

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

Present : Shri B.K. Das, Chairperson
Shri K.C. Badu, Member
Shri B.K. Misra, Member

Case No.127/2009

M/s Pasupati Feeds **Petitioner**
Vrs.
EE, CED, CESU, Cuttack **Respondent**

In the matter of: Determination of tariff applicable to Pasupati Feeds, Tangi, in obedience to order dt.15.09.2009 of the Hon'ble High Court, Orissa, in WP(C) No.9434 of 2009.

Case No.128/2009

EE, CED, CESU, Cuttack **Petitioner**
Vrs.
M/s Pasupati Feeds **Respondent**

In the matter of: Challenging order/judgment dtd.15.09.2008 passed by the GRF, Cuttack in CC.Case No.74 of 2008 and in compliance to order dt.15.09.2009 of the Hon'ble High Court, Orissa, in WP(C) No.9434 of 2009.

For M/s Pasupati Feeds : Mr. R.P. Mahapatra, Authorized Representative

For EE, CED, CESU, Cuttack: Mr. B. K. Nayak, Advocate

Date of Hearing: 18.12.2009 Date of Order: 27.01.2010

ORDER

Both the cases are taken up for hearing as they are arising out of WP(C) No. 9434 of 2009 filed by the licensee-CESU challenging the impugned order of the GRF, Cuttack in Consumer Complaint Case No. CED/74/2008. The Hon'ble High Court has disposed of the above Writ Petition on 15.09.09 by the following orders.

“Both the parties submitted that they will approach the OERC for redressal of their grievances by filing a properly constituted application. Let both the parties appear before the OERC on or before 19.10.2009. If such application is filed for fixing of tariff by the parties, the same shall be fixed in respect of class of industries to which Opp. party No.2 industry belongs. It is made clear that I have not expressed any opinion on the merit of the case. Till the proceeding is disposed of by the OERC, the Op. party No.2 shall pay the electricity dues of the petitioner in accordance with the order passed by the GRF, Cuttack. In the event, the OERC comes to the conclusion that the Opp. party No.2 shall be liable to pay tariff at a higher rate, the Opp. party shall pay the same. The impugned order challenged in this Court shall be subject to the order passed by the OERC.

The Writ application accordingly disposed.”

As per direction of the Hon'ble High Court in WP(C) No. 9434/09 both the parties namely M/s Pasupati Feeds and the Executive Engineer, CED, CESU have filed two petitions. These two petitions are registered as Case No. 127/09 (Pasupati Feeds Vrs CESU) and Case No. 128/09 (CESU Vrs. Pasupati Feeds) and are clubbed together for hearing as they are similar in nature and arising out of the same cause of action. M/s Pasupati Feeds is the petitioner in Case No. 127/09 and Respondent in Case No. 128/09 and the licensee-CESU is vice versa.

2. Mr. R.P. Mahapatra, the authorized representative of the petitioner in Case No.127/09 stated that M/s Pasupati Feeds is availing power supply based on the agreement dated 30.04.2002 to the extent of 160KVA at 400 volts as per commercial category. In the meanwhile the Commission has made amendment to the Supply code, 2004 introducing a new category, namely, “Agro Industrial Consumers” Category vide OERC Distribution (Conditions of Supply) Code, 2007 (4th Amendment). As per Regulation 80(5)(1) of the said amendment, this category relates to supply of power for Pisciculture, Horticulture, Floriculture, Sericulture and other allied agricultural activities including animal husbandry, poultry and cold storage (i.e., temperature controlled storage where flowers, fruits, vegetables, meat, fish and food etc

can be kept fresh or frozen until it is needed). According to the above amendment of the Supply Code, 2007, M/s Pasupati Feeds belonged to “Agro Industrial Tariff” Category vide RST order dated 20.03.08 for FY 2008-09. But the licensee did not allow the said RST tariff determined by the Commission for FY 2008-09 and continued to bill M/s.Pasupati Feeds as per the large industrial tariff, on account of which M/s.Pasupati Feeds filed a complaint before the GRF, Cuttack which was registered as C.C. Case No. CED/74/2008. The said C.C.Case was disposed of on 15.09.08 by the GRF, Cuttack with a direction to the licensee to revise the bills of the unit of the petitioner from 01.04.08 as per ‘Agro Industrial Tariff’ under Regulation 80(5)(i) and future bills to be prepared under the said category until further orders of the Commission.

3. Mr. R.P. Mahapatra, the Authorised Representative of M/s Pasupati Feeds also stated that M/s Pasupati Feeds at New Industrial Estate, Jagatpur, is exclusively producing poultry feed which is supplied only to the various farmers under its Integration Scheme alongwith other inputs for production of broilers. In case of a poultry farm having a poultry feed unit, the power supply to the poultry farm should obviously be under “Allied Agricultural activities”. M/s.Pasupati Feeds is captive to all the poultry farmers under the integration scheme and therefore, should be classified under allied agricultural category. An agreement was executed by both M/s. Pasupati Feeds and the Licensee-CESU represented by its E.E., CDD-II, CESU, Cuttack under Agro-Industrial Category with effect from 01.04.08 as per the RST Order dated 20.3.08 of this Commission and the agreement is continuing till 31.03.09. According to the GRF Order dated. 15.09.08 the licensee-CESU was billing the unit of Pasupati Feeds under Agro Industrial Tariff for the month of September,2008 onwards based on the tariff applicable to the “Agro Industrial Consumer” Category. However, the licensee intimated M/s.Pasupati Feeds that basing on the observations of the Commission at paras 252-258, of the RST Order dated 20.03.09 for FY 2009-10, that poultry farm unit is not coming under the “Agro Industrial Consumer” Category and also served an arrear energy bill with effect from 09/2008. The licensee also issued a disconnection notice dated 18.04.09 for the alleged arrears calculated on the basis of Large Industrial Category, for which M/s.Pasupati Feeds being aggrieved filed a

Compliant Case before the GRF, Cuttack bearing C.C.No. 63/09. During pendency of the above complaint before the GRF, Cuttack, the licensee had filed a Writ petition before the Hon'ble High Court, Orissa on 03.07.09 and the same was disposed on 15.09.09 with the aforementioned observations vide para-1.

4. The licensee had accepted the Orders of the GRF, Cuttack and only on the basis for withdrawing the "Agro Industrial Tariff" to M/s.Pasupati Feeds as per the RST order dtd. 20.3.09 vide paras 252-258, revised bills have been raised. The licensee erred in re-classifying the unit of M/s.Pasupati Feeds under L.I category, based on the above observations for which the reasons are given below:

- (i) On a plain reading, Regulation 80(5)(1) of the Distribution (Conditions of Supply) (4th Amendment) Code, 2007 does not debar the cattle & poultry feed units, from being included under the "Agro Industrial Consumer" Category;

- (ii) The Commission vide its order dated 11.08.09 in Case No. 85/09 filed by the Seafood Exporters Association of India for review of the RST Order dated 20.03.09 for FY 2009-10 has observed at para 12 of the said order as follows:

"In other words, the Commission's observation will need to be incorporated into the regulation and continues be only an observation until such time as its incorporation into the Regulations. Hence, it is not quite apparent as to the errors in those observations. It is needless to state that these observations by their very nature are neither orders of the Commission or automatically amend the existing regulations"

- (iii) As clarified by the Commission in the above Order in Review Case No 85/09, the observation was made in paras 252-258 shall not have any bearing on the classification of M/s Pasupati Feeds under "Agro Industrial consumer" Category. Further, even the observations made in the above paras do not specifically state that the class of industries are not covered under this category to which M/s.Pasupati Feeds belongs. He also stated that any amendment to the said regulations and any

tariff determined on that basis shall have prospective effect only and not retrospective.

5. Mr. Mahapatra further stated that the Commission has further amended Regulations 80(5) vide its notification dated 19.10.2009 (5th Amendment), 2009 of the OERC Distribution Code, 2004. One of the grounds for amendment relates to the order dated 26.08.09 passed by the Hon'ble High Court of Orissa in WP (C) No. 6516/09, setting aside the paras 252-258 of the RST Order dated 20.03.09 of the Commission. Under Regulations 80 (5)(ii) Allied Agricultural Activities Category, "Power Supply for Aquaculture which includes (Pisciculture/Prawn culture). Horticulture, Sericulture, Animal Husbandry and Poultry" were included. It is further mentioned that activities such as Ice factory, chilling plant, cold storages, cattle/poultry/fish feed units and fruit/agricultural products processing units are excluded. The exclusion of cattle/poultry/fish feed units from the activities relating to animal husbandry and poultry has been specified in the (5th Amendment), 2009 of the OERC Distribution Code, 2004, when no such stipulation was made in the (4th Amendment), 2007 of the OERC Distribution Code, 2004, as it did not specifically exclude cattle feed and poultry feeds units from "Agro Industrial" Category.

In view of the above, the cattle and poultry feed unit, namely M/s Pasupati Feeds is to be categorized under the Agro- Industrial Category based on the (4th Amendment), 2007 of the OERC Distribution Code, 2004, at least upto 26.10.2009 when the (5th Amendment), 2009 of the said Code was notified in the Gazette of Orissa i.e., on 19.10.2009, which has been challenged before the Hon'ble High Court in WP(C) No. 19015/09 filed by M/s Shree Lingaraj Feeds Ltd., Rourkela to include / poultry feeds, amongst others, under Allied Agricultural Activity Category. The said Writ Petition has been admitted by the Hon'ble High Court vide its Order dated 19.12.2009 and the Hon'ble Court has directed to issue notice to the Commission. He also prayed the Commission not to dispose the above cases and may keep abeyance till the final disposal of the above Writ petition by the Hon'ble Court.

6. Mr. B.K. Nayak, Advocate on behalf of CESU stated that in exercise of power conferred by Sec.181 of the Electricity Act, 2003 read with part VI of the

Orissa Electricity Reform Act, 1995 the Commission has made Regulations known as OERC Distribution (Conditions of Supply) Code, 2004 to govern distribution and supply of electricity and produces thereof such as the system of billing, modality of payment of bills, the powers, functions and obligations of the distribution licensees/suppliers and rights and obligation of consumers. In the said Regulation, Chapter-VIII of the Distribution Code deals with classification of consumers Regulation 80 of the said code provides that licensee may classify or re-classify the consumer into various categories from time to time as may be approved by the Commission and fix different tariffs and conditions of supply for different class of consumers. Regulation 80(10) of the said Code deals with the large industries which relates to supply of power to the industries with a contract demand of 110KVA and above but below 25000 KVA, where power is substantially utilized as motive force for industrial production.

7. According to the above Regulation of the Commission, M/s Pasupati Feeds which is manufacturing of cattle and poultry feeds and availing power supply with a contract demand of 160KVA load by executing an agreement with CESU on 30.04.2002 as categorized under the Large Industrial Tariff Category and bills have been raised by the Licensee to M/s.Pasupati Feeds under the said category and M/s Pasupati Feeds had been making payment of the energy charges and other charges as applicable to the Large Industrials Tariff Category upto 31.03.08. Thereafter the Commission had introduced a new category namely 'Agro Industrial Consumers' Category vide OERC Distribution (Conditions of Supply) (4th Amendment) Code, 2007 and Agro Industrial consumer has been allowed the same rate of tariff as applicable to the irrigation and pumping categorized at LT/HT for rapid development of Agro Industries in the State.
8. As per Sections 61 to 64 of the Electricity Act, 2003 read with the Regulation 80 (5)(1) of the supply Code, the Commission vide its RST Order dated 20.03.08 while determining the tariff for the DISCOMs has decided the energy charges for Agro Industrial Consumer at 110 paisa per unit at LT & 100 paisa per unit at HT level for FY 2008-09. Accordingly, the electricity charges for "Agro Industrial Consumer" for the year 2008-09 was reduced by 73% to 75% in comparison to the level approved for the previous years 2007-08. On the

basis of the RST Order for FY 2008-09, M/s Pasupati Feeds had submitted an application on 24.04.2008 to the licensee for revision of energy charges from 1.4.08 at the rate applicable to Agro Industrial Tariff Category as the unit is coming under the said category being involved in allied agricultural activities.

9. After receipt of the said application dtd. 24.04.08, the Licensee has prepared the energy bill as per Agro Industrial Consumer Tariff Category, but after going through the agreement and communication dated. 24.04.08 in detail, it was found that the consumer was involved in manufacturing of cattle and poultry feeds, so the energy bill for the month of May, 2008 was revised under the Large Industrial Tariff Category and the differential amount was charged to the consumer for payment with the energy bill for the month of June, 2008. The definition of L.I. Category is different from Agro Industrial Consumer Category as the meaning of word "Poultry" includes hen, rooster, pullet, capon, chick, which means a living bird. The word poultry is different from production of cattle and poultry feeds. Since the activities of the consumer relates to production of poultry and cattle feeds by utilizing power as motive force, the unit is not coming under any of the activities of "Agro Industrial Consumers" Category and is liable to pay the energy charges covered under the L. I. Tariff category. He also stated that there was no such irregularity or mistake has been committed in preparation of bills. Without making payment of energy charges under L. I. Tariff Category, the consumer made payment of energy charges deducting the disputed amount calculating the tariff as per "Agro Industrial Consumers" Category. For non payment of the said revised bill under L.I. category a disconnection notice was issued to M/s Pasupati Feeds. Challenging the said disconnection notice the consumer had filed a Complaint before the GRF, Cuttack which was registered as C.C.Case No. 74/09 for revision of the energy bill from 01.04.08 as per Regulation 80(5)(1) of the Distribution Code, as it is an agro based industry. The said GRF, Cuttack had disposed the matter on 15.09.08 in favour of M/s Pasupati Feeds.
10. The licensee-CESU aggrieved by the said Order of the GRF, Cuttack filed an Writ Petition bearing W.P. (C) No. 9434/09 challenging the impugned order dtd. 15.9.08 of the GRF Cuttack passed in Case No. 74/08 before the Hon'ble High Court of Orissa. The Hon'ble Court had disposed of the said Writ

petition on 15.09.09 by directing both parties to approach the Commission for redressal of their grievances. The Commission vide its RST Order dt. 20.03.09 for FY 2009-10 has clarified in paras 252-258 that the units involved in business, commerce, and trade and manufacturing are not coming under the purview of Agro Industrial Tariff Category. Since the unit M/s. Pasupati Feeds is a production unit, the same is not coming under the aforesaid category and is not entitled to get the benefit of Agro Industrial Tariff. The aforesaid RST Order of the Commission for FY 2009-10 was challenged by one M/s.Prithviraj Dairy Products (Pvt.) Ltd. before the Hon'ble High Court in W.P.(C) No.6516 of 2009. The Hon'ble Court has disposed of the said Writ Petition vide its order dated 26.08.2009 by setting aside the findings given by the Commission in paragraphs 255& 258 of the RST Order dated 20.03.2009 for FY 2009-10 and remit back the matter to the Commission to dispose the matter in accordance with law keeping in view of the observations made at para-7 in the Affidavit filed by the Commission before this Court which is reproduced below.

“That OERC is contemplating to introduce an amendment to Regulation 80(5) of OERC Distribution (Conditions of Supply) Code, 2004 so as to create an independent Sub Category of agricultural consumers taking electricity for cold storage and sub category would be precisely defined for better clarity.”

11. According to the said Order of the Hon'ble Court ,the Commission issued notification dated 19.10.2009 making amendment of Regulation80(5) of Chapter VIII of the OERC Distribution(Conditions of Supply)Code,2004 i.e. classification of the consumer and made these new category of consumers which are given below:

“80(5)(i) : Irrigation Pumping and Agriculture : *This category relates to supply of power for pumping of water in lift irrigation, flow irrigation and for lifting of water from wells/bore-wells, dug-wells, nallahs, streams, rivulets, rivers, exclusively for agricultural purposes.*

80 (5) (ii): Allied Agricultural Activities: *This category relates to supply of power for Aquaculture (which includes Pisciculture/ Prawn culture), Horticulture, Floriculture, Sericulture, Animal Husbandry and Poultry. Activities such as ice factories, chilling plants, cold storages,*

cattle/poultry/fish feed units and food /agri products processing units are excluded.

80(5)(iii): Allied Agro-industrial Activities : *This category relates to supply of power to “Cold Storages (i.e. a temperature controlled storage where flowers, fruits, vegetables, meat and fish can be kept fresh or frozen until it is needed) and includes chilling plant for milk and only the cold storages attached to processing units for meat, fish, prawns, flowers, fruits and vegetables”.*

12. A new category of consumer, namely “Agro Industrial Consumer” has been added vide Regulation 80(5)(1) through the Orissa Electricity Regulatory Commission Distribution (Conditions of supply) (4th Amendment) Code, 2007 notified on 11.09.2007. The said amended Regulation 80(5)(1) reads as under:-

“This category relates to supply of power for Pisciculture, Horticulture, Floriculture, Sericulture and other allied agricultural activities including animal husbandry, poultry and cold-storage (i.e. temperature controlled storage where flowers, fruits, vegetables, meat, fish and food, etc., can be kept fresh or frozen until it is needed)”.

13. While Animal Husbandry, Poultry and Cold Storage as per the aforesaid amendment dated 11.09.2007 comes under “Agro Industrial Consumers”, the question to be decided as to whether the Poultry and Cattle Feed Units which manufacture feeds for Poultry and Cattle would also be covered under Poultry and Animal Husbandry respectively. The amendment provision clearly states supply of power for other allied agricultural activities including Animal Husbandry and Poultry. For rearing of animal and Poultry many things are needed. But the power supply to the Animal Husbandry and Poultry perse would qualify for tariff as applicable to agro industrial consumers. In other words the power supply needed for poultry farm and cattle farm for the purpose of lighting, sprinkling water, lifting water for drinking by the live birds/cattles and cleaning farm shade would qualify tariff as applicable for other allied agricultural activities. The manufacture of cattle and poultry feed would not be covered under Animal Husbandry and Poultry. For preparation

of poultry feed or cattle feed, many raw materials are required. If we agree to the arguments of the petitioner, then the power supply for production of straw, husks cereals and other materials required for preparation of poultry, feed and cattle feed may also come under Animal Husbandry and Poultry. There is no end to all such activities. Merely because the same firm or the individual possess poultry feed or cattle feed unit for supply to its own poultry firm or cattle firm along with supply to other farmers engaged in such activities, the unit as such would not be treated as part of Animal Husbandry and Poultry activities. These are separate industrial activities. This has been further made clear in the amendment carried out in the notification dated 19.10.2009 (which is extracted below) wherein cattle/poultry/fish feed units and Food/Agro products processing units have been excluded from allied agricultural activities.

“80(5)(ii): Allied Agricultural Activities” *This category relates to supply of power Aquaculture (which includes Pisciculture/Prawn culture), Horticulture, floriculture, Sericulture, Animal Husbandry and Poultry, Activities such as ice factories, chilling plants, cold storages, cattle/poultry/fish feed units and food/agri products processing units are excluded”.*

“80(5)(iii) Allied Agro Industrial Activities: *This category relates to supply of power to “Cold Storages (i.e., a temperature controlled storage where flowers, fruits, vegetables, meat and fish can be kept fresh or frozen until it is needed) and includes chilling plant for milk and only the cold storages attached to processing units for meat, fish, prawns, flowers, fruits and vegetables”:*

This has been done only to avoid misinterpretation as has been done in the present case by the petitioner. It may further be noted that the notification dated 11.9.2007 specified cold storage as allied agricultural activities and this has been retained in the amendment notified on 19.10.2009 through a separate sub-category as “Allied Agro-industrial Activities. Since poultry/cattle feed manufacturing units were not contemplated as part of allied agricultural activities notified on 11.9.2007, these have been specifically excluded in the amendment notified on 19.10.2009.

14. In the said amendment dated 19.10.2009, while clarifying the types of units to be covered under different categories, the Commission has specifically excluded the manufacturing units which have also not been included under Agro Industrial Consumer Category as was introduced in the 4th amendment of the Distribution (Conditions of Supply) Code, 2007 notified on 11.09.2007. The Statute has prescribed the specific definition of the Allied Agro Industries as per the intention of the Commission for rapid development of Agro Industrial consumers. In this connection, the Judgment of the Hon'ble Supreme Court reported in AIR 1975 SC 915 cited by CESU in favour of his case is relevant which is quoted below:

**(B) Interpretation of Statutes – Intentions attributed to legislature-
Imperative or directory-Non-compliance –Effect:**

“ No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope.

Where a power is given to do certain things in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden. This rule squarely applies where the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other.

***** ”

Para-20 :“Thus the imperative language, the beneficent purpose and importance of these provisions for efficacious implementation of the general scheme of the Act all unerringly lead to the conclusion that they were intended to be mandatory. Neglect of any of these statutory requisites would be fatal. Disobedience of even one of these mandates would render the surrender invalid and ineffectual”.

15. As clarified by the Apex Court in their order reported in AIR 1975 SC 915 there should be plain reading of the provisions of the Regulations and it should not be extrapolated to the benefit of the petitioner. Accordingly we hold that the cattle feed/Poultry feed processing unit of M/s Pasupati Feeds which produces cattle /poultry feeds do not come under agro industrial consumers

notified on 11.09.2007 nor under “ Allied Agricultural activities or Allied Agro Industrial Activities notified on 19.10.2009. They come under industrial category. Accordingly the petitioner is liable to pay the electricity charges in respect of its cattle/poultry feed manufacturing units as applicable to industrial consumers at appropriate voltage with effect from 01.4.2008.

16. With the above observations, the cases are disposed of accordingly.

Sd -
(B.K. Misra)
Member

Sd -
(K. C. Badu)
Member

Sd -
(B.K. Das)
Chairperson