IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 12908 of 2016
DATE OF DECISION :- July 01, 2016

M/s OPGS Power Gujarat Pvt. Ltd. ...Petitioner

Versus

State of Punjab and another ...Respondents

CORAM: HON'BLE MR.JUSTICE M.JEYAPAUL

Present:- Mr. Karan Bharioke, Advocate for the petitioner.

Mr. P.S. Bajwa, Additional Advocate General, Punjab.

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1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? Yes/No

M.JEYAPAUL, J.

1. Mr. Naveen S. Bhardwaj, Advocate files memo of appearance for respondent no. 2.

2. The present writ petition has been filed by the Petitioner, praying inter alia, that the petitioner's power plant of 2X150 MW at Bhadreshwar, Kutch, Gujarat be treated as a "Captive Generating Plant", qua, its captive consumer, Garg Acrylics Limited, as per Rule 3 of the Electricity Rules, 2005. It is submitted that the Petitioner's plant qualifies with all applicable requirements under the said Rule 3. However, the Respondent No. 2, by Memo No. 288/OA/PPR dated 30.03.2016 rejected

the application of the said captive consumer of the Petitioner. It is submitted that the Petitioner Company's main object as per its Memorandum of Association is, "to own, manage and operate Captive Power Generating Plants." Therefore, it can supply power only to its captive consumers. However, due to the Memo dated 30.03.2016, 6 MW of the power which was to be supplied to Garg Acrylics Limited is being wasted on a daily basis.

3. It is submitted that as per the Articles of Association of the Petitioner, its equity shareholding is divided into Class A equity shares of nominal value of Rs. 0.10/- each and Class B equity shares of nominal value Rs. 10/- each. These shares have different nominal values and transfer rights attached to them. Further, Class A shares can be issued only to persons who have entered into Power Sharing Agreements with the Petitioner. Both classes have the same voting rights attached to them, i.e., one vote per share. This it is submitted is in accordance with Section 2 (46A) and Section 86 of the Companies Act, 1956. Garg Acrylics Limited is a holder of Class A shares in the Petitioner Company and in that capacity applied for the use of 6 MW power from the Petitioner's Captive Power Plant on 13.11.2015 to the CE/SLDC, PSTCL, Patiala. It is submitted that this application was rejected by the Respondent No. 2 by the Impugned Memo dated 30.03.2016 on the basis that the nominal value of the shares owned by the captive users was below 26% of the total nominal value of the equity shares issued. It is submitted that this is contrary to the Rule 3 of the Electricity Rules, 2005 as it is the voting rights attached to the shares and not nominal value of the shares that is determinative.

We see merit in the contention that Section 2(46) and Section 86 of the Companies Act, 1956 permits classes of shares with differential voting rights. The Petitioner Company has therefore issued two classes of shares, i.e., Class A and Class B as per law. There is no dispute that Garg Acrylics Limited is a Class A shareholder of the Petitioner. Given the same, the only question that remains is whether the qualification requirements set out in Rule 3 are met out. Rule 3 reads as under :

> *"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 percent of the ownership is held by the captive user(s), and*
>
> *(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 at (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;

….

(2) ….

Explanation.- (1) For the purpose of this rule.-

a. …

b. …

c. *"Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;"*

4. Rule 3(1)(a)(i), inter alia, provides that no power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless, in case of a power plant, not less than twenty six percent of the ownership is held by the captive user(s). For the purpose of Rule 3, the term "Ownership" is defined in Explanation (1)(c) to Rule 3. A mere reading of Explanation (1)(c) to Rule 3, shows that the test of "Ownership" with regard to companies like the Petitioner, is share capital with voting rights. The eligibility therefore has to be decided by reference to percentage of voting rights and not the monetary value of shares. It would seem that the Respondent No. 2 has ignored the voting rights of the shares held by the captive consumers of the Petitioner and has instead used

monetary value of the shares as a determinative factor. Such an approach would make the words “with voting rights”, in the Explanation (1)(c) to Rule 3 redundant and otiose. Any recourse to monetary value of the shares in question is clearly not warranted and is contrary to the concept of “Ownership” of Companies as envisaged by the Explanation (1) (c) to Rule 3. So long as the captive consumers of the petitioner are collectively holding equity shares in the company with 26% voting rights in the company, then the test of ‘ownership’ is clearly met as per the Rules, irrespective of the value of the share. In other words, the determinative factor is thus not 26% of the equity value, but only 26% voting rights.

5. At this stage the counsel of the Respondent No. 2, on instruction states that the Respondent No. 2 will consider this writ petition as a representation. Given the aforesaid, without being prejudiced or influenced by the decision reflected in the Memo No. 288/OA/PPR dated 30.03.2016 issued by the Respondent No. 2, the Respondent No. 2 is directed to consider the present writ petition as the Petitioner’s representation and decide the same in light of the observations made above. The decision on the matter shall be communicated to the Petitioner by the Respondent No. 2 within one week, i.e., on or before 08.07.2016.

6. Writ petition is disposed of in the aforesaid terms.

(M. JEYAPAUL)
JUDGE

July 01, 2016
p.singh