

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No.210 of 2006, 112 of 2006 & IA 82 of 06 and IA 87/06**

Dated the 16<sup>th</sup> October,2006.

Present: - Hon'ble Mr. Justice E.Padmanabhan, Judicial Member  
Hon'ble Mr. H.L. Bajaj – Technical Member

Vandana Vidyut Ltd. ... Appellant  
In both appeals

Versus

1.Chhattisgarh State Electricity Board  
Dangania, Raipur

2. Chhattisgarh State Electricity Regulatory Commission  
G.E. Road, Raipur

.....Respondents  
In both appeals

For the Appellant : Mrs. Nalini Chidambaram, Sr. Advocate  
in both appeals : Mr. Karan Mehra, Advocate  
Mr. C. Mukhopadhaya, Advocate  
Mr. Viplav Sharma, Advocate

For the Respondents : Mr. M.G. Ramachandran, Advocate with  
in both appeals : Ms Taruna Singh Baghel and  
Mr. Anand K. Ganesan, Advocates for  
CSERC  
Mr. Valmiki Mehta, Sr. Advocate  
Ms Suparna Srivastava, Advocate for  
CSEB  
Mr. Rahul Srivastava, Advocate

## **JUDGMENT**

1) Appeal No. 210 of 2006.

In this appeal the appellant M/s Vandana Vidyut Ltd. has prayed this Appellate Tribunal to set aside the orders dated August 2, 2005 passed by the Chhattisgarh State Electricity Regulatory Commission in petition No. 20/2005 (M) and further prays to issue such further or other directions as the facts of the case may warrant.

2) Appeal No. 112 of 2006.

In appeal No. 112 of 2006 M/s Vandana Vidyut Ltd. has prayed this Appellate Tribunal to set aside the orders dated June 5, 2006 made in petition No. 14/2006 (M) on the file of the Chhattisgarh State Electricity Regulatory Commission, Raipur and to declare that the Chhattisgarh State Electricity Board has to grant permission to the appellant for sale of electricity to third parties in terms of the Power Purchase Agreement without the requirement to apply for open excess and without liability to pay surcharge under Section 42(2) proviso of The Electricity Act, 2003.

3) As both the appeals are connected and the points raised in both the appeals are identical, proceedings being interconnected, the two appeals were consolidated and taken up together for hearing.

4) Heard Ms Nalini Chidambaram, Sr. Advocate for Mr. Karan Mehra, Advocate for the appellant in both the appeals. Mr. M.G. Ramachandran, Advocate appearing for second respondent, Chhattisgarh State Electricity Regulatory Commission and Mr. Valmiki Mehta, Senior Advocate for Ms Suparna Srivastava, Advocate for Chhattisgarh State Electricity Board, the first Respondent.

5) During the year 1994 the State of Madhya Pradesh declared its policy inviting industrialist to set up generating plants for generation of power by use of non-conventional energy sources including bio-energy etc. The policy was declared by the state Government permitting sale of electricity so generated to third parties by such generating companies and it is a consent under Section 43A(1)(c) of The Electricity (Supply) Act, 1948. The appellant in terms of the said policy set up a non-conventional energy generating plant of 6 MW at Sirgiti Industrial Area, Bilaspur. Necessary sanction and permission were secured in terms of The Electricity Act, 1910 and The Electricity (Supply) Act, 1948.

6) On September 2, 2000 a Power Purchase Agreement was entered, which provided for wheeling charges for the sale of power to MPEB and sale of power to third parties at the rates mutually agreed between the appellant and the third parties. The said PPA also provided that the third parties with whom the appellant has entered into contract for sale of

power could be changed once a year. The said PPA entered with the Board and as approved by the Government of Madhya Pradesh is valid for a period of 10 years.

7) The state of M.P. was reorganized and the state of Chhattisgarh was carved out. The appellant's generation plant became operational and commercial generation was achieved during October, 2001. The appellant entered into agreement with third parties for sale/purchase of power generated in its generating plant. The appellant in terms of supplementary power agreement enhanced the capacity of plant from 6 MW to 8 MW. The appellant requested the State Government of Chhattisgarh for necessary permission to sell power to third parties other than the Board. From time to time the state Government sanctioned the sale of power to third parties.

8) According to appellant though it is as such sanction/consent is in terms of Section 43A of The Electricity (Supply) Act, 1948, the Government orders proceeded as if it is under Section 28(1) of The Electricity Act, 1910. The notification issued by State Government under Section 28 of the Indian Electricity Act, 1910 is in fact a consent given by the Government for sale of power generated by the appellant to any person other than the Board under Section 43A(1) of the 1948 Act. Though Section 28(1) of The Electricity Act is referred to, it is a sanction or consent by the State Government of Chhattisgarh which enabled the appellant to

engage in the business of supplying energy to third parties in terms of Section 43A(1) (c) of The Electricity (Supply) Act, 1948. The Third Parties with whom the appellant entered into an agreement for sale and purchase of power, necessarily required to be changed as those third parties themselves set up generating plants of their own in due course.

9) The appellant applied to the Chhattisgarh Electricity Board for change of names of third parties for supply of power from its generating plants in the month of December, 2004. The said Electricity Board in terms of PPA accorded permission to the appellant to continue the supply of power to different set of consumers.

10) While so the Chhattisgarh State Electricity Regulatory Commission issued suo moto notice calling upon the appellant to show cause, as to why the permission granted by the Electricity Board on December 30, 2004 for change of allocation to third parties in terms of the PPA should not be cancelled. Objections were submitted by the appellant as well as by the Electricity Board. The Chhattisgarh State Electricity Regulatory Commission in the meanwhile framed Open Excess Regulations. The said regulations according to the appellant, would enable the appellant to continue the supply to third parties and no application for open excess permission was required as such.

11) By order dated August 10,2005 the State Commission concluded that though the PPA was saved under Section 185(2)(a) of The Electricity Act, 2003 there being no consent of the State Government under Section 43A(1)(c) of The Electricity (Supply) Act, the permission granted for sale of power by the Chhattisgarh State Electricity Board in favour of the appellant is illegal and that the appellant has to apply for sale of electricity to third parties under Open Access System. Challenging the said directions dated June 5,2006 the appellant has preferred appeal No. 112 of 2006.

12) According to the appellant it is not required for the appellant to apply under Open Excess Regulations. According to appellant, the State Commission had no jurisdiction to alter or modify the terms of the PPA. It is further contended that the State Commission had proceeded on an erroneous assumption and misreading of the order of State Government and proceeded as if there was no sanction under Section 43A(1)(c) of the 1948 Act, when actually there was consent/sanction in favour of the appellant though the Government order purport to have been passed under Section 28 of The Indian Electricity Act, 1910. The present two appeals have been preferred by the same appellant and detailed arguments were advanced.

13) It is contended that action of the Regulatory Commission is in excess of jurisdiction and nothing but a misdirection. It is further contended by the learned senior counsel for the appellant that though the Government orders referred to Section 28(1) of The Electricity Act, 1910 it is in fact a consent in terms of Section 43A(1) (c) of The Electricity (Supply) Act, 1948 and therefore the appellant is not required to seek open access as ordered by Commission in the light of the Electricity (Removal of Difficulties) Second Order, 2005. In terms of the said Electricity (Removal of Difficulties) Second Order, 2005 the appellant could very well continue the supply of power with the consent or authorization already given in its favour by the State Government and that it is not liable to pay surcharge in terms of Proviso to Sub Section (2) of Section 42. The learned counsel also referred to and relied upon Open Access Regulations framed by the Chhattisgarh State Electricity Regulatory Commission in support of the appellant's case. The learned senior counsel placed reliance on Regulation 6 of the said Regulations which enabled the appellant, in existing entity to continue to avail such access to the transmission and distribution system on the terms and conditions for the term of 'existing contract', viz PPA.

14) Per contra Mr. M.G. Ramachandran, learned counsel appearing for the Regulatory Commission and Ms Suparna Srivastava, Advocate contended that no interference is called for with the orders of the

Regulatory Commission and that without securing Open Access, the appellant cannot effect or continue the supply of power to a new set of consumers. The learned counsel for the respondents pointed out that what was authorized by the State Government is under Section 28 of The Electricity Act, 1910 and it is not a consent under Section 43A(1)(c) of The Electricity (Supply) Act, 1948. The learned counsel appearing on either side took this Appellate Tribunal through the typed papers filed by the appellant, where earlier orders of the State Government and Electricity Board have been included.

15) In this appeal the following points arise for consideration:-

- (1) Whether the appellant had secured previous sanction/consent to engage in the sale of Energy to third parties from the State Government under Section 43A(1)(c) of The Electricity (Supply) Act, 1948?
- (2) Whether the appellant is entitled to avail benefits of the Electricity (Removal of Difficulties) Second Order, 2005 to supply power without payment of surcharge and applying for open access in terms of Proviso to Sub Section (2) of Section 42 of The Electricity Act, 2003?
- (3) Whether the impugned order of the Regulatory Commission challenged in both the appeals are liable to be set aside?



(4) To what relief to appellant is entitled to in these appeals?

16) The first three points could conveniently be taken up for consideration as they arise out of the same set of facts, besides being interconnected.

17) The learned counsel for the appellant referred to the orders of the State Government of Chhattisgarh dated February 23, 2001, July 15,2002, February 11,2003, April 8,2003 and February 16,2004 as well as the No Objections granted by the Chhattisgarh State Electricity Board on November 2,2001, August 7,2002, February 22,2003, April 23,2003 and March 5,2004. A perusal of the said orders of the Government of Chhattisgarh as well as the No Objections issued by the Chhattisgarh State Electricity Board in terms of the policy directions inviting entrepreneurs to set up non-conventional energy generating plants in the state, would show that a consent has been granted in favour of the appellant under Section 43A(1)(c) of The Electricity (Supply) Act,1948 and the Government notification/orders referring to Section 28 of the Indian Electricity Act, 1910 is in fact a consent of the Government or it would amount to a sanction under Section 43A(1)( c) of The Electricity (Supply) Act, 1948 and the same will enable the appellant to sell power generated by it to third parties.

18) The effect of the Government orders as well as the NOC definitely mean and include that it is a consent in terms of Section 43A(1)(c) of The Electricity (Supply) Act, 1948. Looking at from different angle also the sanction accorded under Section 28, which enables the appellant/generator to engage in the Business of Supplying Energy within the area of supply of licensee would include the consent under Section 43A(1)(c).

19) We have no hesitation to hold that the effect of the Government order as well as NOC by the Board is a consent under Section 43A(1)(c) of the 1948 Act by the Chhattisgarh State Government and following that, the No Objection has been issued by the Chhattisgarh State Electricity Board from time to time. This consent and the sanction are intertwined but for which the appellant could not sell power generated by it to third parties other than the Board constituted under The Electricity (Supply) Act, 1948. Section 43A is an enabling provision which enabled a generating company to enter into a contract for the sale of electricity generated by it either with the Board or with any other person with consent of the competent Government or Governments. Sub Section (2) of Section 43A provides for determination of tariff for sale of electricity to the Board. We are not concerned with Section 43A(2) in the present case.

20) In our considered view we have to deem the said order under Section 28 of The Electricity Act, 1910 would taken and include a consent under Section 43A(1)(c) of The Electricity (Supply) Act, 1948. This would mean that the appellant generator entered into a contract for the sale of electricity generated by it with any other person and the consent of the State Government shall be deemed and factually also the appellant has been selling power to third parties with the consent of the State Government. Section 28 of The Electricity Act, 1910 merely speaks of the sanction which is required for a person other than licensee to engage in the Business of Supplying Energy.

21) For immediate reference let us refer to one of the four orders passed by the State Government, which orders are identical. The order reads as under:

**“ CHHATTISGARH GOVERNMENT, ENERGY DEPARTMENT  
MANTRALAYA, DAU KALYAN SINGH BHAWAN: RAIPUR**

*No. 2727/Secretary/ED/202*

*Raipur, dated 15.07.2002*

*Notification*

*The Government, by exercising powers conferred under Sub Section (1) and (1-A) of Section 28 of Indian Electricity Act, 1910 (No. 9 of 1910), after consultation with Chhattisgarh State Electricity Board, permit sale of electricity produced by M/s Vandana Vidyut Limited Raipur by their 6 Megawatt capacity established power plant which is located at Sirgitti Industrial Area in District Bilaspur, to the following 19 (Nineteen) high tension consumers as per allotment shown against their name:”*

This order is a consent order by the State Government to sell power to 19 H.T. consumers, which falls under Section 43A(1)(c ) of the Supply Act, 1948 though there is no reference to the said section but there is recital under Section 28 of The Indian Electricity Act, 1910.

22) The said Section 28 provides that no person other than a licensee, shall engage in the business of supplying energy to public except with the previous sanction of State Government. On a conjoint reading of Section 43A(1)(c) of 1948 Act. Section 28 of the Electricity Act, 1910, it is clear that no further order is required from the hands of the State Government when the consent already stands granted as seen from the four orders. Hence we are unable to sustain the view of the Regulatory Commission.

23) The sanction of the State Government which sanction under Section 28(1) of The Indian Electricity Act, 1910 viewed from the different angle in our view would also include a consent in terms of Section 43A(1)(c ) of The Electricity (Supply) Act, 1948 as it is clear from the orders referred above. In other words the appellant who had the consent of the State Government to sell power to third parties, is entitled to invoke the Electricity (Removal of Difficulties) Second Order, 2005. The appellant satisfied the conditions prescribed under Section 2 of the said Removal Order, which would mean that the appellant during the currency of the authorization and consent, is not required to apply for open access nor it is required to pay surcharge in

terms of Proviso to Sub Section (2) of Section 42 of The Electricity Act, 2003 as it is a generating company which has been factually selling power with the consent of the competent Government under Section 43A(1)(c ) of The Electricity Act, 1948 before the commencement of The Electricity Act, 2003 as well as on the date of commencement of the said Act.

24) Learned counsel for the appellant rightly placed reliance on Regulation 6 of the Chhattisgarh State Electricity Regulatory Commission Open Excess Regulations. Since in the earlier paragraphs we have concluded first two points in favour of the appellant, it may not be necessary for us to examine this contention. It would be sufficient to point out that there is force in the reliance placed by the learned senior counsel on Regulation 6.

25) Our attention was drawn to pronouncement of the Hon'ble Supreme Court in the case of A.P. Gas Power Corporation V/s A.P. State Electricity Regulatory Commission reported in 2004 (10) SCC 511, where the Hon'ble Supreme Court had occasion to consider Section 43A(1)(c ) of the Electricity (Supply) Act, 1948 and held that after the opening up of generation to any company, a third category was introduced by the amendment of 1991 as contained in Clause ( c) of Section 43A(1) of Supply Act. Thus on a consideration of the Government orders and NOC, we hold that the appellant had secured consent to sell the power generated by it to third

parties and it is deemed to have been granted under Section 43A(1)(c) of 1948 Act apart from grant of sanction under Section 28 of The Indian Electricity Act, 1910. This would enable the appellant to continue the sale of power in terms of PPA for a period of 10 years to reckon from the date found in the PPA to sell power to third parties without payment of surcharge under Section 42(2) of The Electricity Act, 2003. All the three points are answered in favour of the appellant in both the appeals.

26) In the result the impugned orders passed by the Chhattisgarh State Electricity Regulatory Commission in both the appeals are set aside and the state Commission is directed to approve the list to whom the appellant proposes to supply energy from its generating plant from time to time without insisting for payment of surcharge under Proviso to Section 42(2) of The Electricity Act, 2003 during the currency of PPA dated 02.09.2000

27) The appeals are allowed as prayed for and the parties shall bear their respective costs in both the appeals. Consequently IA No. 82 of 2006 and IA No. 87 of 2006 are closed as having become infectious.

Pronounced in the open court on the 16<sup>th</sup> day of October, 2006.

(Mr. H.L.Bajaj)  
Technical Member

(Mr. Justice E. Padmanabhan)  
Judicial Member

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