

IN THE HIGH COURT OF ORISSA AT CUTTACK

**W.P.(C) No.5201 of 2017
W.P.(C) No.11158 of 2016 &
W.P.(C) No.16237 of 2016**

In W.P.(C) No.5201 of 2017

***Central Electricity Supply Utility of Orissa
and others***

Petitioners
Mr. D.K. Mohanty, Adv.

-Versus-

***Orissa Electricity Regulatory Commission
and another***

Opp. Parties
M/s. Laxmidhar Pangari, Sr. Adv.

In W.P.(C) No.11158 of 2016

Nava Bharat Ventures Limited

Petitioner
M/s. Laxmidhar Pangari, Sr. Adv.

-Versus-

***Central Electricity Supply Utility of Odisha
and others***

Opp. Parties
Mr. S.C. Dash. Adv.

In W.P.(C) No.16237 of 2016

Nava Bharat Ventures Limited

Petitioner
M/s. Laxmidhar Pangari, Sr. Adv.

-Versus-

***Odisha Electricity Regulatory Commission
and others***

Opp. Parties
Mr. S.C. Dash. Adv.

CORAM:

**JUSTICE S. TALAPATRA
JUSTICE M.S. SAHOO**

ORDER
05.08.2022

Order Nos.
06.

1. This matter is taken up through Hybrid Arrangement (Virtual/ Physical Mode).
2. In W.P.(C) No.11158 of 2018, the petitioner, M/s. Naba Bharat Ventures Limited (in short “NBVL”) has filed an application for substitution of the Opp. Parties by M/s. Tata Power Central Odisha Distribution Limited (in short “TPCODL”) and its Officer by deleting the Central Electricity Supply Utility of Odisha (in short “CESU”) and its Officer, as the TPCODL has succeeded the interest of CESU as the distribution licensee for CESU of Odisha by virtue of the vesting order of the Orissa Electricity Regulatory Commission (in short “OERC”) dated 26.05.2020. There is no opposition in respect of the said substitution. Accordingly, in place of CESU, TPCODL and its Officers are substituted.
3. The Registry is directed to replace the cause title of W.P.(C) No.16237 of 2016 by the cause title as produced by the petitioner.
4. It appears further, similar application has also been filed by the writ petitioner in W.P.(C) No.11158 of 2016 for substituting the CESU by TPCODL, as TPCODL has succeeded the interest of CESU by virtue of the order of vesting dated 26.05.2022. Since there is no

opposition in respect of this substitution, the Registry shall replace the earlier cause title as by the one supplied by the writ petitioner the same be done in the cause-titles as referred are filed in the application for amendment under Chapter-VI, Rule-27-A of the Orissa High Court Rules.

(S. Talapatra)
Judge

(M.S. Sahoo)
Judge

- 07.
1. This matter is taken up through Hybrid Arrangement (Virtual/ Physical Mode).
 2. All these writ petitions as noted above are combined for disposal by a common order in as much as the parties in these writ petitions have arrived at a consensus, as the basis of the settlement after a protracted negotiation, as stated, over the issue of correction of energy bills and associated issues. The above development has been briefly noted in the communication under File No.TPCODL/ Regulatory/ 2022/23/1182, dated 11.02.2022. The communication by which Tata Power Central Odisha Distribution Limited (in short “TPCODL”) has confirmed their intention of settlement through Odisha Electricity Regulatory Commission (in short “OERC”)- Opp.

Party No.1 in W.P.(C) No.5201 of 2017 titled as CESU vs. OERC and another is relevant in the context.

3. For the purpose of reference, the relevant part of the text of the said communication dated 11.02.2022, which has been taken on record is reproduced hereunder:

“a) CSS Matter: *You will agree that the matter was discussed during your visit to our office way back in February 2021. In the said meeting as well as in our letter dated 23rd February 2021, we had provided the consent to the grant of Open Access for the Power from NBVL on the condition of payment of Rs.25.33 Crores as an interim measure. In this regard, we wish to reiterate that the issue of revision of the demand of Rs.84.01 Crores on account of cross subsidy surcharge is subjudice before the Hon’ble High Court of Odisha and that payment of Rs.25.33 Crores based on your own understanding on the instant issue, was allowed by TPCODL as an interim measure for grant of open access without prejudice to the rights of either party in the pending litigation. We also had informed that as this issue pertains to the past period i.e. prior to 31st March 2020. The matter at present which is in High Court needs resolution in OERC/Aptel.*

b) Security Deposit collected from NBVL: *You are aware that such issue has the stay of the High Court. The amount claimed by you is Rs.2.26 Crores as per our records. In our view, this amount should be settled along with above issue of CSS. In any case, M/s. Navbharat has been paid interest on the Security Deposit from time to time based on the rate of interest allowed by the Hon’ble OERC and hence NBVL is protected to that extent.*

c) Demand Charges for the month of July 2013: *We appreciate that this is a long pending issue which too has been stayed by the High Court. The amount involved is Rs.70.97 Lakhs. As again, as this amount is relating to the period prior to 31st March 2020, the consent of Gridco*

would be required. In the meantime, NBVL may indicate the amount for this can be settled. The proposal can then be put to Gridco accordingly.

- d) Demand Charges for the period January 2012 and February 2012:** *The amount involved is Rs.21.80 Lakhs and has a stay of the Hon'ble High Court. However, in our view this matter is linked to the CSS matter mentioned in Sl. No.(a) above. It will be appropriate to take up this along with the CSS matter and be settled together.*

In all, in our view, the issues are linked to the main issue of settlement of CSS. The matter was discussed with your representative Mr. P. Srinivas on 10.02.2022 in the presence of our CEO, Mr. M. Shenbagam and Mr. V.H. Wagle, Head Regulations and it was agreed in the meeting that the matter will be pursued with OERC.

We trust we have adequately clarified the position.”

4. In view of the said intendment for arriving at a settlement of various issues as reflected in the said communication, Mr. L. Pangari, learned Senior Counsel appearing for the Opp. Party No.2 has submitted that, if the settlement of Cross Subsidy Surcharge (CSS) is made, the other claims can be adjusted.

5. It may be noted that, Mr. Pangari, learned Senior Counsel has been representing the petitioner of W.P.(C) No.11158 of 2016 titled as M/s. Nava Bharat Ventures Limited vs. OERC & others and the petitioner in W.P.(C) No.16237 of 2016 titled as Nava Bharat Ventures vs. OERC & others.

6. It may further be noted here that the Opp. Party No.2 in W.P.(C) No.5201 of 2017 is the petitioner in W.P.(C) No.16237 of 2016 and W.P.(C) No.11158 of 2016.

7. Mr. S.C. Dash, learned Standing Counsel has appeared for the petitioner in W.P.(C) No.5201 of 2017 whereas Mr. D. Mohapatra, learned counsel has appeared for the Opp. Party No.2. Similarly, in W.P.(C) No.16237 of 2016, Mr. D. Mohapatra, learned counsel has appeared for the Opp. Party No.1 whereas, Mr. S.C. Dash, learned counsel has appeared for the Opp. Party Nos.2 & 3.

8. The counsel for the parties are unanimous that, if the OERC takes up the task of calculating the liability along with the Cross Subsidy Surcharge by way of payment and adjustment, the entire controversy can be finally buried.

9. By the order dated 01.08.2022, when the counsel for the parties made the similar statement before this Court, we directed that the settlement through the OERC as proposed be brought on record by a short affidavit.

10. Such affidavit has been filed in W.P.(C) No.16237 of 2016 in the proceeding today and that has been taken on record. By the said affidavit, the writ petitioner has submitted that the order dated

26.07.2016 as passed by the OERC in Revision Petitions No.14 & 15 of 2016 has been challenged in the writ petition.

11. The Central Electricity Supply Utility, Odisha (CESU), the petitioner in W.P.(C) No.5201 of 2017 had approached the OERC by filing the Cases No.43 & 44 of 2014 for determination of the issue of Cross Subsidy Surcharge (CSS). By the order dated 13.10.2015, the OERC had directed as under :

“The Commission directs M/s. NBVL to furnish the required data to CESU/GRIDCO Ltd. in the prescribed format for computation of its CGP status. After computation of CGP status, if it is found that, the CGP of M/s. NBVL has lost its CGP status, then drawal of power from the CGP to the parent industry shall be treated as a drawal from a generating company. In that case, M/s. NBVL shall pay Cross Subsidy Surcharge (CSS) to the concerned DISCOM (CESU) at the rate fixed by the Commission in its CSS orders issued for different years.”

12. The petitioner in W.P.(C) No.16237 of 2016 and W.P.(C) No.11158 of 2016 had approached the OERC for review of the said order by instituting the Review Cases No.14 & 15 of 2016. The said review petitions were rejected by the OERC. Against the said order of rejection, these two writ petitions, being, W.P.(C) No.5201 of 2017 and W.P.(C) No.11158 of 2016 have been filed. The said writ petitioner – Nava Bharat Ventures Limited (NBVL) filed another writ petition against the Demand Notices No.2241 & 2244, dated 04.03.2013 (Annexure-5 series to the writ petition, being W.P.(C)

No.11158 of 2014). It has been contended in that writ petition that the common order dated 29.01.2016 passed by the OERC in Cases No.43 of 2014 & 44 of 2013, it has been observed that, *after computation of CGP status, if it is found that the CGP of M/s. NBVL has lost its status then drawal of power from the CGP to the parent industry shall be treated as the drawal from a generating company.* In that event, M/s. NBVL shall pay the CSS to the concerned DISCOM (CESU) at the rate fixed by the Commission in its CSS orders issued from time to time. The petitioner's grievance in W.P.(C) No.11158 of 2016 is that without determining CGP status of M/s. NBVL (the petitioner), the said demand notices were issued.

13. Before we proceed further, we are persuaded to note the basic facts involved in each of those three writ petitions.

W.P.(C) No.5201 of 2017

14. In this writ petition, being W.P.(C) No.5201 of 2017, the Central Electricity Supply Utility of Odisha (CESU) and others now M/s. Tata Power Central Odisha Distribution Limited (in short "TPCODL") and others have challenged the order dated 16.02.2017 passed by the Odisha Electricity Regulatory Commission (for short "OERC") in Case No.49 of 2016 [Annexure-1 to the writ petition, being, W.P.(C) No.5201 of 2017]. By the said order dated 22.11.2016

[Annexure-1 to the writ petition being W.P.(C) No.5201 of 2017], the

OERC has observed as follows:

“8. Regarding the letter of the Commission dated 31.01.2006 allowing the Ombudsman to receive cases relating to non-implementation of GRF order, we observe that the spirit of that letter was to offer another avenue for an aggrieved consumer to approach Ombudsman for being not satisfied with the decision of GRF. Thus, a consumer has an option either to approach the Ombudsman for direction or to the Commission directly under Section 142 of the Electricity Act, 2003 in case of non-implementation of GRF order. Hence, we do not find any reason to reject the petition of M/s. NBVL on the basis of contravention of GRF order dated 28.05.2015 for not approaching the Ombudsman.

9. From the submission of CESU, we observe that the CESU is not aggrieved with the decision of GRF. Rather, once to adjust the refundable amount which are receivable from M/s. NBVL on account of Cross Subsidy Surcharge (CSS), dispute of which is pending before the Hon'ble High Court. On non-payment of CSS by M/s. NBVL, in violation of the order of the Commission vide Case Nos.43 & 44 of 2014, we opined that, it is an entirely different issue and hence, independent of the present case, in view of the interim order of the Hon'ble High Court dated 15.07.2016, (i) instead CESU should expedite the case for settlement of the amount receivable as CSS with the Hon'ble High Court of Orissa.

10. In view of the above, we feel that the order of the GRF is to be complied with and, therefore, CESU is hereby directed to implement the order of the GRF Case No.329 of GRF 2014 and give rebate to the order of refund within three months of issue of this order. Both parties are at liberty to negotiate refund in installments.”

15. This part of the order has been challenged by the petitioner contending that the order passed by the OERC directing to refund the

amount and to implement the order passed by the GRF is not sustainable. Since the said order has been passed without considering the entitlement of the petitioner towards Cross Subsidy Surcharge (CSS) and adjustment of the amount as directed by the GRF. Thus, the sole grievance as it surfaced is that, without determining the amount of CSS since the said order dated 22.11.2016 has been passed by the OERC, the same is not sustainable.

16. It may be noted that the Opp. Party No.2 in W.P.(C) No.5201 of 2017 is a large industrial consumer, which has been availing power supply to its Ferro Alloys Unit for a contract demand of 3000 KVA load. The said Opp. Party No.2 entered into an agreement to that regard on 01.12.1997 with the CESU (the former entity). The said contract demand was reduced to 3 MVA load with permission of the competent authority and the said 3 MVA power was treated as emergency power for its Captive Power Plant (CPP) and an agreement was executed on 04.09.2009 and the agreement commenced from 01.05.2009.

17. The writ petitioner (CESU) had issued an energy bill in the month of January, 2012 to the said industrial consumer (the Opp. Party No.2) for a sum of Rs.26,74,462/- as energy charges. Again on 01.03.2012 , another energy bill was raised for the month of February,

2012 to the tune of Rs.26,86,066/-. The said industrial consumer raised objection against those two bills, as those were not the correct reflection of consumption. They have further objected that, the writ petitioner had collected demand charges of Rs.15,24,000/- and Rs.6,56,000/- respectively for the months of January & February, 2012. The said amount has been paid by the Opp. Party No.2 (the consumer). The Opp. Party No.2 demanded refund of the excess amount to the extent of Rs.21,80,000/-. Such demand was not acceded to by the writ petitioner. As consequence thereof, the consumer instituted the Consumer Complaint No.329 of 2012 before the Grievance Redressal Forum, Dhenkanal alleging that, they have paid the excess amount for the month of January & February, 2012 and as per the tariff order for the financial year 2011-12, they are not liable to pay the demand charges since the simultaneous maximum demand of the CESU for January & February, 2012 has not been increased during the said period and also prayed for a direction upon the writ petitioner for refund of the said sum of Rs.21,80,000/- with interest. The said complaint was seriously objected by the writ petitioner.

18. On consideration of the rival pleas, the Grievance Redressal Forum disposed of the said complaint case by the order dated 28.05.2015 directing the CESU to adjust Rs.21,80,000/- in the bill of

the said consumer as in the months of January & February, 2012, though the maximum demand of the consumer (the complainant) exceeded the contract demand but in that period, the SMD of CESU did not increase as per the RSD order 557. The order 557 stipulates that one Captive Power Plant is liable to pay the demand charges to the distribution company in event of increase of SMD of the distribution licensee. Admittedly, the SMD of CESU was not increased for the said period. Hence, the applicant company is not liable to pay the demand charges, as observed. It has been further observed that, on demand bill for CSS to the extent of Rs.82,86,2073/- (Rupees eighty two crores eighty six lakhs two thousand seventy three) for not maintaining the CGP status for the financial years 2010-11 to 2012-13 and the bill for Rs.1,14,64,274/- (Rupees one crore fourteen lakh sixty four thousand two hundred seventy four) for construction of 64 MW IPP has been served illegally on the consumer by the Office Letter No.2029 dated 24.02.2014. It has been also observed that the said aspect of the matter is the subject matter of adjudication before the OERC and the decision of the OERC would be final. The said consumer also filed a writ petition, being, W.P.(C) No.2061 of 2017 before this Court against the said order dated 28.05.2015. As reveal to the order, passed by the GRF,

the consumer filed a petition before the OERC under Sections 142 & 146 of the Electricity Act, 2003 on the ground that the CESU had failed to comply with the direction/order dated 28.05.2015 passed by the GRF, Dhenkanal in Case No.329 of 2014. The said petition was registered as OERC Case No.49 of 2016. The said petition was seriously challenged by the CESU contending that the petition itself is not maintainable. However, it was submitted that the consumers were entitled to get back a sum of Rs.82,86,2073/- towards cross subsidy, subsidy from the Opp. Parties (the petitioner herein) towards Cross Subsidy Surcharge (CSS) for losing the CGP status for financial years 2010-11, 2011-12 & 2012-13 and also the petitioner is entitled to get Rs.1,14,64,274/- towards subsidy surcharge for availing construction of NBVL IPP by taking power supply from the CGP without availing power supply from its CSO. It may also be noted that based on the order passed by the Commission in Case No. 129 of 2010, the Opp. Party No.2 herein filed two cases before the OERC, being, OERC Cases No.43 of 2014 and 44 of 2014 against the petitioner challenging the cross subsidy surcharge raised for losing CGP status (Case No.43 of 2014) and challenging the CSS for construction of NBVL IPP by taking power supply from its CGP without availing power supply from CESU (Case No.44 of 2014).

19. By the order dated 29.01.2016, the Opp. Party No.2 (the industrial consumer) was directed to furnish the necessary documents/data of CESU. It was further directed that, if it is found that M/s. NBVL (Opp. Party No.2) had lost its CGP status, in that case, M/s. NBVL shall pay the CSS to the CSO. M/s. NBVL without complying with the direction of the Commission filed two numbers of review petitions before the Commission, i.e. OERC Case Nos.14 of 2016 & 15 of 2016. By the order dated 26.07.2016, the Commission dismissed both the review petitions. According to the petitioner, the said industrial consumer undertook that for availing emergency power supply, if any amount will be legally due to CESU on account of construction of 64 MW IPP in that event, the same will be payable by M/s. NBVL (the Opp. Party No.2) to CESU.

20. As claimed by the petitioner, the order dated 29.01.2016 is a direction to pay the CSS to CESU.

21. In view of the above, the refund of Rs.21,80,000/- does not arise. By the order dated 16.02.2016, M/s. NBVL-Opp. Party No.2 was directed to comply the order passed by the GRF in Case No.329 of 2014. Accordingly, this petition has been filed challenging the said direction. According to the petitioner, the said direction is unsustainable, as there has been no consideration of the entitlement of

the petitioner towards CSS and adjustment of the amount as directed by the GRF.

22. The Opp. Party No.2 (the industrial consumer) filed their counter affidavit and raised the jurisdictional objection in view of Section-111(1) of the Electricity Act, 2003 whereby it has been provided that, any person aggrieved by an order made by the adjudicating officer or by the appropriate Commission under the said Act may prefer an appeal to the appellate Tribunal for electricity. It has been stated that the fundamental framework of Articles-226 & 227 is restricted for introducing the disputed facts.

23. It has been stated that the disputed bills as raised for the months of January & February, 2012 as afore-stated were paid in time. In the words of the Opp. Party No.2:

“It may be noted that after receipt of the aforesaid bills, the Opp. Party No.2 has paid the energy charges in time, but later on it was noticed that, the petitioner had illegally claimed and collected the demand charge of Rs.15,24,000/- and Rs.6,56,000/- respectively for the months of January & February, total amount being Rs.21,80,000/-. The said amount had been illegally collected and the writ petitioner is liable to refund the said amount.”

24. Such is the crux of the dispute that fell for adjudication before the GRF at the instance of the industrial consumer. By the order dated 28.05.2015, the writ petitioner was directed to adjust a sum of

Rs.21,80,000/- in as much as a maximum demand of the Opp. Party No.2 exceeded the contract demand but in that period, SMD of CESU was not increased as per RSD order. In terms of the said order, the Opp. Party No.2 approached the CESU for adjusting the above sum in its energy bills so that the order of the GRF is complied with in its spirit but that was not done. In that circumstances, the Opp. Party No.2 filed the said applications under Section 142 of the Electricity Act before the OERC seeking compliance of the order dated 28.05.2015 passed by the GRF. The CESU filed the present writ petition against the said order dated 28.05.2015 in contemplation of the order that might be passed by the GRF in Case No.49 of 2016. By the order of the OERC dated 16.02.2017, the action of the Opp. Party No.2 was disposed of. The said order has been substantially reproduced hereinbefore. The crux of the said order is that the petitioner shall implement the order of the GRF as passed in Case No.329 of 2014. According to the Opp. Party No.2, the issue of CSS in respect of construction of the power plant is totally different. The said issue has been raised in the writ petition. In defiance of the order of the OERC, the petitioner raised a demand notice for realization of the payment of CSS. According to the Opp. Party No.2, the claim of the said CSS is not tenable. As such, the Opp. Party No.2 is entitled to

refund of Rs.21,80,000/- by way of adjustment in the energy bill. The Opp. Party No.2 has also brought on record, by way of their counter affidavit, that they have also filed a writ petition being W.P.(C) No.11158 of 2016 wherein by the interim order, the demand notices, as challenged, have been stayed. According to the Opp. Party No.2, the OERC being the legal authority, by the order dated 16.02.2017 in Case No.49 of 2016 observed that the issue of CSS is totally different from the issue as raised in the present case. They have denied that there was denial of any opportunity to the writ petitioner, as alleged or otherwise. Therefore, the writ petition does not have any substance for interference.

W.P.(C) No.11158 of 2016

25. This writ petition has been filed by the industrial consumer as aforementioned urging this Court to declare that the demand of the CSS from the petitioner in this writ petition by the CESU, now TPCODL, till the CGP status of the petitioner is finally determined, is arbitrary, illegal and contrary to the provisions of the Electricity Act, 2003 read with Electricity Rules, 2005 and the relevant orders of the OERC. Consequently, the petitioner (the industrial consumer) asked for quashing the demand notices No.2241 & 2244, dated 04.03.2016 for payment of CSS (Annexure-5 series to the writ petition being

W.P.(C) No.11158 of 2016). In terms thereof, a writ of prohibition against the Opp. Party No.1 from demanding the CSS from the petitioner is prayed for. In short, the basic facts as averred in this writ petition are that the petitioner has got two Captive Power Plants (CPP) at Kharag Prasad under the Talcher Electrical Division, Chaipal with generating capacity of 30 MW and 64 MW. The petitioner, in order to avail the emergency power supply to its CPP, entered into an agreement with the Opp. Party No.1 in Case No.49 of 2009 as referred, for a contract demand of 3000 KVA as stated before.

26. In the year 2010, three distribution companies of Odisha, namely NESCO, WESCO & SOUTHCO filed Case No.129 of 2010 before the OERC for permission to collect the CSS from the Captive Power Plant users in the respective areas of those distribution companies for breach of the captive users' status. In that petition, the CESU, the predecessor of the Opp. Party No.1 was joined as the party and supported the case of those distribution companies. On 03.01.2013, the OERC disposed of the said case, being, Case No.129 of 2010 with a direction that the GRIDCO/DISCOM to verify the CGP status of the industries supplying power to the State GRIDCO for the financial years 2009-10, 2010-11 & 2011-12 in terms of the resolution of the State Government and on actual basis for the

financial year 2012-13 and not considering the sale of power by the CGPs for the State GRID as self-consumption to the parent industry. In case, it is found that, any CGP has lost its status, in spite of such computation for the power consumption, the DISCOM may approach the Commission on the issue of cross subsidy surcharge. The petitioner (the industrial consumer) has alleged in this writ petition that on 24.02.2012, the Opp. Party No.2 issued a demand notice alleging loss of CGP status and demanding CSS for the power consumed by the petitioner as regards its 1 X 64 MW IPP set up within its Plant area.

27. The petitioner has brought to the notice of the Opp. Party No.1 that it had used the construction power from its own Captive generating Plant. Hence, the demand for cross subsidy surcharge is unwarranted. Moreover, the petitioner is not an open access consumer under the Open Access Regulation, 2005 of the OERC. The Opp. Party No.1 filed an application before the OERC, being, Case No.43 of 2014, seeking a direction from the petitioner for payment of the CSS for loss of their CGP status during the financial years 2010-11, 2011-12 & 2012-13. Similar application, being Case No.44 of 2014 was filed before the OERC for CSS against the petitioner for availing power from its own CGP for construction of IPP allegedly in violation

of the Electricity Act, 2013. The petitioner (the industrial consumer) filed their reply in the cases and by a common order dated 29.01.2016, the OERC disposed of Cases No.43 of 2014 & 44 of 2014. As stated earlier, by the said order dated 29.01.2016, the OERC has made certain observation viz. the generation of both the units of the petitioner should be considered for computation of the captive status. Having referred to the earlier orders of the OERC, it has been observed that, a format for computation of the CGP status has been provided and all the CGPs were asked to place its status as information to the licensee. The present petitioner (the industrial consumer) was also asked to furnish the required data to CESU/ GRIDCO Ltd. in the prescribed format, for furnishing of its CGP status. After computation of the CGP status, if it is found that the CGP of the petitioner has lost its status, the drawal of the power from the CGP to the parent industry shall be treated as drawal from a generating company. In that case, the petitioner shall have to pay the CSS to the concerned DISCOM (CESU) at the rate fixed by the Commission in its CSS orders issued from time to time. As the petitioner (the industrial consumer) found some apparent error in the order dated 29.01.2016 and some findings contrary to the facts on the records and law, they filed an application for review of the said order

dated 29.01.2016 passed in OERC Cases No.43 of 2016 and 44 of 2016. But those review petitions, as stated earlier, have been dismissed. In the interregnum, CESU issued the demand notices under No.2241 & 2244, dated 04.03.2016 for payment of CSS within fifteen days in order to avoid disconnection of power supply. Both the demand notices have been challenged in this writ petition contending that, unless the CGP status is determined, such demand notices are grossly illegal and unsustainable. According to the writ petitioner, the CGP status has yet to be determined. This contention has been seriously contested by the Opp. Parties No.1 & 2 by stating that the petitioner did not submit any revised information for determination of the CGP status as per the direction of the OERC and hence, now the petitioner cannot be allowed to question the calculation of the CSS. While rejecting the review petitions, the OERC has observed, *inter alia*, that the CSS is to be calculated basing on the load factor of drawal as mutually settled as per the Regulation on security deposit. If CESU has calculated on the basis of the load factor, which is not acceptable to the petitioner, it should be settled mutually. Accordingly, the parties were directed to settle the same within one month from the issue of that order. However, before such settlement,

the demand notices as were issued have been stayed by an interim order.

W.P.(C) No.16237 of 2016

28. By means of this writ petition, M/s. NBVL (the industrial consumer) has urged this Court for declaring the common order dated 26.07.2016 of the OERC in Cases No.14 & 15 of 2016 is erroneous and bad in law. It has been further urged that, on setting aside the order dated 26.07.2016, the cases be remitted to the Commission with a direction to allow the review on appreciation of all the grounds raised therein.

29. Briefly stated, the facts relevant in this writ petition being W.P.(C) No.16237 of 2016 are that the petitioner has got two set-ups with generating capacity of 30 MW and 64 MW as stated in detail earlier. The petitioner had entered into an agreement for a contract demand of 3000 KVA by an agreement with CESU entered on 04.09.2009. According to the petitioner, the CESU is the distributor and retail supplier of electricity within its area of operation. The CESU filed Case No.43 of 2014 before the OERC for a direction upon the petitioner for payment of CSS alleging that the petitioner had lost its CGP status during the financial years 2010-11, 2011-12 & 2012-13. The said Case No.43 of 2014 was decided along with Case

No.44 of 2014 by a common order dated 29.01.2016, as detailed earlier. In paragraph-24 of the said order dated 29.01.2016, it has been observed that, the drawal of the power from the CGP to the parent industry shall be treated as the drawal from a generating company. In that case, the petitioner shall pay the CSS to the concerned DISCOM (CESU) at the rate fixed by the Commission in its CSS orders issued from time to time. According to the petitioner, the OERC has committed error apparent by stating as follows:

“The fact that Commission in both the cases, i.e. Cases No.43 & 44 of 2014 heard them at length and passed a detailed order clearly indicating that the Commission proceeded as assumption that it has jurisdiction to adjudicate the matter. The observation that the petitioner did not raise any objection as regard the jurisdiction of the Commission is incorrect and contrary to the records. The petitioner had in Cases No.43 of 2014 & 44 of 2014 clearly stated that the orders of the Commission in OERC dated 24.06.2010 passed in Cases No.24 to 27 of 2010 and the order dated 13.07.2012 in Case No.528 of 2011 and Cases No.24 to 27 of 2012 are applicable only to the open access customers and not in the petitioner’s case and there was no open access at all. In the Commission order dated 29.01.2016, the OERC did not refer to consider or decide those issues and hence, the review petition was filed but the review petitions were dismissed in the course of time.”

30. The petitioner has asserted that the OERC did not follow their orders, otherwise they would have entertained the review petitions. It has been strongly contended by the petitioner (the industrial consumer) that the order dated 26.07.2016 is liable to be set-aside

being erroneous in as much as in the common order dated 26.07.2016 [Annexure-8 to the writ petition being W.P.(C) No.16237 of 2016], the date of the order has been mentioned as 17.06.2016, but everywhere the petitioner has referred the said order as 26.07.2016. In the said order dated 26.07.2016, it has been clearly observed by the OERC as follows :

“The Commission had assumed jurisdiction U/S. 86(1)(f) of the Act in Cases No.43 & 44 of 2014 since this is a dispute between licensee CESU and the petitioner’s generating company, the fact that the Commission in both the cases, i.e. Cases No.43 & 44 of 2014 heard them at length and passed a detailed order clearly indicating that the Commission proceeded with assumption that it has jurisdiction to adjudicate the matter. This is self evident from the order and no separate finding on jurisdiction is considered necessary. Earlier, issues as raised by the petitioner from paragraph-5(iii) to 5(vii) except 5(vi) were already argued, discussed during the hearing and the Commission has already given its views in its common order dated 29.01.2016 in the above case. There is no scope for review of the same at this juncture. Regarding calculation of CSS on the basis of 20% load factor, it is to be pointed out that the CSS is to be calculated basing on the load factor on the drawal and mutually settled as per our regulation on the security deposit. If CESU has calculated on the basis of the load factor which is not acceptable to the petitioner, it should be settled mutually. Both the parties are directed to settle the same within one month from the issue of this order.”

31. Having observed thus, the review petitions filed by the petitioner was dismissed having further observed that there is no error apparent on the face of the record. New and important facts which are

relevant for that purpose are not claimed to have discovered and there is no other sufficient cause and hence, there is no scope to exercise the jurisdiction of review. Reference has been made to *Ajit Kumar Rath vs. State Orissa; (1999) 9 SCC 596* to exposit the meaning and purport of the expression any other sufficient reasons as embodied in *Order-47, Rule-1 of the CPC*. The Apex Court had enunciated that the said expression means a reason sufficiently analogous to those, specified in the rule. Thus, the common order dated 29.01.2019 has not been disturbed and the consequential order of dismissal had followed. The Opp. Parties No.2 & 3 filed their counter affidavit and stated that the petitioner lost their CGP status during the financial years 2010-11, 2011-12 & 2012-13 and as such, they were liable to pay the CSS for availing the construction power from the CGP and there is no difficulty to understand the meaning and purport of the order dated 29.01.2016.

32. It is apparent that, in two writ petitions filed by the industrial consumer, the order dated 29.01.2016 as passed in Cases No.43 of 2014 & 44 of 2014 has not been challenged. In W.P.(C) No.11158 of 2016, the challenge is against the demand notices dated 04.03.2016, Annexure-5 series of that writ petition and the petitioner has sought to take benefit out of the order dated 29.01.2016. In the writ petition

being W.P.(C) No.16237 of 2016, the petitioner has challenged the order dated 26.07.2016 (the date be read with the clarification as made above) whereby the cases instituted by the writ petitioner being Cases No.14 & 15 of 2016 were dismissed. It has been urged to remit the matter to the OERC to review of the order dated 26.07.2016.

33. The writ petition filed by the DISCOM, i.e. CESU now TPCODL as against the order dated 16.02.2017 (Annexure-1 to the writ petition being W.P.(C) No.5201 of 2017) passed by the OERC in Case No.49 of 2016 whereby the CESU was directed to comply with the order of the GRF passed in Case No.329 of 2014.

34. Now, the counsel for the parties appearing in all these three writ petitions have submitted that the DISCOM, namely TPCODL has expressly placed their intendment in the said letter dated 11.02.2022 as reproduced herein above for settlement of the central issue of CSS. It appears that the representative of the writ petitioners of W.P.(C) No.16237 of 2016 and W.P.(C) No.11158 of 2016 were present in the said discussion and they agreed to such settlement before the OERC. Today, an affidavit has been filed by M/s. NBVL, the petitioner in W.P.(C) No.16237 of 2016 and the CESU, now TPCODL, making a prayer that the matters be remitted to the OERC for reconsideration of the issue as raised in the writ petitions and the OERC to take the final

decision in the matter of cross subsidy charges (CSS) after hearing the parties.

35. It may be mentioned that the CESU (now TPCODL) and the industrial consumer are the disputants. By the petition, the disputants have sought withdrawal of the challenges as projected in the respective writ petitions, subject to final decision of the OERC.

36. In view of the above development and for facilitation of a settlement by the OERC, all the writ petitions are disposed of subject to the following directions:

(I) The challenge as we have appreciated against the order dated 16.02.2007 is dismissed but reserving the right of the CESU (now TPCODL) to raise their contention before the OERC.

(II) The challenge as raised in W.P.(C) No.11158 of 2016, filed by the industrial consumer, against issuance of demand notices dated 04.03.2016 (Annexure-5 series) for payment of CSS is to be decided in terms of the order dated 29.01.2016 subject of determination of the CGP status of the petitioner of the writ petition, being, W.P.(C) No.11158 of 2016. This writ petition also stands disposed of, subject to the fresh decision of the OERC.

(III) In the writ petition, being, W.P.(C) No.16237 of 2016, the petitioner (M/s. NBVL) has challenged the order dated 26.07.2016 [read with the clarification], Annexure-8 to the writ petition being W.P.(C) No.16237 of 2016 whereby the review petitions filed by the petitioner, being, Cases No.14 & 15 of 2016 was dismissed. As we have decided to remit the matter back to the OERC for a fresh decision, that order dated 26.07.2016 shall not restrict the consideration of the OERC.

37. Having regard to the long pendency of these writ petitions, have allowed the prayer for resolution of the disputes through settlement before the OERC. Hence, we remit the issues of energy charges and the CSS to be re-adjudicated by the OERC within a time frame. The industrial consumer, M/s. NBVL is directed to place their calculation with a brief of their submissions before the OERC on or before the next date, as would be posted.

Similarly, the DISCOM, CESU or its successor TPCODL shall file their calculation with reasons along with a brief of their submission on or before the next date, as determined by us. The next date for appearance before the Orissa Electricity Regulatory Commission (OERC) is on 19th September, 2022.

38. It may be noted that no further notice will be issued by the OERC to the parties for their appearance. The OERC is requested to hear the issues in the cases by opening Case No.49 of 2016 titled as M/s. NBVL vs. CESU in terms of this order. We authorize the Commission, the OERC to take the other issue in the said proceeding relating to the claim of refund made by M/s. NBVL (the industrial consumer) and the claim of CSS as claimed by the DISCOM-CESU or their successor TPCODL. The other orders as reflected above passed in various proceedings including the order of the GRF shall merge with the order that will be passed by the OERC in terms of this order. Those orders would give in to the order of the OERC.

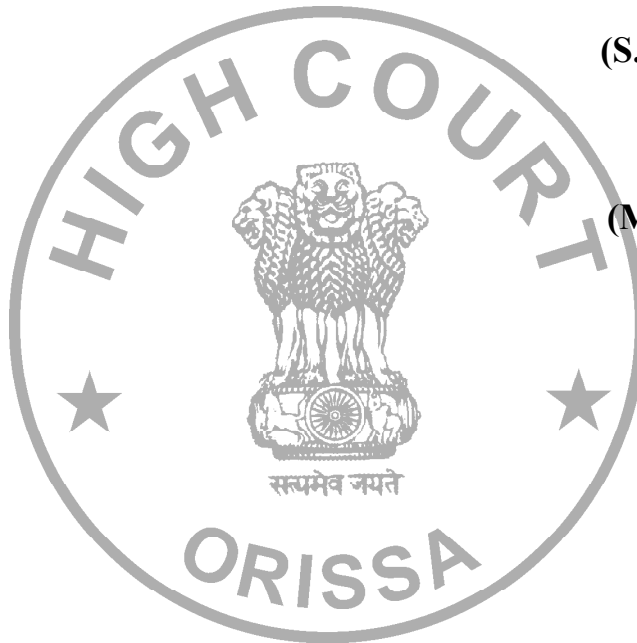
39. We further request the OERC to complete the proceeding preferably by eight weeks from the date of filing of the above calculation with reasons and the brief of submission.

40. It is needless to mention here that, the OERC may provide a structured opportunity of hearing to the disputants as referred above but while giving such opportunity, the time frame as we have requested to be followed, shall not be allowed to be scattered away. We clearly mention that we have not made any comment on the merit of the orders or the challenges as brought before us by those three writ petitions.

41. All these three writ petitions stand disposed of. Pending interlocutory or any other application/s stand disposed of.
42. The Registry is directed to send one authenticated copy of this order to the Odisha Electricity Regulatory Commission (OERC) forthwith.
43. Urgent certified copy of this order be issued as per rules.

(S. Talapatra)
Judge

(M.S. Sahoo)
Judge



Subhasis



