Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.54 of 2012

Dated: 30th January, 2013

Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:

M/s. Emami Paper Mills Ltd
Balgopalpur, Rasulpur,
Balasore, Odhisha
PIN-756 020

…Appellant

Versus

1. **Odhisha Electricity Regulatory Commission**
   Vidyut Niyamak Bhawan,
   Unit-VIII, Bhubaneswar, Odisha

2. **GRIDCO Ltd**
   Janpath, Bhubaneswar-751 022
   Odhisha

3. **Odhisha Renewable Energy Development Agency**
   S/59, Mancheswar Industrial Estate,
   Bhubaneswar-751 010
   Odisha

…..Respondent(s)

Counsel for the Appellant(s) : Mr.Suresh Chandra Tripathy
Mr. Mayank Singh Chauhan
Ms. Prashanto Sen

Counsel for the Respondent(s): Mr. B K Nayak
Mr. Rutwik Panda

J U D G M E NT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. **M/s. Emami Paper Mills Limited** has filed this Appeal as against the impugned order of the Orissa State Commission dated 13.2.2012 passed in Suo-Moto case No.111 of 2011 whereby the State Commission directed the Appellant to purchase power from the renewable sources of energy. The facts of the case are as follows:

   (a) The Appellant is a paper mill unit. It has co-generation based captive power plant of capacity 20 MW to meet its power requirement.

   (b) The captive generation plant of the Appellant produces steam besides electricity for use in the process of manufacture of paper.

   (c) Orissa State Commission by the notification dated 30.9.2010 issued Regulations for Renewable and Co-generation Energy Purchase Obligation.

(d) One M/s. Bhushan Power Steel Limited filed a Petition before the Orissa State Commission praying for the relaxation from the Renewal Purchase Obligation in respect of the said Company as it has co-generation from its captive power plant.

(e) The State Commission in order to have a comprehensive hearing and to take a decision on the issues involved, decided to issue public notice inviting suggestions and objections from various entities.

(f) Accordingly, public notice was issued. Hearing was held on 26.12.2011. So many Companies appeared before the Commission and filed their objections. The Appellant also filed its objections.

(g) According to the Appellant it submitted before the State Commission that the Appellant being a captive power plant which uses co-generation should have no further obligation towards renewable purchase obligation u/s 86 (1) (e) of the Electricity Act, 2003 as it would defeat the intention of the Regulations and the objective of the Electricity Act, 2003.

(h) According to the Appellant, its Company is not a conventional generating plant but it is a co-generation plant. However, the State Commission by the impugned order dated 13.2.2012 rejected the submissions of the Appellant holding that the Appellant being a co-generator would be brought under the definition of the obligated entity and thus, the Appellant is bound to purchase 1.3% of energy from the renewable sources of energy w.e.f. 2011-12 onwards.

(i) Challenging the same, the Appellant has presented this Appeal.

2. Following grounds have been urged by the Learned Counsel for the Appellant:

(a) The impugned order has cast an obligation on the Co-generator to purchase power from the renewable energy source, which is contrary to the statute and in particular, Section 86 (1) (e) of the Act, 2003.

(b) It is the duty of the State Commission to promote both the generators namely co-generators and generators of electricity through renewable energy sources. The entities that can be directed to bear

the burden of purchase of electricity from the Renewable energy sources are the distribution licensees and any other persons consuming electricity generated from the conventional captive generating plant having capacity of 5 MW and above for its own use and/or the persons who procured from conventional generation through open access and third party sale. The co-generators can not be directed to purchase from the Renewable energy sources.

(c) The State Commission ought not to have discouraged co-generation at the cost of Renewable source of energy as that would be contrary to the Electricity Policy and Tariff Policy.

(d) This issue has already been decided by this Tribunal in Century Rayon case in Appeal No.57 of 2009 but the State Commission has totally ignored the said judgment even though the same is binding on the State Commission.

3. On these grounds, the impugned order is sought to be set-aside.

4. The learned Counsel for the State Commission in support of the impugned order made reply by pointing out the reasons contained in the impugned order.

5. In the light of the rival contentions, the following question may arise for consideration:

> **"Whether the Appellant, the co-generator is under a legal obligation to purchase power from the renewable sources of energy for meeting the Renewable Purchase Obligation of its captive load?"**

6. According to the Appellant, being a co-generator, the Appellant cannot be asked to purchase power from renewable sources of energy as it is not an obligated entity as defined in the Regulations.

7. On the other hand, the Learned Counsel for the State Commission would refute the said plea contending that the Appellant is an obligated entity being a conventional captive generating plant and as such, it is liable to fulfil the Renewable Purchase Obligation.

8. Let us now deal with this issue. The Appellant is a paper mill unit. It has co-generation based captive power plant of capacity 20 MW to meets its power requirement. Fuel used is paper sludge and coal. The captive generation plant of

the Appellant produces both electricity and steam for use in the process of manufacture of paper. Thus it becomes the co-generator.

9. According to the Appellant, being a co-generator which satisfies the requirement of co-generation as defined u/s 2(12) of the Electricity Act, 2003 cannot be compelled to purchase renewable energy.

10. The State Commission framed Regulations called OERC (Renewable and Co-generated Purchase Obligation and its compliance) Regulations, 2010, through notification dated 30.9.2010. The term "obligated entity" stands defined in clause 2 (h) and clause 3. Clause 2 (h) is reproduced below:

> "*2 (h) Obligated entity" means the entity mandated under clause (e) of sub-section (1) of Section 86 of the Act to fulfil the renewable purchase obligation and identified under Clause 3 of these Regulations.*
>
> *This shall be applicable to:*
>
> *(a) Distribution licensee(or any entity power on their behalf).*
>
> *(b) Any other person consuming electricity (i) generated from conventional captive generating plant having capacity of 5 MW and above for his own use and/or (ii) procured from conventional generation through open access and third party sale."*

Clause 3: Purchase Obligation from Renewable Sources and Co-Generation:

"Every obligated entity shall purchase not less than 5% of its total annual consumption of energy from co-generation and renewable energy sources under the RPO Regulations from 2011-12 onwards with 0.5 percentage increase every year thereafter, till 2015-16 as reviewed by the Commission even earlier, if any.

Provided that 0.10 percentage out of the RPO so specified in the year 2011-12 shall be procured from generation based on solar as renewable source and shall be increased at a rate of 0.05 percentage every year thereafter till 2015-16 or as reviewed by the Commission even earlier, if any. Accordingly, the year and source wise RPO would be as below:

Year Wise Target	Minimum quantum of purchase in percentage (in terms of energy consumption in the State)			
	Renewable		Co-generation	Total
	Solar	Non-Solar		
2011-12	0.10.	1.20	3.70	5.00
2012-13	0.15	1.40	3.95	5.50
2013-14	0.20	1.60	4.20	6.00
2014-15	0.25	1.80	4.45	6.50
2015-16	0.30	2.00	4.70	7.00

11. While interpreting Clause 3 of the OERC Regulations, the State Commission in the impugned order dated 13.2.2012

has observed as follows after rejecting the plea of the Appellant:

> "*23. Regulations 3 of RCPO Regulations, clearly specifies the minimum Purchase Obligation from (i) Renewable Energy Sources (Solar and Non-Solar) and (ii) Co-generation Sources separately. Thus, the RCPO Regulation has been framed as per the legislative mandate under Section 86 (1) (e) of the Act, by promoting both the above sources simultaneously, unlike in case of Maharashtra, where fastening of liability on Renewable was promoted in preference to that Co-generation, as indicated in Para 45 (IV) of the Hon'ble ATE Order in Appeal No.57/2009.*
>
> *24. Further, in order to remove difficulties likely to be faced by Obligated Entities, the Commission has clarified that the Obligation in respect of Co-generation can be met from both solar and non-solar sources in order to achieve the total purchase requirement of the financial year but the solar and non-solar Purchase Obligations has to be met mandatorily by the Obligated Entities. The Commission further wants to make it abundantly clear that consuming electricity only from Co-generation sources shall not relieve any obligated entity from its responsibility of meeting Renewable obligations of solar and non-solar renewable energy certificates (RECs) ".*

12. While rejecting the plea of the Appellant, the State Commission has distinguished this Tribunal's judgment rendered in Century Rayon case in Appeal No.57 of 2009 stating that the judgment was rendered on the basis of the

Regulations framed by the Maharashtra State Commission and same would not apply to Orissa State Commission. Let us refer to the ratio in the form of the conclusion decided by this Tribunal in Appeal No.57 of 2009:

"45. Summary of our conclusions is given below:-

(I) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' means cogeneration from renewable sources alone. The meaning of the term 'co- generation' has to be understood as defined in definition Section 2 (12) of the Act.

(II) As per Section 86(1)(e), there are two categories of `generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories.

(III) The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86 (1)(e).

(IV) The clear meaning of the words contained in Section 86(1)(e) is that both are different and both are required to be promoted and as such the fastening of liability on one in preference to the other is totally contrary to the legislative interest.

(V) Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by State Commission through the suitable methods and suitable directions, in

view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.

(VI) The intention of the legislature is to clearly promote cogeneration in this industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone.

46. In view of the above conclusions, we are of the considered opinion that the finding rendered by the Commission suffers from infirmity. Therefore, the same is liable to be set side. Accordingly, the same is set aside. Appeal is allowed in terms of the above conclusions as well as the findings referred to in aforesaid paras 16,17,22 and 44. While concluding, we must make it clear that the Appeal being generic in nature, our conclusions in this Appeal will be equally applicable to all co-generation based captive consumers who may be using any fuel. We order accordingly. No costs."

13. Thus, while arriving at such a conclusion referred to above, the Tribunal has specifically made a mention that the conclusion in the Appeal No.57 of 2009 being generic in nature, would apply to all the co-generation based captive consumers who may be using any fuel. Therefore, the reasonings given by the State Commission for distinguishing the judgment of this Tribunal, which is binding on the State Commission is utterly wrong.

14. Now let us deal with the other reasonings which have been referred to in the impugned order.

15. It is to be pointed out that the relevant definition of the 'obligated entity' would not cover a case where a person is consuming power from co-generating plant. This definition only covers an entity consuming power from a conventional captive generating plant or procured from conventional generation through open access and third party sale. Therefore, the contention that the consumers i.e. industrial unit consuming power from Co-generation captive power plant is to be considered to be 'obligated entity', cannot be accepted in the light of the ratio already decided by this Tribunal in Appeal No.57 of 2009.

16. Further, it is noticed that the Regulations 2 (h) of the OERC Regulations, 2010 has defined the obligated entity, an entity mandated under Section 86 (1) (e) of the Electricity Act, 2003. As such, this shall be applicable to person consuming electricity generated from conventional Captive Generation Plant in terms of findings of this Tribunal in the judgment in Appeal No.57 of 2009. However, it is pointed out that this definition does not explicitly mention about the Co-generation unit.

17. It was argued during the hearing in the Appeal by the learned Counsel for the State Commission that Co-Generation

Plant also would come under the Conventional Generating Plant category if its source is fossil fuel. This plea raised by the State Commission has not been referred to in the impugned order. This additional submission raised by the State Commission during the hearing of the Appeal would amount to reading into the words contained in the definition of the obligated entity under Clause 2 (h). The said definition nowhere provides that a co-generation plant having fossil fuel as its basis would be a conventional captive generating plant and that therefore, it is an obligated entity.

18. As a matter of fact, this Tribunal in its judgment in Appeal No.57 of 2009, has specifically observed that the intention of the legislature is to clearly promote the co-generation also irrespective of the nature of the fuel used for such co-generation as well as the co-generation from renewable source. This ratio which has been decided by this Tribunal has not been taken into consideration by the State Commission.

19. What was originally missing in the Regulation is that there was no such inclusion of Co-generation plants in obligated entities, but the same was sought to be covered in the clarificatory order issued by the State Commission. This course is quite impermissible.

20. Since the Regulation was silent with regard to the status of the Appellant and other similarly situated co-generation plants, it was considered imperative to raise objections/submissions before the State Commission. The Captive generating plant of the Appellant is not a conventional power plant but it is a co-generating power plant using fossil fuel and is, therefore, not an obligated entity as per the definition given in the Regulations.

21. The reading of the Regulations does not seem to bring the Appellant in the definition of the 'obligated entity'. Since the Regulations remained silent with regard to the issue, there can not be a situation where the State Commission would bring a co-generator in the orbit of the said definition through the impugned order. In the impugned order, the State Commission has mentioned that the obligation is applicable to the industrial units consuming power from fossil fuel based captive power plants. Regulation 2 (h) defines obligated entity as a person consuming electricity generated from conventional captive generating plants. There is no obligation for the persons consuming power from captive Co-generation plant for purchase of renewal energy irrespective of the fuel used in the captive Co-generation Plant.

22. In this context, the relevant observations made by this Tribunal on this issue in Century Rayon case in Appeal No.57 of 2009 are relevant. They are as under:

> *"18. The reliance placed on the reading of para 6.4 of the Tariff Policy that uses the word including co-generation is misplaced. In fact, the para 6.4 of the Tariff Policy does not suggest that the expression "co-generation" used in section 86(1)(e) is to cover co-generation only from non-fossil fuel. The mere mention of co-generation in para 6.4 of the Tariff Policy cannot mean that co-generation mentioned under 86(1)(e) mean only co-generation units using non-fossil fuel.*
>
> *20. As a matter of fact, the reading of the section 86 (1)(e) along with the other sections, including the definition Section and the materials placed on record by the Appellant would clearly establish that the intention of the legislature is to promote both co-generation irrespective of the usage of fuel as well as the generation of electricity from renewable source of energy.*
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> *39. These documents as well as the relevant provisions of the Act and the National Electricity Policy and National Electricity Plan and Tariff Policy would make it clear that it is mandatory on the part of the State Commission to give encouragement to co-generation in the industry without reference to any type of fuel or the nature of source of energy whether conventional or non-conventional".*

23. The above observation would make it clear that this Tribunal has specifically held that irrespective of the nature of fuel used, the cogeneration is co-generation as defined under

section 2(12) of the Act. Therefore, the said co-generator cannot be compelled to purchase energy from renewable source.

24. The State Commission despite the rulings by this Tribunal giving the ratio interpreting the relevant provisions cannot give a different interpretation which is contrary to the interpretation given by this Tribunal. The relevant portion of the impugned order is as follows:

> *" RCPO Regulation is applicable to industries of the State, for its consumption of power source from its fossil fuel based captive plant and all open access consumers. Industries and Open Access consumers consuming electricity are the obligated entity and not any generators generating electricity. Therefore, the contention of some of the objectors (e.g. M/s. VAL) that CPP should be exempted from RCPO obligation has no relevance. The RCPO obligation is applicable to the Industrial Units consuming power from fossil fuel based captive plants. Accordingly, RCPO obligation is not applicable to auxiliary consumption of any generating station including CPP."*

25. On the basis of these observations made by the State Commission in the impugned order, the learned Counsel for the State Commission submits that the Regulations framed by the State Commission cannot be challenged before this Tribunal. This submission has no substance. We are not concerned with the validity of the Regulations.

26. In fact, the clear stand taken by the Appellant is that Regulations framed by the State Commission did not include a Co-generation plant in its definition of obligated entity. This aspect has not been properly dealt with by the State Commission. The consistent stand of the Appellant both before the State Commission as well as before this Tribunal that it was not an obligated entity and therefore, it cannot be asked to meet the Renewable Purchase Obligation.

27. The learned Counsel for the State Commission both in his oral submissions as well as in his written submissions has not explained as to how the definition of obligated entity would include the Appellant which claims that it has been meeting its captive consumption from co-generation plant.

28. As a matter of fact the State Commission by the impugned order has also relaxed the RCPO obligation in respect of solar and non solar sources. The relevant extracts are as under:-

> "Further, in order to remove difficulties likely to be faced by Obligated Entities, the Commission has clarified that the Obligation in respect of Co-generation can be met from both solar and non-solar sources in order to achieve the total purchase requirement of the financial year but the solar & non-solar Purchase Obligations has to be met mandatorily

by the Obligated Entities. The Commission further wants to make it abundantly clear that consuming electricity only from Co-generation sources shall not relieve any obligated entity from its responsibility of meeting Renewable obligations of solar and non-solar renewable energy certificates(RECs).”

29. The above observation would make it clear that the State Commission has relaxed the obligation to purchase from co-generation but has made it mandatory that the co-generation must purchase from renewable sources of energy. When such a relaxation has been made, the State Commission should have given relaxation in respect of consumers consuming energy from captive co-generation power plant using fossil fuel in view of findings of this Tribunal in Century Rayon case that fastening of the obligation on the Co-generator to procure electricity from renewable energy would defeat the object of Section 86(1)(e).

30. The State Commission has in fact, relaxed the obligation to purchase from co-generation source allowing the obligated entities to purchase entirely from renewable sources of energy.

31. On the other hand, it has not relaxed the requirement of consumers consuming electricity from captive co-generation

for purchasing from renewable source of energy, in the light of judgment in Century Rayon case.

32. The State Commission as indicated above has clearly held that renewable source of energy can substitute co-generation; when that being so, it ought to have also mandated that the consumers meeting electricity consumption from captive Co-generation Plant in excess of the total RCPO Obligations will also be exempted from obtaining electricity from renewable sources of energy. The State Commission has failed to follow the judgment given by this Tribunal in Century Rayon case.

33. In fact, the State Commission has totally ignored the ratio given by this Tribunal in Century Rayon case. Let us again quote the said ratio in the judgement of this Tribunal in Appeal No.57 of 2009.

"45. Summary of our conclusions is given below:-

(I) The plain reading of Section 86(1)(e) does not show that the expression "co-generation means co-generation from renewable sources alone. The meaning of the term 'co-generation' has to be understood as defined in definition Section 2(12) of the Act.

(II) As per Section 86(1)(e), there are two categories of generators namely(1) co-generators (2) Generators of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by

directing the distribution licensees to purchase electricity from both of these categories.

(III) The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86(1)(e).

(IV) The clear meaning of the words contained in Section 86(1)(e) is that both are different and both are required to be promoted and as such the fastening of liability on one preference to the other is totally contrary to the legislative interest.

(V) Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by the State Commission through the suitable methods and suitable directions, in view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.

(VI) The intention of the legislature is to clearly promote cogeneration in this industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone.

46. In view of the above conclusions, we are of the considered opinion that the finding rendered by the Commission suffers from infirmity. Therefore, the same is liable to be set aside. Accordingly, the same is set aside. Appeal is allowed in terms of the above conclusions as well as the findings referred to in aforesaid paras 16,17,22 and 44. While concluding, we must make it clear that the Appeal being generic in nature, our conclusions in this Appeal will be equally applicable to all co-generation based captive

consumers who may be using any fuel. We order accordingly. No costs."

34. The above judgment of this Tribunal in the Century Rayon case became final and binding on all the State Commissions in the absence of any Appeal taken by the authorities or the persons concerned to the Hon'ble Supreme Court or the decision taken by the Supreme Court contrary to the ratio decided by this Tribunal. As quoted in the above judgment, we have specifically observed that "Appeal being generic in nature, our conclusion in this Appeal will be equally applicable to all cogeneration based captive consumers".

35. Therefore, all the State Commissions are bound to follow the law laid down by this Tribunal in Century Rayon case. But, in this case the State Commission unfortunately has not only ignored the law laid down in the Century Rayon case but also has given its own interpretation which is quite contrary to the interpretation given by this Tribunal. This would show the attitude of the Orissa State Commission by not following the judicial discipline which is required to be maintained by the subordinate authorities.

36. It is well settled law that the characteristic attribute of the judicial act or a decision of the Appellate authority would bind the subordinate authorities whether it be right or wrong. In other words, the error of law or fact committed by the

Appellate Judicial body can not be impeached by the subordinate authority except by the judgment in Appeal.

37. The principle of judicial discipline requires that the judgements of the higher Appellate authorities should be followed scrupulously and unreservedly by its subordinate authorities. If the Subordinate authority refuses to carry out the directions or to follow the dictums issued by the superior Tribunal in the exercise of Appellate powers, the result would be chaos in the administration of the justice. In fact, it will be destructive of one of the basic principles of the administration of the justice.

38. As laid down by this Tribunal in Century Rayon case, we reiterate that the mere use of fossil fuel would not make co-generation plant as a conventional plant. The State Commission cannot give its own interpretation on this aspect which is not available in the Regulations and which is against the ratio and the interpretation of provision given in the judgement by this Tribunal.

39. We feel anguished to remark that unfortunately, the State Commission has not followed the judicial propriety by ignoring the well laid principles contained in the judgement of this Tribunal, which is binding on the authority.

40. **Summary of our findings:**

i) This Tribunal in its judgment in Appeal No.57 of 2009 has specifically observed that the intention of the legislature is to clearly promote the co-generation also irrespective of the nature of the fuel used and fastening of the obligation on the co-generator would defeat the object of Section 86(1)(e). The Tribunal also mentioned in the above judgment that the conclusion in Appeal No.57 of 2009 of being generic in nature, would apply to all the co-generation based captive consumers who may be using any fuel. Therefore, reasoning given by the State Commission for distinguishing the judgment of this Tribunal, which is binding on the State Commission, is wrong.

ii) The definition of the obligated entity would not cover a case where a person is consuming power from co-generation plant.

iii) The State Commission by the impugned order, in order to remove difficulties faced by the obligated entities, has clarified that the obligation in respect of co-generation can be met from solar and non-solar sources but the solar and non-solar purchase obligation has to be met mandatorily by the

obligated entities and consuming electricity only from the co-generation sources shall not relieve any obligated entity. When such relaxation has been made, the same relaxation must have been allowed in respect of consumers meeting electricity consumption from captive Co-generation Plant in excess of the total RCPO Obligations. Failure to do so would amount to violation of Section 86(1)(e) of the electricity Act, which provides that both co-generation as well as generation of electricity from renewable source of energy must be encouraged as per the finding of this Tribunal in Appeal No.57 of 2009. Unfortunately the State Commission has failed to follow the judgment given by this Tribunal in Century Rayon case.

41. In view of our above findings, the impugned order is set-aside. The State Commission is directed to pass the consequential orders, in terms of the conclusion arrived at by this Tribunal in this Appeal.

42. Pronounced in the open court on the **30th day of January, 2013.**

(Rakesh Nath) ***(Justice M. Karpaga Vinayagam)***
Technical Member ***Chairperson***

Dated:30th January, 2013

√REPORTABLE/~~NON-REPORTABALE~~