

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NOS. 2578-2579 OF 2008

**CHHATTISGARH STATE POWER DISTRIBUTION
COMPANY LTD. ...APPELLANT(S)**

VERSUS

**CHHATTISGARH STATE ELECTRICITY
REGULATORY COMMISSION AND ANOTHER
...RESPONDENT(S)**

WITH

CIVIL APPEAL NOS. 2941-2942 OF 2008

CIVIL APPEAL NO. 2868 OF 2008

J U D G M E N T

B.R. GAVAI, J.

1. These appeals challenge the judgment dated 6th December 2007 passed by the Appellate Tribunal for Electricity (hereinafter referred to as the "APTEL"), thereby dismissing the appeals filed by the present appellant.

2. The facts in brief giving rise to the present appeals are as under:

M/s Shri Bajrang Power and Ispat Ltd. (hereinafter referred to as “SBPIL”) has established a Captive Generation Plant. M/s Shri Bajrang Metallics and Power Ltd. (hereinafter referred to as “SBMPL”) is a sister concern of SBPIL. SBPIL submitted a petition to the Chhattisgarh State Electricity Regulatory Commission (hereinafter referred to as “the Commission”) for providing open access and wheeling of power through the transmission system of the appellant for captive use by SBMPL. The petition of the SBPIL was for permission to wheel 19 lakh units, corresponding to 13 MW, to SBMPL. It was stated in the said petition that SBMPL holds 27.6% of the equity shares of SBPIL and that more than 51% of the electricity generated by the captive power plant would be consumed by them. It was submitted that the generating capacity of the captive generation plant set up by SBPIL would be 103.68 MU per annum. It was further submitted that out of the said 103.68 MU per annum power generated, 13.22 MU per annum would be utilized in its sponge iron plant. It was further submitted that 54 MU per annum would be supplied to SBMPL through the appellant grid and the balance would be sold to the appellant.

3. The said petition came to be resisted by the appellant. It was contended by the appellant that SBPIL holds more than 72% of the shares of the company. However, its consumption would be limited only to 14.16% (13.22 MU), whereas the consumption of SBMPL holding 26.67% shares, would be 57.87% (54 MU). It was submitted that this was not proportionate to the ownership of the power plant.

4. The Commission, vide its order dated 14th October 2005, rejected the contention of the appellant and held that SBPIL was entitled to supply electricity to its sister concern SBMPL and the same would qualify to be treated as 'own consumption' within the ambit of Section 9 read with Section 2(8) of the Electricity Act, 2003 (hereinafter referred to as "the said Act") and Rule 3 of the Electricity Rules, 2005 (hereinafter referred to as "the said Rules"). While allowing the said petition, the Commission imposed the following conditions:

- (i) "The consumption of electricity by the captive users shall not be less than 51% over a financial year, and in case it is not so it would be treated as 'supply of electricity by a

generating company' in terms of provision of rule 3(2) of the Rules.

- (ii) The CSEB is entitled to charge for wheeling of electricity and levy other charges as per their present rates which shall be subject to revision as per the provisions in regulations on the charges for open access to be notified by the Commission shortly.
- (iii) The company may enter into necessary agreement with the CSEB for the sale of balance power under the present terms and conditions of the CSEB, is subject to revision as per the directions of the Commission from time to time.”

5. Being aggrieved thereby, the appellant preferred appeals before the APTEL. The said appeals came to be dismissed by the APTEL vide impugned judgment dated 6th December 2007. Being aggrieved thereby, the present appeals.

6. We have heard Shri Nikhil Nayyar, learned Senior Counsel appearing on behalf of the appellant and Shri Naveen R. Nath, learned Senior Counsel and Smt. Swapna Seshadari, learned counsel appearing on behalf of the respondents.

7. Shri Nayyar submitted that the order passed by the Commission and the impugned judgment passed by the

APTEL are contrary to the plain language used in Rule 3 of the said Rules. He submitted that SBMPL is a sister concern of SBPIL which has established the captive power plant. It is submitted that unless SBPIL consumes 51% of the aggregate electricity generated by it, it will not be entitled to get the benefit under Section 9 of the said Act. He submitted that in sub-rule (1) of Rule 3 of the said Rules, the words used are “Captive Generating Plant”. He submitted that upon a plain and literal interpretation of Rule 3 of the said Rules, it will be abundantly clear that unless the sister concern establishes captive generating plant utilization of 51% of the electricity generated, it will not be entitled to get benefit under Section 9 of the said Act.

8. Shri Nath submitted that the Commission, as well as the APTEL, has rightly construed the provisions of the said Act and the said Rules. He submitted, that this Court, in the case of ***Maharashtra State Electricity Distribution Company Limited v. JSW Steel Limited and Others***¹, has held that no permission is required from the Commission for supply of electricity for its own use. He further submitted

¹ (2022) 2 SCC 742

that this Court has also held that insofar as captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the said Act.

9. Smt. Seshadari, learned counsel appearing on behalf of the Commission submitted that if the arguments advanced on behalf of the appellant are accepted, the same would be contrary to the provisions of the said Act. She, therefore, submitted that the order passed by the Commission and the impugned judgment passed by the APTEL warrant no interference.

10. For appreciating the rival contentions, it will be apposite to refer to Clauses (8) and (49) of Section 2 as well as Section 9 and sub-sections (1) and (2) of Section 42 of the said Act, which read thus:

“2. Definitions.-

.....

(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 cooperative society or association of persons for generating electricity primarily for use of members of such cooperative society or association;

.....

(49) “person” shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person;

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 plan to any licensee 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.

42. Duties of distribution licensee and open access.—(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in

accordance with the provisions contained in this Act.

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross-subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross-subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross-subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

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

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

.....”

11. It could thus be seen that in view of Section 9 of the said Act, any person may construct, maintain or operate a captive generating plant and dedicated transmission lines. The first proviso to Section 9 of the said Act provides 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 the generating company. The second proviso to Section 9 of the said Act provides that no licence shall be required under the said Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of the said Act and the rules and regulations made thereunder and to any consumer, subject to the regulations made under sub-section (2) of Section 42 of the said Act. Sub-section (2) of Section 9 of the said Act provides that 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. The first proviso to sub-section (2) of Section 9 of the said Act provides 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. The second proviso to sub-section (2) of Section 9 of the said Act provides that if there is any dispute regarding the availability of transmission facility, it shall be adjudicated upon by the Appropriate Commission.

12. Clause (8) of Section 2 of the said Act defines “Captive generating plant”. It states that “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.

13. Clause (49) of Section 2 of the said Act defines “person”. It states that “person” shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person.

14. A combined reading of Section 9 and Clause (8) of Section 2 of the said Act would reveal that a person is entitled to construct, maintain or operate a captive

generating plant. Such a plant should be primarily for his own use. Clause (8) of Section 2 of the said Act would further show that it includes a power plant set up by any co-operative society or association of persons for generating electricity. The requirement is that it should be primarily for the use of the members of such co-operative society or association.

15. The definition of “person” is wide enough to include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person.

16. It is thus clear that a person, to get benefit under Section 9 of the said Act, could be an individual or a body corporate or association or body of individuals, whether incorporated or not. It could thus be seen that even an association of corporate bodies can establish a captive power plant. The only requirement would be that the said plant must be established primarily for their own use. The fourth proviso to sub-section (2) of Section 42 of the said Act would also reveal that surcharge would not be leviable in case open access is provided to a person who has established a captive

generating plant for carrying the electricity to the destination of his own use.

17. Therefore, the question that would arise is as to whether the open access for transmitting electricity from SBPIL to SBMPL would be for own use or not.

18. We find that Rule 3 of the said Rules would clarify the position, which reads thus:

“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 cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty-six per cent of the ownership of the plant in aggregate and such captive user(s) shall consume 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 generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including—

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

(2) The equity 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.”

19. The provisions made in Rule 3 of the said Rules are clear. Sub-rule (1) of Rule 3 of the said Rules provides that no power plant shall qualify as a “Captive Generating Plant” under Section 9 read with Clause (8) of Section 2 of the said Act unless the conditions stated therein are fulfilled. The first requirement is that not less than 26% of the ownership is held by the captive user(s). The second requirement is that not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis, is consumed

for the captive use. The second proviso to Rule 3(1)(a)(ii) of the said Rules provides that in case of association of persons, the captive user(s) shall hold not less than 26% of the ownership of the plant in aggregate and such captive user(s) shall consume not less than 51% 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 10%.

20. Admittedly, SBMPL holds 27.6% equity shares in SBPIL. As such, the requirement of not less than 26% of shares is fulfilled by SBMPL. As already discussed hereinabove, even an association of corporate bodies can establish a power plant. Since SBMPL holds 27.6% of the ownership, the use of electricity by it would be for captive use under the provisions of the said Act. The other requirement would be that the consumption of SBIPL and SBMPL together should not be less than 51% of the power generated. Admittedly, the joint consumption by SBIPL and SBMPL is more than 51%. As such, both the conditions as provided under Rule 3 of the said Rules are satisfied.

21. We find that it will also be appropriate to refer to the National Electricity Policy, 2005 (hereinafter referred to as “the said Policy”) as notified by the Government of India, in exercise of its powers under Section 3 of the said Act, on 12th February 2005. Clauses 5.2.24 to 5.2.26 deal with the “Captive Generation”, which read thus:

“Captive Generation

5.2.24 The liberal provision in the Electricity Act, 2003 with respect to setting up of captive power plant has been made with a view to not only securing reliable, quality and cost-effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry.

5.2.25 The provision relating to captive power plants to be set up by group of consumers is primarily aimed at enabling small and medium industries or other consumers that may not individually be in a position to set up plant of optimal size in a cost-effective manner. It needs to be noted that efficient expansion of small and medium industries across the country would lead to creation of enormous employment opportunities.

5.2.26 A large number of captive and standby generating stations in India have surplus capacity that could be supplied to the grid continuously or during certain time periods.

These plants offer a sizeable and potentially competitive capacity that could be harnessed for meeting demand for power. Under the Act, captive generators have access to licensees and would get access to consumers who are allowed open access. Grid inter-connections for captive generators shall be facilitated as per Section 30 of the Act. This should be done on priority basis to enable captive generation to become available as distributed generation along the grid. Towards this end, non-conventional energy sources including co-generation could also play a role. Appropriate commercial arrangements would need to be instituted between licensees and the captive generators for harnessing of spare capacity energy from captive power plants. The appropriate Regulatory Commission shall exercise regulatory oversight on such commercial arrangements between captive generators and licensees and determine tariffs when a licensee is the off-taker of power from captive plant.”

[emphasis supplied]

22. It could thus be seen that the provision with respect to establishing captive power plant has been made with a view to not only securing reliable, quality and cost-effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry. The said Policy further states that the provision relating to captive power plants to be set up by a group of consumers has been made primarily for enabling small and medium industries or other consumers that may not

individually be in a position to set up plant of optimal size, in a cost-effective manner. It also states that the efficient expansion of small and medium industries across the country would lead to creation of enormous employment opportunities. Clause 5.2.26 of the said Policy further states that the captive and standby generating stations in India have surplus capacity that could be supplied to the grid continuously or during certain time periods.

23. The said Policy is issued under Section 3 of the said Act and as such, has a statutory flavour. In any case, the said Policy is in tune with the provisions as contained in Section 9 and Clause (8) of Section 2 of the said Act. A liberal provision has been made in Section 9 of the said Act so as to promote establishment of captive power plants.

24. It is a settled position of law that the interpretation which advances the object and purpose of the Act, has to be preferred. A reliance in this respect can be placed on the judgments of this Court in the cases of ***Administrator, Municipal Corporation, Bilaspur v. Dattatraya Dahankar, Advocate and Another***², ***S. Gopal Reddy v.***

² (1992) 1 SCC 361

**State of A.P.³ and Ahmedabad Municipal Corporation
and Another v. Nilaybhai R. Thakore and Another⁴.**

25. We are, therefore, of the considered view that no case is made out for interfering with the order dated 14th October 2005 passed by the Commission and the impugned judgment dated 6th December 2007 passed by the APTEL.

26. In the result, the present appeals are found without merit and as such, are dismissed.

27. Pending application(s), if any, shall stand disposed of in the above terms. No order as to costs.

.....**J.**
[L. NAGESWARA RAO]

.....**J.**
[B.R. GAVAI]

**NEW DELHI;
MAY 12, 2022.**

3 (1996) 4 SCC 596

4 (1999) 8 SCC 139