Chhattisgarh State Electricity Regulatory Commission
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Petition No. 36/2005 (M)

In the matter of declara0tion of share-holder companies as captive consumers and reduction of CD by such consumers

M/s Hira Ferro Alloys Limited, Raipur. ..... Petitioner

V/s

Chhattisgarh State Electricity Board ..... Respondent

O R D E R
(Passed on 05 /04/2006)

M/s Hira Ferro Alloys Limited (HFAL), Raipur has two units for manufacturing ferro alloys in Urla Industrial area, Raipur and is now setting up a power plant of 20 MW capacity. One of the units of the HFAL has a sanctioned contract demand of 5000 KVA at 33 KV voltage with the Chhattisgarh State Electricity Board (CSEB or the Board, for short), the respondent in this case. HFAL wants to share the power being produced by its captive power plant aforementioned with six other sister concerns who are also shareholders of HFAL. It also wants to reduce its current contract demand of 5000 KVA to 2000 KVA (subsequently changed to 1500 KVA only) for start up purposes and surrender 3500 KVA. The petitioner had also sought sanction of standby demand; provision of open access; provision of purchase of infirm power from the CPP by the CSEB etc. But subsequently during hearing, these issues have been dropped. The petitioner now seeks direction of the Commission only on two issues i.e., declaration of six sister concerns as captive consumers and reduction in CD.

2. We have heard the petitioner and the CSEB in detail. For dealing with the issues raised in this case, it would be necessary to recall the provisions of the Electricity Act, 2003 (the Act, for short) and the Electricity Rules, 2005 (the Rules, for short) with regard to captive generating plants. Clause 8 of Sec. 2 of the Act defines the captive generating plant as "a power plant set up by any person to generate electricity primarily for his own use" A 'person' in this provision includes a company. The terms 'primarily' and 'own use' have not been clarified in the Act. The Rules have sought to interpret these provisions. Clause 1 of Rule 3, which is relevant in this case, 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: xxxxxxxxxxx"

In the explanation to the above Rule 'Captive User' and 'Captive Use' and 'Ownership' have been defined as under:

" 'Captive User' shall mean the end user of the electricity generated in a Captive Generating Plant and the term 'Captive Use' shall be construed accordingly."

" '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."

In terms of these definitions there is no scope for doubt about HFAL, which will use 92 MU (66%) of the power produced by its captive power plant (CPP) for its ferro alloys units being the captive consumer and the power plant being a CPP. The issue for determination is whether the other six companies are 'captive users' within the meaning of the provision of the Rules.

3. The total power available from the CPP after deducting auxiliary consumption is 139 MU (151.10 MU – 12.10 MU). HFAL's own consumption being 92 MU, the remaining about 47 MU is to be used by the six sister concerns. The details of these consumers including their shareholding in HFAL and their power consumption, are as under:

Name of the Company	Shareholding in HFAL (in percentage)	CPP power used MU/annum
1. Hira Cement, Raipur (a unit of Shree Hira Exim Ltd.)	0.59	3.00
2. Hira Industries Ltd. Jagdalpur	0.84	1.00
3. Hira Steels Ltd., Raipur	4.85	27.50
4. Godawari Power & Ispat Ltd., Raipur	1.33	7.50
5. RR Ispat Ltd., Raipur	1.33	7.50
6. Jain Carbides & Chemicals Ltd.	0.10	0.50
	9.04	47.00

Thus the total shareholding of the six companies in HFAL, which seek to be classified as 'captive consumers', is only a little more than 9%. The CSEB's case is that-

(i) since the so-called sister concerns do not hold share capital in HFAL to the extent of 26% they cannot be treated as captive consumers in terms of Rule 3 quoted above.

(ii) it has also been pleaded that in any case the share of the six sister concerns in power generated by the CPP can only be in proportion to their shareholding in HFAL.

As to the first issue, Rule 3 requires that the captive user(s) should hold not less than 26% of the 'ownership' of the CPP and 'ownership' in case of a company is in terms of shareholding with voting rights. It has been argued by the petitioner that although shareholding of the sister concerns in HFAL is not 26%, the ownership of the CPP is not only with the sister concerns but also the company holding the CPP i.e. HFAL in this case, the 26% shareholding requirement has to be met by the captive consumers and HFAL together. In fact the main captive consumer, i.e. HFAL with the six proposed consumers, hold 100% ownership of the CPP. On the other hand, it has been argued on behalf of the respondent that such an interpretation may not be legally valid. In fact, a plain reading of Sec. 2(8) and Sec. 9 of the Act would indicate that a company setting up a CPP alone is the captive consumer. The Rules have sought to interpret the provision of law with regard to captive user and to lay down that in case of a company, the captive user, whether one or more, may hold 26% of the shares with voting rights, in the company which holds the CPP. In effect it means that the captive user's contribution to the ownership of the CPP should at least be 26%. Although the Rules make no distinction between the main captive consumer who has set up the CPP and the shareholder captive consumers, if their shareholding is taken together it would always constitute 100% ownership. That could not have been the intention of the framer of the Rules as otherwise the 26% shareholding stipulation would be rendered meaningless. That being so, the only interpretation of the Rules which would appear to be logical is that the captive consumers, excluding the CPP holder, should have at least 26% stake in the CPP. Any other interpretation would mean that a company with even only 0.1% shareholding in the CPP-holder company would be eligible to be captive consumer. Such an interpretation is liable to misuse of the provisions of the Act in that independent power plants can easily masquerade as CPPs.

4. In the present case the six so-called sister concerns together hold as little as 9.04% of share in HFAL. As per the discussion above, therefore, they do not qualify as captive consumers. The petitioner has further argued that all the seven companies are under 'the same management'.

5. The petitioner has further argued that all the seven companies are under 'the same management' within the meaning of section 370 of the Companies Act, 1956 and section 2(g) of the Monopolies and Restrictive Trade Practices Act, 1969. Section 2(g) of the MRTP Act defines "interconnected undertakings" and explanation 1 to this section says: "For the purpose of this Act two bodies corporate shall be deemed to be under the same management-

(i) If one such body corporate exercise control over the other or both are under the control of same group or any of the constituents of the same group; or

(ii) If the Managing Director or Manager of the one of such body corporate is the Managing Director or Manager of the other xxxxxxxxxxxxx"

The shareholding pattern of the seven companies which want to be captive consumers of the CPP promoted by HFAL and their management structure have been submitted by the petitioner. The Directors, relatives and the group companies hold only 23.30% shares in HFAL which is a public limited company. But the shareholding pattern of the companies which claim to be captive users is such that it is only the Directors and relatives of the group of companies who hold most of the shares. It has thus been argued that all the companies are of the same family. The definition of captive generating plant given in clause (8) of Section 2 of the Act clearly indicates the intention of the legislature which is that a power plant is a CPP if the electricity generated by it is primarily used by the promoters of the power plant. The Rule position can not be different from that of the Act. Where the power generated by a CPP is consumed by the industries under the same group and the same management, the main shareholders of all companies being family members and closely related, there should be no room for doubt that the objectives of the law are adequately met. The petitioner has pointed out, to further buttress the position, that the shareholding pattern of the companies have not been altered for the setting up of the CPP. While primafacie the argument appears logical, the wording of Sec. 2(8) of the Act together with the elaboration of these provisions in the Rules and the requirement of a CPP laid down in the rules would not support such a view. Such an interpretation is likely to lead to misuse of the provisions of the Act in respect of CPPs. The above argument, therefore, may not be legally sustainable. It has argued by the learned counsel for the respondent that the provisions of the MRTP Act cannot logically be invoked in this case. These are specialized statues and their provisions are applicable for specific purposes. The Electricity Act is a self-contained statute and interpretation of its provisions in terms of the provisions of another statute would not be legally valid. We agree with this view.

6. In view of the discussion above, the second contention of the CSEB that consumption of power generated by a CPP should be in proportion to the shareholding need not be addressed being of no relevance. However, this is an important issue in the context of CPPs and we would like to discuss it here. This provision of proportional use does not appear to be applicable in case of a company. The second proviso to clause (1) of Rule 3 indicates that only in the case of an 'association of persons' setting up a CPP would the users be required to consume 51% of the electricity generated, determined on an annual basis, "in proportion to their shares in ownership of the power plant within a variation not exceeding 10%". This provision has not been made applicable to a company and its shareholders. Nowhere the Rules provide that shareholders of a company may consume power in proportion to their shareholding. The CSEB has produced a letter from Ministry of Power (letter No.23/23/2005-R&R, Ministry of Power, Govt. of India) addressed to the Chief Engineer (Commercial) of the Board, apparently in response to a letter seeking clarification by the Board, that as per provision of Rule 3 "if the equityholders in a captive plant act individually for seeking power from such a plant for captive use such equity holders will be covered in the case of association of persons". This letter unfortunately creates more confusion than it clears. In the case of an association of persons the determinant of their ownership in the CPP is their proprietary interest and control over the generating station, while in case of a company, which is a corporate body, it is shareholding with voting rights. These two positions are not comparable. It is also to be noted that if power is to be consumed as per the pattern of shareholding, the total consumption by the shareholders may not be 51% and above. If shareholding is ownership consumption in proportion to shareholding may not satisfy the second

condition of 51% consumption of power generated by a CPP, since 26% shareholding is enough to make it a CPP. We therefore feel that the clarification given by the Ministry of Power needs to be looked into afresh. The shareholding pattern in a company, can not be the determinant of the respective share of the shareholders in the power generated by a CPP. We are conscious of the fact that this interpretation may lead to a situation where a person holding a fraction of shareholding of a CPP-holder company may have a claim to captive consumption. Such a position seems unavoidable because under Rule 3, there is no restriction the total number of captive consumers who may hold 26% of the shareholding of the CPP-holder company. The provision does not stipulate that every captive consumer must hold 26% of shares. Such an interpretation may not be logical. We are therefore of the view contribution to ownership need not be a determinant of share in captive power in the absence of any such specific provision in the Rules. Only in case of a CPP promoted by an association of persons and a co-operative society is the proportional share relevant.

7. In view of the above discussion, the Commission is of the view that while HFAL has set up a captive power plant and is entitled to use all the electricity generated by the plant for himself, the six so-called sister concerns cannot be deemed to be captive consumers of the CPP.

8. As regards the issue of reduction in CD of HFAL from the present 5 MVA to 1.5 MVA, the only contention of the Board is that the company should clear its arrears with the Board which are large and amounts to Rs.65.55 lakhs, before its CD is reduced. The history of these arrears is that most of the ferro-alloys units in the State of Chhattisgarh were closed for a considerable period of time because of unfavourbale market conditions. In order to revive these units, in the larger interest of the State, the State Government had introduced a scheme on 28.3.2002 under which instalments were fixed for liquidation of arrears. On a minimum payment of 5% of the arrears, the balance amount could be recovered in seventy monthly instalments. The State Government had also waived all surcharge amounts payable by the ferro-alloys units and a concessional tariff was made applicable to the industry. The petitioner's plea is that it has been regularly paying the instalments and the Board has admitted this position. The petitioner also pleads that it would continue to be the consumer of the Board and hence the arrears would continue to be recovered as per the State Government's scheme. CSEB, on the other hand, has pleaded that sufficient concessions have already been given to the ferro-alloys units and on the basis of these concessions there is a subsisting agreement with the petitioner for a period of five years. The petitioner has already reduced his CD earlier during the present agreement period. He is hence not entitled to further reduction in CD during the currency of the present agreement as per the provisions of the Supply Code issued by this Commission. The Code allows reduction of CD only once during the period of agreement. It may, however, be pertinent to mention here that the Commission has granted a special dispensation to CPPs vide its order passed on 6.2.2006 in petition No. 17 of 2005, under which a captive consumer may reduce its CD to the extent desired without any restriction, after availing power from a CPP. This order would be applicable to HFAL also w.e.f. 1.3.2006. Therefore, there seems to be no need for a separate order for reduction of CD in this case. However, the Commission has noted that the position of this case is different from other captive consumers in terms of its relationship with the CSEB. Recovery of arrears in easy instalments has been provided as a package. Now that the petitioner is seeking another special dispensation after setting up its own CPP, the Commission feels that the Board's interests should be protected in this case. It is accordingly ordered that the petitioner shall deposit

the entire arrears immediately before his CD is reduced to the extent desired. However, the recovery of this amount shall be by way of adjustment of the present security deposit of the petitioner the bulk of which may have to be refunded to him as a consequence of reduction in CD from 5 MVA to 1.5 MVA. The balance amount, if any, shall be paid in cash. The amount of security deposit to be retained on reduced CD shall be calculated as per the provisions of the CSERC (Security Deposit) Regulations, 2005 and the Electricity Supply Code, 2005.

Sd/- Sd/-
Member **Chairman**

True Copy

(N.K. Rupwani)
Secretary