

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.-4, CHUNUKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021**

**Present: Shri S. C. Mahapatra, Chairperson
 Shri G. Mohapatra, Member
 Shri S.K. Ray Mohapatra, Member**

Case No. 07/2019

M/s. Prasad Bio-energy (P) Ltd.	Petitioner
Vrs.		
M/s. OREDA	Respondent

In the matter of: Proceeding on remand by Order dated 25.04.2023 of the Hon'ble High Court of Orissa passed in W.P.(C) No.38718 of 2021

For Petitioner : Shri Avijit Pal, Advocate and Sri T.Patnaik, Advocate

**For Respondent: Shri Bijay Kumar Dash, Advocate and
 Ms. Soniashree Behera, Advocate.**

ORDER

Date of hearing: 23.05.2023

Date of order: 03.06.2023

Consequent upon remand of the matter pursuant to the order dated 25.04.2023 passed by Hon'ble High Court of Orissa in W.P.(C) No.38718 of 2021, this order is pronounced as stated hereinafter.

2. The brief fact of the case is that on 10.04.2007 the Petitioner had submitted its proposal to Respondent OREDA, the State Nodal Agency that acts as the single window for promotion and facilitation of power projects based on renewable energy to set up 10 MW Biomass based power project at Theruballi in Rayagada District in the State of Odisha. M/s. OREDA vide their letter dated 29.06.2007 issued in-principle clearance for setting up the above project with certain terms and conditions. The in-principle clearance was valid for six months from the date of issue of letter. During the said six months time period, the petitioner was supposed to submit the registered copy of the land purchase agreement/ sale deed alongwith the location of the project site providing every details pertaining to water sources, nearest Grid Sub-station and biomass collection area. The validity of in-principle clearance could be extended for further six months provided that the petitioner pays Rs.15,000/- to OREDA as extension charges with proper justification. For getting extension of validity of clearance the petitioner was required to apply at least

15 days in advance in this regard failing which the clearance would be cancelled without giving any notice thereof. Subsequently the Petitioner had deposited commitment fee of Rs.50 lakhs on 15.12.2009 and also signed the implementation agreement on 22.01.2010. But the firm could not stick to the implementation agreement and failed to establish the plant. As a result, M/s. OREDA forfeited the commitment fee of Rs.50 lakhs vide its letter dated 13.11.2014.

3. Since the Respondent-M/s. OREDA did not refund the above amount deposited by the Petitioner for which it had moved the Hon'ble High Court of Orissa in W.P.(C) No. 6000 of 2015 seeking direction of the Hon'ble Court for refund of the amount deposited by it. The Hon'ble Court in their order dated 19.11.2018 had disposed of the case by remitting the matter to this Commission. The said Order of the Hon'ble Court is stated hereunder:

"Learned Counsel for the opposite party states that there is an arbitration clause and the dispute between parties is required to be referred to the Arbitrator. Clause 19 of the agreement dated 01.10.2010 provides for settlement of the dispute, which reads as under:

"19. In case of any dispute regarding any clause in this agreement, the matter shall be referred to the OERC and the decision of OERC shall be binding on both the parties."

In view of the above clause under Annexure-4, the matter is required to be referred to the Orissa Electricity Regulatory Commission. If any appropriate application is made before the Orissa Electricity Regulatory Commission in view of Clause-19 and the parties will come before the OERC and will not raise any technical objection under Section 86 of the Electricity Act, the OERC shall proceed with the matter in accordance with law."

4. Pursuant to the above order of the Hon'ble High Court, the Petitioner had filed an application before this Commission invoking Section 86 (1) (f) read with Section 158 of the Electricity Act, 2003 without any technical objection for arbitrating the dispute that has arisen between the parties alleging illegal forfeiture of the commitment fee of Rs.50,00,000/- (Rupees Fifty lakhs) deposited with the Respondent-M/s. OREDA for the purpose of setting up of 10 MW Biomass based power project at Theruballi in Rayagada district of Odisha and prayed the Commission to quash the letter of forfeiture dated 13.11.2014 of the Respondent OREDA and direct the Respondent to refund the commitment fee of Rs.50,00,000/- (Rupees Fifty lakhs) along with 12% interest per annum w.e.f. 13.11.2014.
5. This Commission took note of the above observation of the Hon'ble High Court of Orissa and registered the application as Case No.7 of 2019 for resolution of the dispute in respect

of forfeiture of commitment fee of Rs.50 lakhs deposited by the petitioner for setting up of 10 MW Bio-mass based power project in at Theruballi in Rayagada district of Odisha. After hearing the parties, the Commission disposed of the said case vide its order dated 29.10.2021. The relevant portion of the aforesaid order of this Commission is as under:

“8. We heard the parties at length. From the date chart we find that the Techno-economic clearance for the project was issued on 21.03.2009 by clearing the proposed project in Rayagada district of Odisha. The Petitioner company deposited the commitment fee (Rs.50,00,000/-) and processing fee (Rs.5,00,000/-) with OREDA on 15.12.2009. The Implementation Agreement was executed on 22.01.2010 for setting up of 10 MW Bio-mass project in Rayagada district of Odisha. The relevant clause of implementation agreement under which forfeiture was made is reproduced below:

*“12.The company/developer shall complete the financial closure within 6 months from the date of issue of Techno-economic clearance. Non-adherence of the same will result in cancellation of the project and **forfeiture of all deposits** made in connection with the project with OREDA.*

14. The company/developer shall in normal conditions complete the commissioning of the project within 18 months of financial closure. OREDA reserves the right to grant extension in the period of execution of the project under extraordinary situation following submission of due justification by the developer. Such extension can be granted maximum for a period of 6 months at stretch on depositing an extension fee of Rs.50,000/- per MW.

19. In case of any dispute regarding any clause in this agreement, the matter shall be referred to OERC and the decision of the OERC shall be binding on both the parties.

22. OREDA reserves the right to withdraw the approval upon noticing major default in adherence to the terms and conditions laid down in this agreement. In case of withdrawal on such grounds the Company/Developer shall forfeit all its deposits with OREDA in connection with the said project.”

9. From the perusal of the Implementation Agreement, it is clear that the financial closure of the Petitioner’s project should have been completed before 21.07.2010. But without doing the same, the Petitioner has signed power purchase agreement with GRIDCO on 30.12.2010 committing that it would supply 10 MW of bio-mass power to GRIDCO. Subsequent to that, surprisingly the Petitioner had changed its mind and knocked at the door of the OREDA on 04.05.2011 for the first time to withdraw from the project. The reasons for withdrawal from the project had been cited as non-remunerative tariff and non-availability of land.

10. This matter after crossing several steps had reached the State Technical Committee (STC) on 24.09.2013 along with cases of several project developers. The State Technical Committee went through the status of 11 nos. of bio-mass power projects that were cleared earlier by it for implementation in the State.

11. The State Technical Committee (STC) also noted that six nos. of developers had communicated their inability to implement the project and requested for refund of their commitment fee. The State Technical Committee had concluded that in accordance with the provisions under Clause 12 and 22 of the Implementation Agreement executed with the respective developers (6 nos.), the allotment made in their favour be cancelled and the said commitment fee and all other deposits made with OREDA be forfeited. Subsequently, considering the replies of six developers, the STC in their meeting dated 05.12.2013 finally advised OREDA to forfeit the commitment fee deposited by the above developer along with some other developers.

12. We find that the project is a self defined project and OREDA has no role for the location of the project or its financial viability. OREDA has also no role in fixing tariff for the said project. While executing PPA with GRIDCO, the Petitioner was well aware about the prevailing tariff of bio-mass power project declared by OERC. In its DPR, the Petitioner had proposed a tariff of Rs.3.50 per unit with a payback period of five years. Subsequently, OERC declared its tariff at Rs.4.87 per unit (for the base year 2011-12). The Petitioner in its own volition had entered into PPA with GRIDCO accepting the role of OERC on tariff determination. Therefore, we cannot accept the plea of the Petitioner that the project became unviable due to low tariff. Similarly, making land available to the Petitioner in its place of choice is not the responsibility of OREDA. This amounts to self withdrawal from the project by the Petitioner knowing clearly its consequence. The forfeiture of commitment fee has not only happened in the present case but has been uniformly decided for all the six developers who have not adhered to the timeline of financial closure.

13. Accordingly, we concur in the decision of OREDA to forfeit the commitment fee of Rs.50,00,000/- as per Clause 12 and 22 of the Implementation Agreement executed on 22.01.2010 with the Petitioner. The forfeiture of Rs.5,00,000/- of processing fee is also justified since the matter has been processed at several levels

by OREDA over a period of time and go ahead signal had been given to the Petitioner through implementation agreement.

14. With this observation, the case is disposed of.”

6. Being aggrieved with the above decision of the Commission, the Petitioner once again approached the Hon'ble High Court of Orissa by filing another writ petition in W.P.(C) No.38718 of 2021 where the Hon'ble High Court after hearing both the parties, set aside the order dated 29.10.2021 passed by this Commission in Case No.7 of 2019 and remitted back this matter to this Commission with their direction to hear the matter afresh and pass necessary order with regard to the question of maintainability of the proceeding and entertainability of the matter before this Commission within the scope of the provision of Section 86(1)(f) of the Electricity Act, 2003. Relevant extract of the order of the Hon'ble High Court is as follows:

“This case is in second round of litigation. Taking this Court to the first round of litigation and the order therein leading through the direction part (ii) in disposal of the W.P.(C) No. 6000 of 2015, Shri Pal, learned counsel for the petitioner contends even assuming there is a direction to the parties to get adjudication of the issue before the OERC in view of clause-19 of the agreement and the petitioner participated in the proceeding before the OERC for the provision at section 86(1)(f) of the Electricity Act, 2003, for the petitioner herein neither a licensee nor generating company, it was incumbent upon the OERC to first adjudicate the entertainability of such proceeding before it before proceeding to adjudicate and pass further orders. This Court, however, finds this question of law raised for the first time in the writ petition itself. For question of law involve herein, this Court is constrained to take up such issue.

This Court records consensus at the bar that the petitioner herein is neither a licensee nor generating company. Keeping this in view, this Court in setting aside the impugned order at Annexure-3 and in remitting the matter to the Commission directs OERC before proceeding to adjudicate, follow up exercise should be taken regarding entertainability of the proceeding at the instance of the petitioner being the vital issue. All the parties appearing are directed to appear before the OERC on 8.5.2023 and take the date of hearing on the question of maintainability of the proceeding of the OERC. OERC is also directed to first adjudicate on the question of maintainability of the proceeding

and then proceed keeping in view the provision of section 86(1)(f) of the Electricity Act, 2003 before proceeding to decide on merit. In the event the OERC finds the proceeding therein not maintainable before it, it may close the proceeding enabling the parties to find their other opportunity if any, available”.

7. As per the aforesaid directives of the Hon’ble High Court, the Commission is required to pass order on the point as to whether the application of the Petitioner is maintainable keeping in view the provision under Section 86(1)(f) of the Electricity Act, 2003.
8. We have considered the submissions of the Petitioner and the Respondent-M/s. OREDA and have scrutinized the record. The power of the Commission to adjudicate the dispute is derived from the provisions under Section 86(1) of the Electricity Act, 2003. We do refer the provisions under Section 86(1) of the Electricity Act, 2003 for the purpose of addressing the point of maintainability of this proceeding. The said provision is reproduced below:

“86(1) The State Commission shall discharge the following functions, namely:-

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State;

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

- (i) *specify or enforce standards with respect to quality, continuity and reliability of service by licensees;*
- (j) *fix the trading margin in the intra-State trading of electricity, if considered, necessary;*
- (k) *discharge such other functions as may be assigned to it under this Act.*

On going through the above provision, we find that the Commission is only empowered to decide the matter/dispute between the Generators and Licensees. There is observation of the Hon'ble Orissa High Court in following words:

“This Court records consensus at the bar that the Petitioner herein is neither a licensee nor generating company.”

9. The Respondent-M/s. OREDA herein does not occupy/take position of a licensee so far as its function is concerned and it can only be placed to be a promoter of renewable energy. In substance, the prayer of the Petitioner can be concisely stated as herein after:

“It is therefore, most humbly prayed that taking into consideration the aforesaid facts and circumstances of the case, this Hon'ble Commission may quash the letter of forfeiture dated 24.11.2014 under Annexure-10 and to direct the Respondent to refund the commitment fee of Rs.50,00,000/- alongwith 12% interest per annum with effect from 24.11.2014 forthwith”.

When the provision under Section 86(1)(f) of the Electricity Act, 2003 only empowers to adjudicate/ decide the dispute between the Generators and the Licensees, we are of the opinion that this Commission lacks jurisdiction to adjudicate the present dispute of the Petitioner within the limited scope under Section 86(1)(f) of the Electricity Act, 2003. Since this Commission under Section 86 (1) (f) of the Electricity Act, 2003 is not vested with jurisdiction to embark upon the adjudicatory exercise relating to dispute raised by the Petitioner, it appears improper to opine about merits of the other aspects of the prayer of the Petitioner which can be duly addressed before the appropriate forum.

10. Accordingly, the proceeding stands disposed of.

Sd/-
(S. K. Ray Mohapatra)
Member

Sd/-
(G. Mohapatra)
Member

Sd/-
(S.C. Mahapatra)
Chairperson