

**ORISSA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
UNIT-VIII, BHUBANESWAR – 751 012

**Present : Shri B.K. Das, Chairperson
 Shri S.K. Jena, Member
 Shri K.C. Badu, Member**

Case No.01 of 2008

M/s. NESCO, Januganj,
Balasore

.....

Petitioner

- Vrs. -

M/s Jindal Stainless Ltd.
& others.

Respondents

For the petitioner	:	Mr. B. K. Nayak, Advocate
For the respondent	:	Mr. Mr. L. Pangari, Advocate
For M/s OPTCL	:	Mr. J.P. Das, Sr. G.M. (R&T)
For DoE, GoO	:	Mr. B. Mahapatra, Adl. Secretary
The objector	:	Mr. R.P. Mahapatra

Date of Hearing: 30.05.2008

Date of Order : 24.06.2008

ORDER

Being aggrieved by the Review Order of the Commission dtd. 20.04.2005 passed in Case No. 139, 141,143 and 145 of 2004, M/s Jindal Stainless Ltd (M/s.JSL) had filed a writ petition before the Hon'ble High Court of Orissa bearing No.WP (C).5847 of 2006. The Hon'ble Court vide its Order dtd. 08.11.2006 quashed the said

Review Order and directed the Commission to rehear the review application of NESCO by giving opportunity to the M/s.JSL & other parties concerned.

2. The Commission re-initiated the review proceeding by registering Case No.1 of 2008. The Commission also issued public notice in order to invite suggestions/ objections from the affected parties as the review order may affect not only the M/s.JSL but also other similar HT/EHT consumers/ industries operating in the State. In response to the said public notice the Commission has received only one response from Mr.R.P. Mahapatra, Jayadev Vihar, Bhubaneswar. No other HT or EHT consumer/industry has appeared to contest the proposal contained in the petitioner's (i.e.NESCO's) review petition. The written submissions filed by the parties and the objector were taken into record and the Commission conducted the hearing on 18.02.2008. The Commission heard NESCO, M/s.JSL, OPTCL, Dept. of Energy, GoO and the objector Mr. R.P. Mahapatra. The hearing was concluded and the order was reserved.
3. During pendency of the order, the NESCO and M/s.JSL settled their disputes inter se, out of Court, and filed a petition before the Hon'ble High Court of Orissa in WP (C) Nos.8516 of 2006, 3018 of 2007 and 14572 of 2007 for disposing of the Writ Petitions in terms of the settlement. The Hon'ble High Court after hearing the parties in aforesaid cases recorded their terms of settlement and disposed the matter vide its Order dtd. 18.03.2008. One of the terms of such settlement as recorded by the Hon'ble Court was that both M/s.JSL & NESCO will file joint affidavit before the Orissa Electricity Regulatory Commission to withdraw the case filed in Case No. 1 of 2008. In accordance with the said order of the Hon'ble Court, both NESCO and M/s.JSL have filed a joint petition on 18.03.2008. In paragraph 5 of the said joint petition both parties (i.e. NESCO and M/s.JSL) have averred as follows: -

“That, in course of hearing of the matter, both the parties have settled their disputes. The opposite party,

M/s. JSL, have no objection to continue with the modified order dtd.20.04.2005 passed by the Hon'ble Commission and has agreed to pay the energy charges as per Tariff Order dtd.22.03.2005 and modified Tariff Order dtd.20.04.2005 for the FY 2005-06. A copy of the proposal of M/s..JSL dtd.26.02.2008 addressed to the Managing Director, NESCO, which has been accepted by the Management of NESCO, vide its communication dtd.26.02.2008 are annexed herewith as annexure-A & B to this affidavit."

And the prayer in the joint petition is as follows: -

"In view of the above facts, circumstances, the Hon'ble Commission may be pleased to pass the order restoring order dtd.20.04.2005 passed in Case No.139, 140, 143 & 145 of 2004."

4. It is noteworthy that although in the terms of settlement as recorded by the Hon'ble High Court, "Both M/s. JSL and NESCO will file joint affidavit before the Orissa Electricity Regulatory Commission to withdraw the cases filed in Case No.1 of 2008" (vide clause 7 of the terms recorded in the Hon'ble Court's order dtd.18.03.2008), the joint application is not an application for withdrawal of Case No.1 of 2008, but an application for disposal of Case No.1 of 2008 in terms of an agreed order based on assumptions of M/s. JSL to the effect that the order which it got quashed by the Hon'ble Court may be restored. There is a significant distinction between withdrawal of a case which renders the proceeding non-existent and disposal of a case by a consent order, which keeps the proceeding alive, so that the orders of the Commission in the proceeding (including the consent order) possess full force and effect.
5. On 30.05.2008, the Commission heard NESCO, M/s.JSL, DoE, GoO, OPTCL and the objector Mr. R.P. Mahapatra for disposal of the aforesaid joint petition. After hearing the parties and perusal of the records filed by

them it appears that the basis of the settlement between NESCO and M/s.JSL will be as per agreement dtd.24.08.2005 and corrigendum Agreement dtd. 01.10.2005 and the billing will be made as per the tariff applicable to M/s.JSL as per the tariff orders passed by OERC for all relevant tariff years till date. Basing on the above principle, the NESCO & M/s.JSL have arrived at their agreed figures in order to settle all the outstanding amount. This term of settlement is also recorded by the Hon'ble High Court in its Order dtd. 18.03.2008 which is extrated below for ready reference (vide para-2):

“2. This Court heard Mr. Pal, learned Senior counsel appearing for M/s.Jindal Stainless Ltd., and Mr. B.K. Nayak for NESCO. It is submitted that the parties have settled their disputes inter se out of Court and a petition has been filed to dispose of the Writ Petitions in terms of the settlement as mentioned in the said petition which are as follows: -

“(1) The basis of settlement will be as per the Agreement Dated 24.08.2005 and Corrigendum Agreement Dated 01-10-2005 and the billing will be made as per the Tariff applicable to M/s.Jindal Stainless Ltd. (JSL) as per the Tariff Orders passed by OERC for all the relevant Tariff years till date.

(2) The outstanding dues to be settled to be reckoned with all the arrear dues accrued from September, 05 to January, 08.

(3) Based on the principles stated at point No.1 above and after considering the payments already made by JSL from time to time as per the direction of the Hon'ble High Court of Orissa, the outstanding energy dues is reconciled between both JSL and NESCO. The reconciled figure arrived at is Rs.7,25,00,000.00 (Rupees Seven Crores Twentyfive Lakhs only) for the period from September, 2005 to January, 2008 in order to settle all the outstanding amount.

(4) M/s. JSL will make the payment on 26.02.2008 for the aforesaid settled amount of Rs.7,25,00,000.00 (Rupees

Seven Crores Twentyfive Lakhs only) to NESCO by post dated cheque dated 5th March, 08.

- (5) Upon realization of the aforesaid settled dues, NESCO will return all the Bank Guarantees deposited by M/s.JSL from time to time as per the direction of the Hon'ble High Court of Orissa.
- (6) Both JSL & NESCO will file joint affidavit before the High Court of Orissa in WP (C) No.8516 of 2006, WP (C) No.795 of 2008 and WP (C) No.3018 of 2007 for withdrawal of all cases.
- (7) Both JSL & NESCO will file joint affidavit before the Orissa Electricity Regulatory Commission to withdraw the cases filed in Case No.01/2008.
- (8) The Orders passed by Ombudsman, NESCO area in the matter pertaining to reduction of contract demand and Force Majeure will not have any effect whatsoever."

After hearing the learned counsel for the parties, this Court disposes of all the three Writ Petitions in the aforesaid terms of compromise."

- 6. Mr. R.P. Mahapatra the objector in this case stated that the order of the Commission dtd. 20.04.2005 is no longer applicable having been quashed by the Hon'ble High Court and incentive will be calculated on the basis of RST order dtd. 22.03.2005 and OERC Distribution (Conditions of Supply) Code, 2004. He further stated that the principle on which the reconciliation was made between the NESCO & M/s.JSL may be applicable to the other consumers of same status as well. In response to the objections advanced by Mr. Mahapatra the Counsel for NESCO & M/s.JSL have stated that the parties have settled their disputes inter se, and the said settlement having been approved by Hon'ble High Court, at present, there is no lis between them for disposal. They have stated that the parties have entered a lawful

agreement and the settlement has also been duly recorded by the Hon'ble High Court in its Order dtd. 18.03.2008.

7. In the light of the above arguments put forth by the parties, we observe as follows:-
 - (i) In the joint affidavit submitted to the Commission the petitioner & respondent have stated that the Hon'ble High Court by its judgment dt.8th Nov, 2006 in WP (C) No.5847 of 2006 has set aside the review order and remanded the matter to this Commission for reconsideration after giving an opportunity of hearing M/s.JSL.
 - (ii) It was submitted that, NESCO and M/s. JSL have settled their disputes. The opposite party M/s. Jindal Stainless Limited has no objection to continue with the modified order dt.20.04.05 passed by the Commission and has agreed to pay the energy charges as per the tariff order dt.22.03.05 as modified by order dt.20.04.05 for the FY 05-06. In view of the above facts and circumstances the petitioner & the respondent have prayed that the Commission may be pleased to pass an order restoring order dt.20.04.05 passed in Case Nos.139, 143, & 145 of 2004.
 - (iii) The prayer is allowed and the Order dtd.20.04.2005 stands and has full force and effect as between NESCO and M/s. Jindal Stainless Steel Limited.
 - (iv) Despite public notice of the review there was no opposition by any of the HT and EHT consumers to the incentive formula proposed by NESCO in review petition dtd.08.04.2005. The Commission has reconsidered the merit of its order dtd.20.04.2005 qua HT & EHT (other than M/s. JSL) and is satisfied that the said order is sound and accordingly reaffirms the said order qua all HT & EHT consumers.
8. Sri R.P.Mohapatra submitted that the orders of the Hon'ble High court has disposed of the Writ Petition No.5847/2006 vide judgment dt.08.11.06. While disposing of the above Writ Petition the Hon'ble High Court has given a direction that the review order dt.20.04.05 passed by the OERC is quashed and declared invalid and that the OERC was directed to take up

a hearing of the review afresh. It is not correct to say, as contended by Sri Mohapatra, that the Commission is precluded from arriving at the same decision after affording opportunity of hearing to these parties concerned. Its order dtd.20.04.2005 in the present remanded review proceeding stands restored since there is no petition for withdrawal of case No.1 of 2008 before the Commission.

9. The order of the Hon'ble High Court makes it clear that it was a procedural deficiency, i.e. denial of natural justice, for which the order dt.20.04.05 was quashed and declared invalid. The Hon'ble Court has not quashed the order dt.20.04.05 on merits. After mutual settlement was reached between M/s.JSL and NESCO the Hon'ble High Court of Orissa in their order dt.18.03.08 has recorded one of the terms of settlement (vide clause 7) *that both M/s.JSL and NESCO will file joint affidavit before the OERC to withdraw the cases filed in Case No.1/2008*". However, inasmuch as NESCO and M/s. JSL, instead of filing a petition for withdrawal of Case No.1 of 2008, have moved the Commission for consent order to the effect that order dtd.20.04.2005 of the Commission be restored, it is clear that the review proceeding does not become non-existent and the Commission is competent, after giving opportunity of hearing to all concerned, to restore the order dtd.20.04.2005 qua M/s. JSL and reiterate the said order qua all other HT & EHT consumers.
10. The case stands disposed of accordingly.

Sd/-
(K.C.Badu)
Member

Sd/-
(S.K. Jena)
Member

Sd/-
(B.K. Das)
Chairperson