BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 77 of 2010

Dated : 18th February, 2011

Coram: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

M/s. Jayaswal Neco Industries Ltd.
Siltara Growth Centre, Siltara
Raipur – 493111

…Appellant

Versus

1. Chhattisgarh Electricity Regulatory Commission
Civil Lines, G.E. Road,
Raipur – 492001 (Chhattisgarh)

2. Chhattisgarh State Power Distribution Co. Ltd.
Vidyut Sewa Bhawan, Danganiya
Raipur – 492013

…Respondents

Counsel for the Appellant: Mr. Sanjay Sen, Ms. Sikha Ohri
Mr. Achintya Diwedi, Ms. Surbhi Sharma
Counsel for the Respondents: Mr. M.G.Ramachandran, Mr. Anand K. Ganeshan
Ms. Swapna Seshadri &
Ms. Ranjitha Ramachandran for Resp. 1
Ms. Suparna Srivastava for Respondent No. 2
Mr. Sudhir Kathpalia

JUDGMENT

JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The Appeal is directed against the order dated 25th May, 2009 passed by the Chhattisgarh Electricity Regulatory Commission, the Respondent No. 1 herein in Suo Moto Petition No. 17 of 2008 (M)

and the order on the review of the former dated 5th December, 2009 passed in Petition No. 37 of 2009(M) rejecting thereby the prayer of the Appellant for combining the quantum of consumption of two captive power plants of the Appellant for the purpose of fulfilling the requirement of the Appellant's captive power plant (JNIL) to comply with the Rule 3 of the Electricity Rules, 2005

The facts are these:

2. The Appellant who is engaged in the business of production of steel commissioned two generators having 4 MW capacity each and one generator with 6 MW capacity between the years 1996 – 2001. In March, 2007 M/s. Maa Usha Urja Limited (MUUL) commissioned a generating plant of 7.5 MW. It operated on non-conventional fuel (rice husk). The Appellant subscribed to 31.63% of the equity share in MUUL as a result of which this MUUL became the captive generating plant of the Appellant. According to the Appellant, this is a special purpose vehicle of the Appellant generating electricity for captive use which fulfills the requirement of Rule 3 of the Electricity Rules, 2005 read with applicable provisions of the Electricity Act, 2003. Therefore,

according to the Appellant, its total generation under the captive route was 14 MW (4 x 2 +6 =14) in respect of M/s. Jayaswal Neco Industries Ltd. (JNIL) and 7.5 MW which is the generation of MUUL. The Commission in Petition No. 17 of 2008(M) and the Petition NO. 37 of 2009 held that the Appellant is a captive generating plant having generating assets aggregating to 14 MW and 7.5 MW but is alleged to have wrongly held that "*while on the basis of shareholding of MUUL by JNIL (to the extent of 31.63%), the power plant of MUUL can be treated as CGP of JNIL, but it cannot be combined with the consumption of electricity generated by another plant.*"

3. On 23rd September, 2009 the Commission issued notices under Section 142 of the Act against the Appellant and two other generating companies in connection with the aforesaid Petition No. 17 of 2008 (M) alleging that self consumption of electricity by the Appellant and other two companies was found to be below the minimum requirement of 51% on the annual basis which was in violation of Section 10 and 12 of the Act, 2003. The Appellant contended before the Commission that they own and control 31.63% of the share of the MUUL and that the total consumption

of the Appellant from its aggregating generation was 63.66% which, according to the Appellant was in compliance with the criteria laid down in Rule 3 of the Electricity Rules 2005. But the Commission in the impugned order dated 25th May, 2009, though it accepted MUUL to be a generating plant owned by the Appellant, refused to combine the consumption of electricity made by the Appellant from the power plant of JNIL together with that of the MUUL of the Appellant. Now, it is the contention of the Appellant that from the total generation by the Appellant through MUUL of 54.23 MUs the Appellant was the consumer of 53.53 MU which corresponds to nearly 99% of the total generation. The Appellant further contends that from 101.31 MU generated by its other plant its consumption is 38.34 MU which is approximately 41.68%. The Appellant was in fact thus consuming 62.33% of its total generation. In support of the Appeal the Appellant relies on an order of the Commission passed in Petition No. 6 of 2007 (M) wherein it held that:

> *"MIEL, which fully owns the CPP and has also taken over the manufacturing facility of MIL through a lease agreement, is using the same. Thus, the power being used is for the purpose of "own Use" of MIEL only. Therefore, the question of*

application of the requirements laid down in Rule 3 does not arise in this case. The fact that MIL is a separate company is of no consequence of the matter of the captive use by MIEL of the electricity generated by it."

Thus it is the case of the appellant that total consumption of the Appellant from both the power plants satisfies the criteria as laid down in Rule 3(1)(a)(i) & (ii) of the Electricity Rule 2005 for each of such power plants.

4. The Chhattisgarh State Power Distribution Company Ltd., the Respondent No. 2 herein filed a counter affidavit challenging the contentions of the Appellant to be of any substance. It is pointed out that consumption of electricity as captive user of a captive generating plant cannot be combined or clubbed with self consumption of electricity by that captive user from its own captive generating plant for the purposes of fulfilling the mandatory requirement of minimum 51% of self consumption under Rule 3. The reliance of the Appellant on the order of the Commission in Petition No. 6 of 2007 (M) in the case of M/s Monnet Ispat and Energy Ltd. is of no avail because unlike the present case where there are two captive generating plants in question and power is being drawn in dual capacity of a captive

generator (from own plant) and as a captive user (from captive generating plant of another entity), there was only one generating plant in the case of M/s Monnet Ispat qua which the 'captive user' status based on lease arrangement, was being sought. There does exist a lease arrangement in the present case but the existence of a 'captive user' status on the basis thereof cannot be disputed. That being so, reliance by the Appellant on the case of M/s. Monnet Ispat is completely misplaced and is liable to be ignored by this Tribunal.

5. It is submitted that the requirement in the relevant rules are as follows:

(i) the entity or entities consuming the power generated from the captive generating plant on 'self use' basis must necessarily hold not less than 26% of the ownership in the captive generating company, the said entity or entities being called the 'captive user(s)'. and defined in Explanation (b) to Sub-Rule (2) as the "end user of the electricity generated in a captive generating plant"; and

(ii) from out of the aggregate electricity generated in such captive generating plant (determined on an annual basis), not less than 51% must be consumed for captive use.

The use of the term "captive user" with a suffix "s" suggesting plurality as well indicates that there may be more than one captive user for a given captive generating plant provided they fulfill the required shareholding criteria.

6. It is further contended by the Respondent No. 2 that the two requirements under Rule 3 of the Electricity Rules, 2005 are conjunctive and not disjunctive so that even if the requirement of the captive user(s) holding 26% shareholding in the captive generating plant is fulfilled (as is the case of the present Appellant) but the self-consumption by the captive user(s) of the electricity generated from such plant (which is the Appellant itself in the present case), determined on an annual basis, is less than the required 51%, then the generating plant will cease to qualify as a captive generating plant. In such a situation, the plant will be a generating plant as defined under Section 2(30) of the 2003 Act and the electricity supplied by it even to its 'captive user(s)' will be treated as electricity supplied to third parties, which is permissible

only under a distribution licensee or through open access. The generating plant will then either have to abide by the terms and conditions of a distribution license such as universal supply obligation, or pay cross subsidy to the distribution licensee in its area of supply, as the case may be, so that operation of the distribution licensee and the interests of its subsidized and the subsidizing consumers are not adversely affected.

7. It is further contended that the Appellant has a captive generating plant of 14 MW capacity comprising three units two being 4 MW capacity each and one being 6 MW and is connected with the grid of the Respondent No. 2 through 132 KV line for receiving import/export power from/to the Respondent No. 2 under contractual arrangements. The said captive generating plant of the Appellant is co-located with its industrial unit. As per the prescriptions made under the 2003 Act read with the 2005 Rules the Appellant being the owner as also the captive user of the electricity generated from this plant fulfils the requirements of 26% minimum ownership as a captive user. However, the Appellant must also necessarily be a consumer of 51% of the power generated from this captive generating plant (determined on

an annual basis) for the purposes of consumption in its own industrial unit. It is an admitted position based on the material placed on record before the Respondent No. 1 Commission and also examined in detail by the Commission that the self consumption of the Appellant even after deduction of its auxiliary consumption, comes only to 41.68% for the year 2007-08.

8. Self consumption as per the parameters prescribed in the Act of 2003 read with the Rules, 2005 is the cardinal factor that distinguishes a captive generating plant from a generating station and grant the former concession of either exemption from payment of cross subsidy surcharge while availing open access for taking electricity to the destination of his own use, or grant exemption from rigors of the Act on an entity while supplying to the installation of the consumer.

9. It is the further contention of the Respondent No. 2 that as per the scheme of generation and consumption set out under the Act, 2003 read with the Rules, 2005 the electricity generated in a generating plant and consumed for self-use is distinct from the electricity generated in another plant and consumed as a captive user. It is submitted that for the purpose of complying with the mandatory

requirement set out in Rule 3(1)(ii) of the 2005 Rules, it is only the electricity generated at its own power plant and consumed for self – use that can be taken into account for the purpose of determining the 51% minimum consumption. The electricity consumed as captive user be taken into consideration for the purpose of determining 51% consumption of the other power plant. In other words, where there are two sources from which electricity is being received by an entity: one from its own generating plant on 'self use' basis and the other from another generating plant of which such entity is a 'captive user', it is only the electricity received on self – use basis which is prescribed under Rule 3 of the Rules, 2005 to be taken into account for the purposes of determining the 51% minimum consumption. If the claims of the appellant as raised before the Respondent No. 1 commission and presently being agitated before this Tribunal are accepted, then by resorting to mechanism such as the "lease mechanism: in the present case or in the case of M/s Monnet Ispat, and acting under the camouflage of an impermissible mechanism of combining self – consumption from their own generating plants with the consumption as captive user of another generating plant, generating plants would attain the

status of captive generating plants, which will entitle them to affect supply to third parties without obtaining a distribution license or without availing open access as mandated under the Act, 2003. Thus, these would gradually cripple the operation of the Respondent No. 2, still burdened with the statutory universal supply obligation, by leaving mostly the subsidized category of consumers and would cause grave adverse impact on the tariff of its consumers. In contrast, these "captive" generating plants, now having more surplus power at their disposal, would achieve huge financial gains through sale of surplus power in open market.

10. The points for consideration are as follows:

(i) Whether the Commission passed the impugned order in contravention of the principles established under the Electricity Act, 2003, National Electricity Policy as well as the orders passed by this Tribunal from time to time?

(ii) Whether the Commission erred in ignoring the fact that the total consumption of the Appellant from all its power plants operating under captive mode has to

be taken into account for determining its captive status?

(iii) Whether the Commission erred in denying the captive status to the Appellant for the year in question even though the Appellant was in compliance with the conditions laid down under the Electricity Act, 2003 read with Rule 3 of the Electricity Rules 2005, as alleged by the Appellant?

(iv) Whether the Commission erred in ignoring the report of the Chief Electrical Inspector dated 15.06.2009 wherein it has been admitted that once the total generation of the Appellant from its captive generating assets of 21.5 MW is considered, the consumption for self use is about 62.33% (much above the minimum requirement of 51%)?

All these issues are inter-linked and inter-woven with each other; therefore, a common treatment is given to all the issues. There is no denial of the fact that the Appellant is having a captive power plant having generating capacity of 14 MW (4 x 2 + 6). It is absolutely owned by the Appellant. The other

power plant is also a captive power plant owned by the 'Maa Usha Urja Ltd.' (MUUL) in which admittedly the Appellant has 31.63% of the equity share with voting rights. This MUUL has generation capacity of 7.5 MW. According to the Appellant, it took over the generating assets of the MUUL by a lease agreement dated 4th January, 2007 which enables the Appellant to exercise the direct right and propriety interest in the generating assets of the MUUL. Each of the two plants was entitled to be the captive power plant. According to the Appellant, by virtue of the Appellant owning and controlling 31.63% shares in the MUUL it became a captive power plant of the appellant; as such once it is a captive generating plant of the Appellant the benefits that accrue to it is available to the Appellant and the total generating capacity aggregates to 21.5 MW. Once this position is admitted the Commission for the purpose of calculating consumption of electricity for captive use is required to take the total generation of the Appellant and compare the same with its total consumption. Thus, consumption for self use is nearly 62.33% which satisfies the Rule 3(1)(a)(i) and (ii) of the Rules, 2005. According to Mr.

Sanjay Sen, learned counsel for the Appellant, who argued with much force, the very purpose of the Act is defeated if consumption of the Appellant is not taken into account by combining the total consumption from both the captive power plants together in view of the fact that the Appellant invested a lot of funds for generation of electricity for the betterment of its industry. Though the Commission recognized the MUUL to be a captive generating plant of the Appellant it failed to give credit for the consumption of the Appellant of the power supplied through MUUL

11. Mrs. Suparna Srivastava, learned counsel for the Respondent No. 2 submitted as follows:

(a) Clubbing of consumption of the two plants is not permissible under the relevant Rules;

(b) Reliance on the decisions of the Commission in the case of Monnet Ispat and Energy Ltd. is of no good.

(c) The Appellant must consume 51% of the power generated from each of the captive generating plants for the purpose of consumption in its own industrial units so as to be recognized as CPP but the consumption of the Appellant after deducting

its auxiliary consumption came to 41.68% in the year 2007-08.

(d) The electricity generated in a generating separate and consumed for self use is distinct from the electricity generated in another plant and consumed as captive user.

(e) The two power plants are distinct and apart from each other and their legal entities are not one and the same, so that each of the plants must satisfy each of the two requirements as laid down in the Rules, 2005

12. Mrs. Swapna Seshadri, learned counsel for the Commission justified the order of the Commission submitting that the Appellant failed to comply with the provisions of Rule 3 of Electricity Rules, 2005 as the requirement laid down in Rule 3(1)(a)(i) & (ii) are conjunctive and not disjunctive and each power plant must satisfy both the criteria.

13. Having heard the learned counsel for the parties we first propose to read the relevant provisions of the Act and the Rules so as to appreciate the case of the Appellant.

14. Section 2(8) of the Electricity Act, 2003 defines the captive generating plant as follows:

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.".

15. Captive Generation has been defined in Section 9 of the Act as under:

*"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:

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licencee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42,

(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."

16. Read with the above, Rule 3 of the Electricity Rules, 2005 which is the focus of our consideration is reproduced herein below:

"3. ***Requirements of Captive Generating Plant****. – (1) No power plant shall qualify as a 'Captive Generating Plant' under section 9 read with clause (8) of section 2 of the Act unless-*

(a) in case of a power plant –

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

(ii) not less than fifty one per cent 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 that in case of association of persons, the captive user(s) shall hold not less than twenty six per cent. of the ownership of the plant in aggregate and such captive user(s) shall consumer not less than fifty one per cent 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 per cent:

(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 generation 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 user 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 shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent. of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant."

17. The Commission observed that M/s Jayaswal Neco Industries Ltd. (JNIL) has CGP of 14 MW capacity and the total generation of Appellant's power plant in the year 2007-08 was 101.31 MU and the total consumption in the industry of the Appellant was only 38.34 MU and even if auxiliary consumption of 10.13 MU is

deducted from the total generation, the total self-use of the electricity generated by the CGP comes to only 41.68% which is below the mandatory requirement of 51%. Before the Commission the Appellant pleaded, as is pleaded here also, that if self consumption of the Appellant's industry is combined with the MUUL then the total consumption is much more than 51%. The Commission gave a concession to the Appellant to the effect that the power plant of MUUL because of the Appellant's share in that plant can be treated as CGP of the Appellant but it held that MUUL is a different company and the consumption of the two cannot be combined although benefit of consumption of electricity generated by MUUL may go to JNIL. So far as the data concerning the consumption of power from the Appellant's captive power plant is concerned, it is admittedly far below the requirement of 51%. Even though MUUL is a different company it cannot be denied that in view of the Appellant having acquired 31.63% ownership in MUUL the Appellant satisfies the first requirement of the rule so as to be a CPP, and its consumption also satisfies the second requirement. It is noticeable that the opening words of Rule 3 refer to the provision of Section 9 read with

Section 2(8). No amount of logical reasoning is required to be employed to decipher that the requirements in Rule 3(1)(a)(i) and (ii) are distinct and separate and they cannot be said to be disjunctive of each other so that each of the two plants has to meet with each of the two requirements. We notice the word 'a' before the word 'power plant' in Section 2(8) which defines captive generating plant. Section 9 in its sub-sections (1) and (2) repeats the word 'a' to qualify 'captive generating plant'. The provision of Section 2(8) and Section 9 have been taken note of in Rule 3 while prescribing the requirements of a captive generating plant. Here also in the Rule 3 the word 'a' has been used before the words 'captive generating plant'. Necessarily, such a captive generating plant before being recognized as such must satisfy that it has at least 26% of the ownership and that its own consumption from the generating plant is not less than 51%. It is without question that the Appellant's power plant called JNIL is a distinct power plant; equally is the distinct power plant that goes in the name and style of Maa Usha Urja Ltd. (MUUL). Unquestionably, they were both captive power plants. But Mr. Sen is not correct when he picks up the compliance with consumption of one power plant as the

consumption of the other in order to show the JNIL power pant to be the CPP. It is plain that each of the two power plants has to satisfy each of the two requirements of ownership of 26% and consumption of 51% and consumption of one is not permitted to be combined under the rules with the consumption of the other so as to fulfill the requirements of the former. The intention of the legislature is very clear as it uses the word ‘ such plant’ in Rule 3(1)(a)(ii) to denote a singular power plant, not two power plants, that has to satisfy both the requirements of (i) and (ii). A leverage is given in Rule 3(1)(b) just for dividing or splitting units of single generating station and not for combining two or more generating stations for determination of this status of captivity. The Hon’ble Supreme Court says in *Jugalkishore Sharaf Vs. Raw Cotton Ltd. (AIR 1955 SC 376)*:

> *“The cardinal rule of construction of statutes is to read the statutes literally, that is, by giving to the word that ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation.”*

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 provisio 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 thereunder 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 statue. Reference may be made on the treaties of Bennion on Statutory Interpretation (Indian reprint 5th edition page 1064).

20. Mrs. Suparna Srivastava seeks to make a distinction between the two plants by styling one power plant as the Appellant's own generating plant and the other by styling the Appellant as a captive user of the MUUL. That is to say, she argued that electricity generated in generating plant and consumed for self use is distinct from that of electricity generated in another plant and consumed as a captive user. But we feel it impossible to agree with her in as

much as given the undisputed fact that in MUUL the Appellant has 31.63% equity share and its consumption is not less than 51% it becomes a captive generating plant of the Appellant.

21. The result is that the Appellant's power plant (JNIL) ceased to be the captive power plant during the year in question namely 2007-08 and we do not find the Commission's impugned order suffering from infirmity warranting any interference.

22. We therefore, dismiss the appeal without costs.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

Dated : 18th February, 2011

INDEX : REPORTABLE/NON-REPORTABLE