

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Shri Ashok Basu, Chairperson**
2. **Shri Bhanu Bhushan, Member**
3. **Shri A.H.Jung, Member**

Petition No. 27/2006

In the matter of

To restrain PTC from carrying on purchase of electricity from GRIDCO or any other electricity trader.

And in the matter of

Gajendra Haldea ... **Petitioner**

Vs

PTC India Ltd. **Respondent**

Following were present:

1. Shri Gajendra Haldea
2. Shri Rajiv Yadav, Advocate, Rep of Shri Gajendra Haldea
3. Shri N.L. Ganapathi, Advocate, PTC

**ORDER
(DATE OF HEARING: 27.7. 2006)**

The petitioner seeks to restrain the respondent, a licensee for inter-State trading in electricity, from carrying on purchase of electricity from any other electricity trader, including Grid Corporation of Orissa (GRIDCO) and to cancel or suspend the respondent's licence for inter-state trading on the ground of willful contravention of clause (4) of Regulation 2 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Trading Licence and other related matters) Regulations, 2004, hereafter "the trading regulations" notified by virtue of powers under Section 178 of the Electricity Act, 2003. According to the petitioner, clause (2) of

Regulation 4 of the trading regulations interdict purchase of power by one electricity trader from another. It was submitted by the petitioner that sale and purchase of electricity from one trader to another trader will have the effect of increasing the cost of electricity supplied to the consumer. The Commission by its order dated 5.4.2006 in Petition No.15/2006, has held GRIDCO as an intra-State electricity trader.

2. The respondent has contested the plea of the petitioner on merits. The respondent has submitted that there is nothing in the Electricity Act or the trading regulations which may prohibit purchase of power by one trader from another. The respondent in its reply has also taken certain preliminary objections.

3. Heard the petitioner in person and Shri N.L. Ganapathi, Advocate for the petitioner.

PRELIMINARY OBJECTIONS

4. We consider first the preliminary objections raised by the respondent.

Status of GRIDCO

5. The respondent has stated that GRIDCO being a bulk licensee, cannot be a trader in electricity. It has further stated that the Commission does not have jurisdiction to give such a finding. The respondent has not urged any specific ground for its plea of lack of jurisdiction of the Commission.

6. The question of status of GRIDCO was raised in the proceedings before the Commission in Petition No.15/2006 (Gajendra Haldea Vs Grid Corporation of Orissa).

The Commission after elaborate analysis of the provisions of the Electricity Act, 2003; Orissa Electricity Reforms Act, 1995 and the transfer schemes formulated by the State Government of Orissa from time to time, came to the conclusion that GRIDCO is a trader in electricity and its operations are limited within the State of Orissa. For adjudication of the dispute raised in Petition No.15/2006, the Commission was competent to decide on the status of GRIDCO. Therefore, the issue of lack of jurisdiction raised by the respondent is without any substance. Further, the respondent cannot be permitted to question the findings recorded by the Commission earlier, in these collateral proceedings. Even though the respondent was not party to the proceedings in Petition No.15/2006, it, as a third party could file a petition for review of the order dated 5.4.2006, as "a person feeling aggrieved" by the said order. The Commission for the sake of consistency, certainty and uniformity in the field of judicial decisions, is to follow its earlier findings on the status of GRIDCO as an electricity trader. Therefore, we over-rule the preliminary objection.

Non-Joinder of Necessary Parties

7. The respondent has next contended that the petition is not maintainable because of non-joinder of necessary parties. It has been stated that other inter-State electricity traders who buy power from GRIDCO are not impleaded before the Commission.

8. Absence of the necessary parties in the proceedings is fatal to the proceedings and the petition where necessary parties are not impleaded, is liable to be dismissed. As repeatedly held, a necessary party is that party in whose absence the dispute cannot be decided effectively. The dispute raised in the present petition involves

interpretation of the trading regulations. Merely for the reason that a decision in the matter will affect any other person, such a person cannot be considered to be the necessary party. At best, such a person may be the desirable party. A dispute can be decided in the absence of a desirable party, though not in the absence of necessary party. This is the established principle of law. Therefore, we do not find any merit in this preliminary objection also.

Suppression of Facts

9. The respondent has further alleged that the petitioner has filed an appeal against the Commission's order dated 5.4.2006 *ibid*, but has suppressed this fact, while filing the present petition. The respondent has pleaded dismissal of the petition on this ground.

10. The Commission is a party to the appeal filed by the petitioner before the Appellate Tribunal for Electricity and is thus aware of the proceedings. In any case, there is nothing in law to prevent the petitioner from approaching the Commission for a relief which he claims to be entitled to, based on the earlier finding of the Commission that GRIDCO is an electricity trader, particularly when in the appeal the petitioner has questioned that part of the decision which holds that GRIDCO as an "intra-State" trader.

Exemption from Payment of Fee

11. The respondent has further submitted that the petitioner is not entitled to exemption from payment of court fee since no such power is vested in the Commission in terms of the Central Electricity Regulatory Commission (Payment of Fee)

Regulations, 2004 (hereafter “the fee regulations”). It has been alleged that the petitioner is abusing the indulgence shown by the Commission in the past when he was exempted from paying fee. The respondent has brought out that the petitioner had prayed for exemption from payment of fee before the Appellate Tribunal but the Appellate Tribunal had declined to grant exemption since it did not have any such power. Similarly, it has been urged, since the power to exempt is not available, the petition deserves to be dismissed on this ground itself. In support of this preliminary objection, the respondent has also relied upon the decision of the Hon’ble High Court of Delhi in a case reported as Sahara India Airlines Ltd. Vs R.A. Singh – 1997 (43) DRJ 217.

12. The fee regulations have been framed by the Commission by virtue of powers under clause (g) of sub-section (1) of Section 79 of the Electricity Act, “to levy fee for the purposes of this Act”. Therefore, by virtue of its inherent power to levy fee, the Commission may exempt any person from payment of fee in appropriate cases. The case of Sahara India Airlines (supra) is distinguishable since the question raised therein was of exemption from payment of court fee prescribed by the legislature under the Court Fees Act, 1870. It is obvious that in the matter of payment of court fee, the court cannot grant exemption since no such power is conferred on the court under the law governing payment of court fee. Also, in the matter before the Appellate Tribunal, the rules for levy of fee have been framed by the Central Government. These rules do not provide for exemption from payment of fee by the Appellate Tribunal. In the case on hand, we have granted exemption to the petitioner, considering the nature of the proceedings, in exercise of our inherent power to levy fee, which may include power not to levy fee in appropriate cases.

Delay and Laches

13. The next contention of the respondent is that the petition is hit by delay and laches. It has been stated that the respondent has been purchasing power from GRIDCO for more than two years, and this was never questioned by the petitioner, even though the information in this regard was available in public domain and this was neither questioned in Petition No.15/2006.

14. There is no merit in the respondent's contention. The petitioner's case involves interpretation of the trading regulations. This gives rise to continuing cause of action so long as these regulations stand on the statute book. Further, every purchase is a fresh and separate cause of action which can be called into question through appropriate proceedings. It is also noted that as per the respondent itself, the respondent has been purchasing power from GRIDCO for nearly two years. This period is not considered long enough to non-suit the petitioner on the ground of delay and laches. Therefore, the objection is without merit.

Applicability of Order II, Rule 2, CPC

15. The last preliminary objection raised by the respondent is that the present petition is barred by the principles enunciated in Order II Rule 2 of the Code of Civil Procedure, according to which, a suit or claim must be framed in a manner to prevent further litigation and that if a litigant has omitted to seek a relief in the first claim, he cannot claim such relief afterwards. It has been urged that the petitioner could claim the relief claimed in the present petition, in Petition No.15/2006 as well and not having done so the present petition is barred by application of the principle contained in Order II, Rule 2, CPC.

16. Even though Order II Rule 2 of CPC is strictly not applicable to the proceedings before the Commission, the principles underlying the provision have been extended by the Commission to certain cases in the past on the ground that these are fundamentally the matter of public policy. However, it is to be noted that for application of the bar contained in Order II Rule 2, the conditions to be satisfied are that the two claims must be between the same parties and also the causes of action are same. In the earlier petition (No.15/2006), the present respondent was not a party. Also, there is no identity of causes of action in two proceedings. The Commission's decision in the order dated 5.4.2006 gave rise to a fresh cause of action for filing of the present petition. Therefore, the principles of Order II Rule 2 are not attracted.

MERITS

17. We now proceed to examine the contentions of the parties on merits. Before doing so, we take note of sub-clause (c) of clause (1) of Regulation 2 and clause (4) thereof. For facility of reference, these are reproduced below:

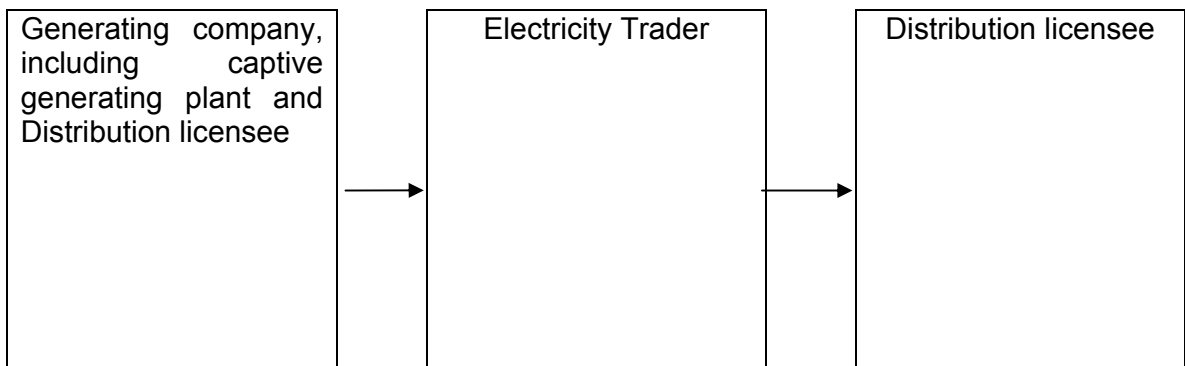
“(c) “Agreement” means the agreement entered into between the electricity trader and the seller of electricity on the one hand and the electricity trader and the buyer of electricity on the other;

.....

(4) These regulations shall be applicable to trading carried out bilaterally between the generating company, including captive generating plant, distribution licensee and the electricity trader on the one hand and the electricity trader and the distribution licensee on the other:

Provided that the scope and applicability of these regulations may be reviewed from time to time to keep pace with the developments of formulation of regulations for open access in distribution by the State Electricity Regulatory Commissions or introduction of power exchange market by the Commission.”

18. The definition of the term “agreement” states that in every transaction of trading of electricity, there will be three players namely, the seller of electricity, the electricity trader and buyer of electricity. The electricity trader completes the chain between the seller and buyer of electricity. The definition of “agreement” necessarily excludes the electricity trader from being seller of electricity to another trader. Similarly, the buyer of electricity is also excluded. Clause (4) of Regulation 2 of the trading regulations means that trading can be carried out bilaterally between the generating company and distribution licensee AND the electricity trader, in one part and on the other part between the electricity trader AND the distribution licensee. The relationship can be represented graphically as under:



19. The above was the clear intention of the Commission, when trading regulations were framed. Everyone keeping track of electricity Market reforms is well aware of California crisis of 2000-01 where prices of wholesale electricity were artificially jacked up by way of routing one transaction through a number of traders. Therefore, we agree with the contention of the petitioner, since otherwise the prices of electricity can be artificially jacked up by two or more traders joining hands. Any other interpretation would render clause (4) of Regulation 2 redundant. Accordingly, we allow the petition. We direct that the respondent is restrained to buy power from any trader in electricity

including GRIDCO. As a corollary of the above finding, the existing contracts entered into by the respondent for sale of power from an electricity trader including GRIDCO shall be rendered null and void, being in contravention of the trading regulations, in the light of the construction adopted by us.

20. We are conscious of the fact that the State utilities are presently buying power from the respondent sold by GRIDCO, a trading company, or other similar entities. Therefore, in order to avoid any situation of uncertainty, in case the concerned State utilities so desire, they may, by 22.8.2006 enter into agreements directly with GRIDCO and other similar entities for purchase of power at a price purchased by the respondent. In case the concerned State utilities exercise this option, the transmission corridor booked by the respondent shall be transferred in the name of the concerned State utilities by the Regional Load Despatch Centres.

21. The present petition stands disposed of accordingly.

Sd/-
(A.H.JUNG)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRPERSON

New Delhi, dated the 7th August 2006