

REPORTABLE

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

CIVIL APPEAL NO.18506-18507 OF 2017
(Arising out of SLP(C)Nos.17045-17046/2013)

MONNET ISPAT & ENERGY LTD.ETC. ... APPELLANT(S)

VERSUS

UNION OF INDIA & ORS.ETC. ... RESPONDENT(S)

WITH

C.A.NO.18508/2017 @ SLP(C)NO.10057/2014

C.A.NO.18509/2017 @ SLP(C)NO.10516/2014

O R D E R

1. Leave granted.

2. The vires of Rule 3(1)(a)(ii) of the Electricity Rules, 2005 (hereinafter referred to as 'the Rules of 2005') was questioned before the High Court. The

same has been upheld. Hence, the appeals.

3. In a nutshell, Appellant's averments before High Court are thus. Being an incorporated Company, it had set up a Captive Generating Plant, having a capacity of 90. M.W., at its premises situated at Naharpali in Raigarh, for its own use. A show cause notice dated 10.08.2009 was issued by respondent 2—Chhatisgarh State Electricity Commission—to the appellant, stating that as the appellant had consumed less than 51 % of the power produced by its own plant, it ceased to be a captive generation plant and that, therefore, the consequences listed in the show cause notice would follow, including that the appellant would be required to obtain "open access" under Section 42 (2) of the Electricity Rules, 2003.

4. It was contended before High Court that a Captive Generating Plant can not lose its character and status as such a plant when, due to force majeure events, it could not, in the interregnum, consume for its own use, 51 % of the power generated. It was pleaded that respondent 2 had no statutory authority to impose penalties or charges on a captive generating company insofar as and, so long as, the

issue would pertain to production of electricity by such a company, and consumption of the same by the company its own use, at its own premises, without seeking access to the grid.

It was averred that there had been delegation of essential legislative functions, and that the Rule making at issue was beyond the power conferred on the Central Govt. under Section 176 of the Act. Thus, prayer had been made challenging the vires of Rule 3 of the Rules of 2005; vires were also challenged of Regulation 11 (6) (b) (ii) of the Chhattisgarh State Electricity Regulatory Commission (Intra-State Open Access in Chhattisgarh) Regulations, 2005.

5. On the other hand, at the High Court, qua the vires of Rule 3 (1) (a) (ii), respondent No.1—the Union of India—had contended that the rule provides for a quantifiable and unambiguous benchmark for identifying captive power plant on the basis of annual minimum consumption with a view to preventing misuse and circumvention of the provisions of captive generating plants. Further, that what the rule only does is that it simply elaborates the qualifying criteria to make the statutory provisions

clear and explicit. On the issue of the rule making power, and on the alleged excessive delegation, it was the stance of respondent 1 that the Act can not specify minute details of enabling provisions and that, therefore, under Section 176, the Act empowers the appropriate authority to issue rules on various subjects provided for by Section 176; also, Section 183 provides that the appropriate authority may by order make such rules as are not inconsistent with the provisions of the Act in case a difficulty arises for carrying out the provisions of the Act.

6. The appellant is generating the electricity by means of captive generating plants. The captive generating plant has been defined in Section 2(8) of the Electricity Act, 2003 (hereinafter referred to as 'the Act of 2003'), which is extracted hereunder:

“Section 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.”

7. Section 9 of the Act of 2003 deals with the captive

generation, the provisions of Section 9 is extracted hereunder :

“Section 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 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."

8. It is apparent from the provisions that generating plants are to be regulated as per the provisions of the Act, Rules and Regulations. Section 38 of the Act of 2003 deals with the Central Transmission Utility and its functions. The Central Transmission Utility is enjoined with the duty of transmission of electricity through inter State transmission system. It has to discharge other functions as enumerated in Section 38 (2) of the Act as prescribed in the Act. Section 38 is extracted hereunder :

"Section 38. Central Transmission Utility and functions.- (1) The Central Government may notify any Government company as the Central Transmission Utility :

Provided that the Central Transmission Utility shall not engage in the business of generating of

electricity or trading in electricity:

Provided further that the Central Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity of such Central Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 (1 of 1956) to function as to transmission licensee, through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

(2) The functions of the Central Transmission Utility shall be -

(a) to undertake transmission of electricity through inter-State transmission system;

(b) to discharge all functions of planning and co-ordination relating to inter-State transmission system with -

(i) State Transmission Utilities;

(ii) Central Government;

(iii) State Governments

(iv) generating companies;

(v) Regional Power Committees;

(vi) Authority;

(vii) licensees;

(viii) any other person notified by the Central Government in this behalf;

(c) to ensure development of an

efficient, co-ordinated and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centres;

(d) to provide non-discriminatory open access to its transmission system for use by -

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon as may be specified by the Central Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

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

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Central 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."

9. Section 42 of the Act of 2003 deals with the duties of distribution licensee and open access. It is the duty of distribution licensee to develop and maintain an efficient, coordinated and economical distribution system. Section 42(2) deals with surcharges, cross subsidies, operational constraints. Fifth proviso to sub section 2 of Section 42 provides that State Commission shall frame regulation to provide open access to all consumers as provided therein. Fourth proviso to sub section 2 of Section 42 of the Act provides that a person shall not be liable to pay surcharge, in case open access is provided with respect to a captive generating plant, for carrying electricity to destination of his own use. Similar is the provision in the fourth proviso to sub section 2 of Section 38 of the Act. Section 42 is also reproduced hereunder :

“Section 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 (57 of 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.

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

(6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

(7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

(8) The provisions of sub-sections (5), (6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections."

10. It was submitted by Mr. C.U. Singh, learned Senior counsel and Mr. Devashish Bharuka, learned Advocate-on-Record, appearing for the appellants that, the definition of captive generating plant, provided in Section 2(8) of the Act of 2003, does

not contemplate the restriction, as has been imposed under Rule 3(1)(a)(ii) of the Rules of 2005. It was also submitted that since there were some unforeseen circumstances, the generating plant had to be closed down on certain directions having been issued by concerned authorities; as such, it was not possible to enable consumption as provided in the said rule and the rule deserves to be struck down, or requires reading down, so as not to make it oppressive, but to make it purposive. The counsel for respondents has supported the stand of respondents.

Rule 3(1)(a) (ii) is extracted hereunder:

“Rule 3(1)(a)(ii). Not less than fifty one percent 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 (i) and (ii) above shall be satisfied collectively by the members of the cooperative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less

than fifty one percent 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 percent;"

Reading of the aforesaid Rule makes it clear that to be classified as 'captive generating plant' under Section 9 read with Section 2(8) of the Act of 2003, a power plant has to fulfil certain conditions; firstly, 26% of the ownership of the plant must be held by the captive user(s); and secondly, 51% of the electricity generated in such plant, on annual basis, is to be consumed for captive use. We find that the provision of the rule making power in Section 176 of the Act of 2003, deals with the power of Central Government to make the rules for carrying out the provisions of the Act and, Section 178 of the Act of 2003, deals with the powers of the Commission to make regulations. The Rules of 2005 have been framed by the Central Government under the power conferred upon it under Section 176 of the Act of 2003.

11. The vires of Rule 3(1)(a)(ii) have been put into question in the instant cases. The High Court has

rightly upheld its validity. We find that the definition of generating plant, as provided under Section 2(8) of the Act of 2003, emphasizes that the generation of electricity should be primarily "for his own use". Similar is the expression used in fourth proviso to Sub-Section 2 of Section 38, and the fourth proviso to Sub-Section (2) of Section 42 of the Act of 2003 contains provision of no surcharge on "his own use" as contemplated therein. Thus, while exercising the power under Section 176 of the Act of 2003, it was open to specify how much minimum use should be made in order to classify a captive power plant, primarily for "his own use". Thus, the Rule cannot be said to be repugnant to, rather it carries the very intendment of, the Act and is quite reasonable.

12. The prescription that at least 51% electricity generation should be used for the purpose of "his own use", as has been provided in Rule 3 (1)(a)(ii) of the Rules of 2005, cannot be said to be arbitrary in any manner. In case, for certain months generating plant has to be closed for any reason or for non-compliance of the provisions or for any deficiency, the prescription of consumption of 51% on yearly basis takes care of such closure

as well. The calculation is provided to be on an annual basis. Thus, provision is quite reasonable, and it cannot be said to be ultravires to the Act and fulfills purpose of the provisions of the Act, and no reading down of provision is called for as prayed. In case, due to force-majeure any generating plant has been closed for a certain period, provision of consumption to be seen in annual perspective takes care of such exigency also.

13. Reliance has been placed on behalf of the appellants on *Global Energy Ltd. & Anr. v. Central Electricity Regulatory Commission* (2009) 15 SCC 570. Relied upon portions are extracted hereunder :

“44. A disqualifying statute, in our opinion, must be definite and not uncertain; it should not be ambiguous or vague. Requisite guidelines in respect thereof should be laid down under the statute itself. It is well settled that essential legislative function cannot be delegated.”

“57. We may now consider the provisions of Section 178 of the Act. Although various clauses contained therein are merely illustrative in nature and not exhaustive, we

will assume that although the matter relating to grant of licence is covered by Sections 12 and 14 of the Act, the regulation-making power may also be available for the said purpose. We have noticed hereinbefore the effect of subsection (1) of Section 178. We may only notice that clauses (a), (b), (c) and (o) which are referable to the provisions of Sections 14 and 15 as such do not provide for any power to deal with disqualification authorizing the respondent to frame regulation."

This Court considered vires of Regulation 6-A of the Regulations framed by the CERC in 2006. It was held to be ultra vires of Act and the Constitution of India. Regulation 6-A provided for disqualification. This Court held subordinate legislation should be read in the context of the Act, in terms of requirement of section 52 of the Electricity Act, 2003. This Court observed that when statute is sought to be enforced power of authority to impose restrictions and conditions must be construed having regard to purpose and object it seeks to achieve. The conditions regarding generation of power must be reasonable. There cannot be excessive delegation. The power of Central Electricity Regulatory Commission to impose

qualifications/restrictions should be read in line with larger object of the Act. The delegated legislation should promote rational and accountable policy implementation. This Court also observed that for disqualification guidelines should be laid down in the statute itself. Essential legislative functions cannot be delegated.

14. In the light of what has been discussed by this Court in *Global Energy Ltd.* (supra) when we examine definition of Generating Plant in section 2(8) of the Act it emphasizes setting up primarily for his own use or in case of cooperative society for use by its members. When we consider Rule 3()(a)(ii) of the Rules of 2005, it is clear that it provides not less than 51% of aggregate electricity generated in such plant determined on annual basis is consumed for captive use. The rule conforms to the requirement of section 2(8) that primarily electricity should be generated by captive generating plant for his own use/members as the case may be. The provisions of Rule 3(1)(a)(ii) of the Rules of 2005 cannot be said to be against

purposes of the Act. Rather it promotes rationale of the provision and essential qualifications laid down in the Act itself. It cannot be said essential legislative function has been delegated in the case. The prescription in Rule 3(1)(a)(ii) is not thus ultra vires to the Act. It makes intendment of statutory provision clear and explicit.

15. Thus, we find that the decision upholding the vires of the provisions is absolutely correct; the appeals have no merit and they are liable to be and are hereby dismissed. Pending application, if any, stands disposed of. No costs.

.....J.
[ARUN MISHRA]

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

New Delhi;
13th November, 2017.

ITEM NO.4

COURT NO.10

SECTION IV-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s).17045-17046/2013

(Arising out of impugned final judgment and order dated 30-01-2013 in WPC Nos.3140/2011 and 4481/2011 passed by the High Court Of Chhatisgarh At Bilaspur)

MONNET ISPAT & ENERGY LTD. ETC.

Petitioner(s)

VERSUS

UNION OF INDIA & ORS.ETC.

Respondent(s)

WITH SLP(C)Nos.10057/2014 & 10516/2014 (IV-A)

Date : 13-11-2017 These petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ARUN MISHRA
HON'BLE MR. JUSTICE L. NAGESWARA RAO

For Petitioner(s)

Mr. Devashish Bharuka,AOR
Mr. Justine George,Adv.

Mr. Lakshmi Raman Singh,AOR
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Mr. C.U. Singh,Sr.Adv.
Mr. Mahesh Agarwal,Adv.
Mr. Rishi Agrawala,Adv.
Mr. Vivek Jain,Adv.
Mr. Rajesh Kumar,Adv.
For Mr. E.C. Agrawala,AOR

For Respondent(s)

Mr. C.K. Rai,AOR
Mr. Umesh Prasad,Adv.
Mr. Mohit Rai,Adv.

Mr. A.P. Mayee,Adv.
Mr. Chirag Jain,Adv.

Mr. Gopal Choudhari,Adv.
Ms. Liz Mathew,Adv.
For M/s. Mclm & Co.,AOR

Ms. Liz Mathew,Adv.

Ms. Kritika Sachdeva, Adv.
Ms. Kirti Dua, Adv.
For Mr. G.S. Makker, AOR

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeals are dismissed in terms of the signed
reportable order.

(Sarita Purohit)
Court master

(Jagdish Chander)
Branch Officer

(Signed reportable order is placed on the file)