desai has argued at length contending that the proceedings before the Commission are ab initio void due to lack of jurisdiction. On the

other hand, the Learned Counsel for the Respondents/Appellant have submitted that the Commission has jurisdiction to deal with the matter quoting various provisions.

3. Let us now refer to the gist of the submissions made by the Counsel for the parties. Contents of the Preliminary Objections raised by Mr. Desai, the Learned Counsel for the Petitioner in I.A. No. 7/09 are as follows:

“The prayer made by the Petitioners(Appellant) before the Commission is this:

“Direct the Respondents to furnish the required information to the competent authority mentioned in the notification No. GHU-203-53-GEI-11-2003-3898-K dated 22/10/03 of the Government of Gujarat and take action against the persons violating the conditions of operation and maintenance of captive power plants and utilization of power.”

The bare reading of the prayer and contents of the Petition filed before the State Commission would reveal that the Appellant approached the State Commission for giving a suitable direction to the respondents to give information to the Commission, and if any violation of the conditions for operations and maintenance is found out from that information, the Commission shall take action against those Respondents.

This prayer is in the nature of seeking for a roving enquiry of facts to find out the truth, and thereupon to take action. This would amount to conferring of jurisdiction on the State

Commission which is not available in Section 86(1)(a) to (k) of the Act.

Though under Section 86(1)(k), the State Commission can discharge such other functions as may be assigned to it under the other provisions of the Act, there are no other provisions either in the Act or rules or regulations permitting the State commission to conduct roving enquiries to find out the violations, if any, through some other agency by directing them to act as a fact finding agency. Admittedly, no determination of tariff is prayed for, nor the State Commission was called upon to discharge any other function enumerated in Section 86(1) of the Act. Though various sections such as Sections 2(8), 9, 2(28) and 2(30) of the Act have been quoted in the reply filed by the Appellants/Respondents, the said sections do not have any nexus with the jurisdiction of the State Commission with reference to the subject matter and the relief prayed for.

As per the Section 42 of the Act, the State Commission has framed open access regulations under which it determines the cross subsidy surcharge. The open access regulations say clearly that the Distribution licensees are entitled to collect such cross subsidy surcharges. As per the Regulations, the Distribution licensees are required to raise demand for cross subsidy surcharge from the consumers, if the circumstances so warrant.

The decision to make the demand from the particular consumer who is liable to pay cross subsidy surcharge has to be taken only by the distribution licensee and not by the State Commission. In other words, the distribution licensee cannot

approach the State Commission to ascertain whether any cross subsidy surcharge is payable by any consumer or not.

In this case, the State Commission has been approached by the Appellants requesting them to verify whether or not the Respondents have been complying with the conditions imposed for the captive generating stations and if the Commission found that they are not complying with those conditions, then the State Commission has to take action against them. By this method, the Appellants have sought to find out the cause of action with the help of State Commission to acquire the right to take action against the consumers after finding out the breach committed by any of the owners of the captive generating plants.

Neither the Distribution licensee can approach seeking for the said relief, nor the State Commission is having jurisdiction to conduct a roving enquiry to find out if any breach was committed by the captive generating plants.

Admittedly, when the petition was filed by the Distribution licensee before the Commission, no relevant provision of the Act was mentioned in the petition. When the Secretary asked for those particulars from the Distribution licensee, a letter has been sent by the licensees quoting 65 provisions i.e. 16 sections of the Electricity Act, 2003, 4 Sections of the Indian Electricity Act 1910, 51rules of the Electricity Rules and two notifications issued by the Government. This would prove that the Appellants themselves were not sure about any specific Section or provision under which the said petition was made. Further these provisions have no relevance to the subject matter.

There is no dispute in the fact that the petitioner, the captive generating plant has obtained the approval from the Chief Electrical Inspector, imposing the appropriate conditions. If the Distribution licensees have collected some materials as to the breach of those conditions, their remedy is only to go to Chief Electrical Inspector and report about the matter to them, or to file an Appeal before the State Government under the relevant rules. The Commission is not the proper forum to enquire about the same and to take action for the alleged breach.

The State Commission is not at all empowered to ensure compliance with the rules with regard to the criteria for the status of the captive generating plants. If any captive user is getting power from the captive generating plant which has become a mere generating station, after loosing the status of the captive generating plant, as stipulated in Rule 3(2) of the Electricity Rules, then the Distribution licensee should raise the demand for cross subsidy surcharge against such a captive user, instead of approaching any forum. If such captive user feels that such demand is not legal, then he alone has to approach the State Commission. Similarly, Section 42(5) gives the right to any consumer aggrieved by the non-redressal of his grievance to make a representation for redressal of his grievance to an authority to be known as the Ombudsman to be appointed or designated by the State Commission. Without resorting to such remedies, the Commission cannot be approached for invoking the power for redressal of the alleged grievances, which are not vested with the State Commission.

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The contention of the Counsel appearing for the Distribution licensees, the appellants herein, that the captive generation plant is also a generating company is absolutely incorrect. A generating company as well as a captive generation plant is separately defined. Under the Act, the specific duty of a generating company, including the duty of the establishment of the sub-station are prescribed. But such duties of captive power plants are not laid down anywhere in the Act. The definition of generating station does not include any sub-station. The generating company refers to ownership of generating stations which are not identified for captive use, whereas captive generating plant specifies the purpose for which the generated capacity is to be used. Therefore, the generating station is different from a generating company. The provisions of Section 129 gives jurisdiction of the State Commission for giving appropriate directions with regard to the breach, if any, committed by the licensees and generating companies only. As per relevant provision, the responsibility of ensuring that the conditions imposed on captive generating plants are fulfilled, lies with the Chief Electrical Inspector and not with the State Commission. As far as captive generating plants or group captive generation plants are concerned, no regulatory function in the Act of 2003 for the State Commission is envisaged in consonance with the National Electricity Policy (paras 5.2.2, 5.2.24 to 5.2.26 of the policy)

The responsibility to find out as to whether or not a particular generating station falls under the category of captive power plant as defined under the Act, and if it loses the said status, to take appropriate action with reference to the breach of the open access regulations lies only on the Distribution licensees. In other words, the Commission cannot decide about the

Status of a captive power plant. Similarly, the Commission cannot direct any enquiry to be conducted to enable it to give declaration about the Status of the captive power plant.

The Commission has got only one power, i.e. to fix the rate of cross subsidy surcharge for consumers taking power directly from generating companies using distribution system laid out by the distribution licensees. But in this case, the relief prayed for in the petition made to the State Commission, is to take action against the defaulting generating plants or consumers for violations, if found any, after enquiry. This is beyond the purview of the State Commission. Hence the impugned order is vitiated due to the lack of jurisdiction.”

4.0 Let us now refer to the crux of the reply to the above preliminary objection made by Shri M.G.Ramachandran, the Learned Counsel for the Distribution licensees and Transmission licensees who are the Appellants in this Appeal.

“The jurisdiction of the State Commission is to be determined not only with reference to issues referred to in Section 86(1) but also with reference to the other issues as Section 86(1)(k) states that the State Commission can discharge such other functions as may be assigned to it under the other provisions of the Act. Therefore, the functions of the State Commission would include not only with reference to the determination of tariff for generation, supply etc. but also for facilitating the intra-State transmission, issue of license for transmission, distribution and trading etc.

A captive generating plant as defined u/s 2(8) is also a generating station within the meaning of Section 2(30). The owner of the captive generating station is a generating company within the meaning of Section 2(28) of the Act. Therefore, the captive generating plant has to satisfy the conditions of being a generating station as well as being a generating company.

The special privileges of a captive generating plant and a captive user u/s 42(2) is that there is no cross subsidy surcharge payable. If they are not captive generating plants and they are merely generating stations, they are liable to pay cross subsidy surcharge as fixed by the State Commission to the benefit of the distribution licensees.

In order to have the privileges of the captive generating plant, it should fulfill the two conditions i.e. (1) it must own 26% of the ownership in the power plant and (2) it should consume for their own, a minimum of 51% of the generated units in terms of Rule 3(2) of the Electricity Rules. If these conditions are not fulfilled, the cross subsidy surcharge will become payable.

The decision with reference to the above has to be taken only by the State Commission, which is the authority to deal with the open access and cross subsidy surcharge, and licensees etc. When the State Commission alone determines and administers the payment of cross subsidy surcharge, which a Distribution licensee is entitled to, naturally, the State Commission will alone have to decide as to whether the conditions to qualify as a captive power plant and a captive user have been satisfied in order to confer the privileges of the captive power plants. In other words, if the plants have failed

to satisfy that the conditions have been complied with, the State Commission can hold that they are liable to pay, and accordingly fix the cross subsidy surcharge.

In order to fix the cross subsidy surcharge, the State Commission has to decide as to whether the cross subsidy surcharges are payable or not. In order to decide the same, the State Commission, has to decide the status of the various captive power plants also. The State Commission is the only authority which is entitled to go into this aspect. Under Section 97 of the Act, the State Commission has the powers to delegate and get the functions discharged through the other authorities. Therefore, it is open to the State Commission to delegate powers, to monitor and take appropriate action through the Chief Electrical Inspectors, which has been rightly done in this case. Therefore, the contention urged by the Counsel for the Petitioner that there is lack of jurisdiction for the Commission to decide the same, is not tenable and has to fail.”

4.1 In the light of the rival stand taken by the Counsel for the parties, we directed the Learned Counsel appearing for the State Commission to file written submissions with reference to their stand regarding the jurisdiction. Accordingly, the Learned Counsel for the Commission also filed the Written Submissions supporting the stand taken by the Appellants, quoting Section **129** of the Act and contending that the State Commission has got the jurisdiction to decide the issue in the petition.

5.0 We have considered the submissions made by the Counsel for the parties. We are now called upon to decide over the question as

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to whether the State Commission is empowered to conduct enquiry to find out whether the particular generating plant has satisfied the requirements of the captive generation plant and if not, whether it has got a jurisdiction to take appropriate action on it.

5.1 According to Shri Desai, the Learned Counsel for the Petitioners in I.A.No. 7/09, none of the provisions pointed out by the Counsel for the appellants/respondents would apply to the issue with reference to the power of the Commission to declare about the Status of the captive power plant. It is also vehemently contended by the learned Counsel for the petitioner (R-8) that the State Commission has no powers to decide the Status of the captive power plant and it cannot at all direct for roving enquiry to find out whether the plant has lost the status of the captive power plant.

5.2 It is also contended by the Counsel for the petitioner that the notifications and Section 129 would apply only to the generating companies and not the generating stations as there is a difference between the generating station, and a generating company which have been separately defined under Section 2(30), 2(8) and 2(28) of the Electricity Act.

5.3 On the other hand, it is strenuously contended by Shri M.G.Ramachandran, the Learned Counsel for the Respondents/Appellants, with equal vehemence that it is the responsibility of the State Commission to determine whether or not, a particular generating station falls under the category of captive power plant with reference to the definition given in Section 2(8) r/w Section 9 of the Act r/w Rule 3 of the Electricity Rules 2005

and to take appropriate action, if any with reference to the Regulation 14(2) of the State Commission Open Access Regulations 2005.

5.4 In this context, it is to be noted that both the notifications dated 22/10/03 and Section 129 of the Act would relate to the generating companies. It is contended by the Counsel for the Distribution licensees the appellants that this would apply to both the generating companies as well as generating stations as they are one and the same. But the Learned Counsel for the petitioner contended that the word 'generating station' has been separately defined and the word 'generating station' is not mentioned in the notification as well as Section 129 which refers only to generating companies.

5.5 As indicated above, it is the specific stand taken by the Learned Counsel for the Petitioners that the State Commission has the duty to fix the cross subsidy surcharge only and it is not empowered to declare about the Status of the captive generating unit after conducting a roving enquiry, and that the Notification dated 20/10/03 and Section 129 of the Act would apply to the generating companies only and not to the captive generating plants and the generating stations. Hence, we feel the question raised in this case has to be thoroughly gone into by taking into consideration of the various regulations framed by the State Commission and various provisions of the rules and the Act.

5.6 As stated earlier, though this question relating to jurisdiction has not been raised by the Petitioner herein before the State

Commission, we felt that it would be proper to give opportunity to the Learned Counsel for the Petitioner to raise this issue and accordingly, we allowed him to raise this question through the independent application as in our view it goes to the root of the matter.

5.7 Similarly, we feel that the opportunity to deal with this question must be given to the State Commission as well in order to deeply probe into this aspect in the light of the rival stand taken by the learned Counsel for the parties. On perusal of the chronological events, which were submitted by the Counsel for the Appellants, it is clear that the Appellants filed a petition before the State Commission on 23/11/05 seeking for a direction to be given to the Respondents to furnish information as per the Notification dated 22/10/03 and if the Respondents did not satisfy the Commission about the compliance of the conditions for being qualified as a captive power plant, it shall take action against them.

5.8 In pursuance of the said prayer, the Commission called for information from the Respondents and also directed the Chief Electrical Inspector to collect the other materials and to file a Report before the Commission. Accordingly, this information was given and report was filed. On the basis of the information and report of the Chief electrical Inspector, the State Commission passed the Final Order on 22/10/07, declaring that some of the Respondents including the Petitioner in I.A. No. 7/09 and R-8 in the Appeal have not complied with the requirements for qualifying as a captive power plants and accordingly, giving appropriate

directions to the Chief Electrical Inspector, regarding the monitoring etc.

5.9 Thus, it is clear that an enquiry has been conducted through the Chief Electrical Inspector and on that basis a decision has been arrived at with reference to the status of the captive power plant. The question is whether such an enquiry is permissible under law in order to give such declaration regarding the status of the captive power plant by the State Commission is to be decided now.

6.0 Since various regulations on this aspect have been framed by the State Commission, it would be proper to leave the question to be decided by State Commission itself for better appreciation, by taking into consideration of the rival contentions raised by the Counsel for the parties, and the relevant regulations and the rules framed under the Act.

6.1 Accordingly, we direct the State Commission to decide the issue regarding jurisdiction by considering the same afresh, in accordance with law, after giving an opportunity to the Counsel for the parties, without being influenced by the earlier stand taken by the Commission through its Written Submission filed before this Tribunal.

6.2 It is made clear that we are not expressing any opinion on this question. We entirely leave it to the decision of the State Commission. We further direct that the same be decided within six weeks from the date of the receipt of this Order. Till the same is decided, it would be appropriate to stay the operation of the

Impugned Order dated 22/10/07 by which directions were given pending the Appeals before this Tribunal. Accordingly, ordered.

7.0 With these observations, this I.A. is disposed off. After decision by the Commission the aggrieved party if any, can approach this Tribunal for necessary relief. Thereafter, we will decide over all the relevant issues in this Appeal as well as other Appeals.

(A.A. Khan)
Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 5th March, 2009.

REPORTABLE / NON - REPORTABLE