



Chhattisgarh State Electricity Regulatory Commission

Civil Lines, G.E. Road, Raipur – 492001

Tel: 0771-4073555, Fax-4073553

Petition No.6 of 2007(M)

In the matter of declaration of ferroalloys manufacturing facilities of M/s Monnet Industries Ltd., as captive consumer of electricity of the generating plant of M/s Monnet Ispat & Energy Ltd.

Monnet Ispat & Energy Ltd
Raipur.

... Petitioner

V/s

Chhattisgarh State Electricity Board
Raipur

... Respondent

Present: S.K.Misra, Chairman
Sarat Chandra, Member

ORDER

(Passed on 28.11.2007)

Monnet Ispat & Energy Ltd (MIEL, formerly Monnet Ispat Ltd), Mandir Hasaud, has submitted this petition for declaring its ferroalloys manufacturing unit in the premises of Monnet Industries Ltd (MIL), Urla industrial area, Raipur, 'captive consumer' in terms of the provisions of section 9 of the Electricity Act, 2003 ('the Act') for the purpose of obtaining open access to the wires of the Chhattisgarh State Electricity Board ('CSEB' or 'the Board', for short) for taking power from its captive power plant at Mandir Hasaud to the premises of MIL in Raipur.

2. The facts of the case are that MIEL is a company with its registered office at Mandir Hasaud, Raipur, where it manufactures sponge iron, M.S. ingot, M.S. billet & structurals, ferroalloys etc., and also generates power in its generating plant of 60MW capacity. The company also claims to have manufacturing activity in the premises of MIL in Raipur for manufacturing ferroalloys in the name of MIEL (Unit-IV), having taken over these premises and plant and machinery under an 'oral lease agreement'. Before MIEL took over the premises of MIL, the latter had obtained a power connection of 7500KVA from the Board for manufacturing ferroalloys, under an agreement entered into with the Board on 13.1.2004. The lease agreement mentioned above was for a period of three years, from 14.1.2004 till 13.1.2007. Having obtained the lease MIEL wanted to use own power from its generating plant at Mandir Hasaud for manufacturing ferroalloys at MIL premises. It requested CSEB for wheeling of power from Mandir Hasaud to Raipur to which the latter apparently agreed and a wheeling agreement was entered into between Monnet Power Ltd (which was subsequently merged with Monnet Ispat Ltd) on 9.3.2004 for wheeling of 7MW power to the premises of MIL. There was a second wheeling agreement between Monnet Ispat Ltd and CSEB when by an order of High Court Monnet Power merged with Monnet Ispat, executed on 2.4.2005. MIEL executed a second lease agreement with MIL on 20.4.2006, called a 'memorandum of oral agreement of lease' on the lines of the earlier lease agreement, for a period

of three years from 1.4.2006 to 31.3.2009. Since the wheeling agreement was expiring on 13.1.2007, MIEL requested the Board for a fresh agreement on the basis of the use of electricity in the manufacturing activity in the premises of MIL as its own captive consumption, under the Intra-State Open Access in Chhattisgarh Regulations, 2005 (hereinafter 'Open Access Regulations') since notified by this Commission on 30.7.2005. The Board has not executed the wheeling agreement applied for and has not permitted open access, as was being done till 13.1.2007, and has informed the petitioner that MIL ceases to qualify as captive user on termination of the earlier agreement. This petition has been filed to declare MIEL's manufacturing activity at MIL premises as captive consumption, a position not accepted by the CSEB, so that open access is available to the petitioner as a matter of right under section 9(2) of the Act.

3. The only issue for consideration in this case is whether the use of electricity in the manufacturing activities claimed to be of MIEL in the premises of MIL, can be treated as captive consumption of electricity carried by the former from its generating plant located at Mandir Hasaud and should MIEL be permitted open access in the capacity of a captive power plant. Although CSEB has informed the petitioner that with the earlier wheeling agreement coming to an end on 13.1.2001, MIL ceases to be a captive consumer. MIL was not a captive consumer at any time, and the CSEB has no wheeling agreement with MIL in the first plan. CSEB has a supply agreement with MIL.

4. We have heard the parties. There is no dispute about the fact that CSEB has been wheeling power from MIEL's generating plant at Mandir Hasaud to the manufacturing activity at MIL, Raipur, in terms of the wheeling agreements entered into between MIEL and the Board, the first on 9.3.2004 (between Monnet Power and the Board), and the second on 2.4.2005 (between Monnet Ispat and the Board, on merger of Monnet Power with Monnet Ispat). On MIEL taking over the premises and the ferroalloys manufacturing facilities at MIL, supplementary agreements to the original electricity supply agreement of 13.1.2004, between MIL and CSEB, were entered into between CSEB and MIL to ensure that MIL undertakes to make payment for any power supplied by the Board in case of default in payment by MIEL, apparently on the presumption that hereafter power dues would be paid by MIEL. The first supplementary agreement was entered into on 11.6.2004 and the second on 2.4.2005. Both these supplementary agreements recognize the fact that the manufacturing at MIL had been taken over by MEL on lease. The lease agreement is what has triggered these two supplementary agreements. The petitioner entered into the second oral agreement of lease with MIL on 20.4.2006, valid for a period of three years from 1st April 2006 till 31st March, 2009. On the basis of this lease deed the petitioner approached the respondent Board for extension of the wheeling agreement on the basis, as earlier, of the manufacturing activity at MIL being under his control, in terms of the lease agreement. However, the Board has not accepted the use of power generated by the petitioner at Mandir Hasaud in MIL's manufacturing facility at Raipur as captive consumption. The Board has raised the following issues in favour of its contention that the manufacturing activity at MIL cannot be treated as that of MIEL and use of power there as his own use:-

- (i) The so-called memorandum of oral agreement of lease of 14.1.2004 and of 20.4.2006 are not registered documents. Both the documents have been executed on stamp paper of Rs.50/- and the date of purchase of the stamp

paper is not evident on the face of the stamp paper. This so-called lease agreement, in any case, is in contravention of the provisions of section 107 of the Transfer of Property Act of 1887 (TP Act) and section 17 of the Registration Act, 1908 and hence the documents purported to be lease agreements, have no validity in the eyes of law and are void and illegal.

- (ii) The petitioner's contention that the premises of MIL were taken on lease by him as far back as January, 2004 and that he has since carried on manufacturing activity in the same premises as its Unit-IV, using the plant and manufacturing of MIL, is not borne out by the documents placed on record by the petitioner. The Central Excise Registration Certificate in the name of the petitioner for the same premises is issued only on 11.5.2006. There is no evidence of the petitioner having carried on manufacturing activity on his own account from as far back as 2004.
- (iii) The petitioner is hence not entitled to open access for captive use of power under section 9(2) of the Act. That being so he is not entitled to open access, the quantum of power to be wheeled being less than 10MW. Such consumers (of less than 10 MW) would be entitled to open access under clause 5 of the Open Access Regulations only in April, 2007 (since revised to 1.10.2007).

5. As to the first issue there is no doubt about the legal position in respect of a lease of immovable property. Section 107 of the TP Act reads as under:

"107. Leases how made – A lease of immovable property from year to year, or from any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession".
The provision of section 17 of the Registration Act is as under:-

"17. Document of which registration is compulsory –

- (i) The following documents shall be registered
- (a)
- (b)
- (c)
- (d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent";

Section 49 of this Act deals with the effect of non-registration of documents required to be compulsorily registered, and reads as under:-

"49. Effect of non-registration of documents required to be registered – No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall–

- (a) affect any immovable property comprised therein, or
- (b) confer any power to adopt, or
- (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882) to be registered may be received as evidence of a contract in a suit for specific performance under Chapter-II of the Specific Relief Act, 1887 (3 of 1887), or as evidence of any collateral transaction not required to be effected by registered instrument”.

Both the so-called agreements of lease of 13.1.2004 and 20.4.2006 which were for a period of three years each and for consideration of a monthly rent of Rs. 3 lakhs and Rs. 5 lakhs respectively, should have been registered instruments in compliance with the provisions of section 107 of the TP Act and section 17 of the Registration Act. There is no dispute about the properties leased being immovable properties. The lease document covers building and the plant and machinery in the premises of MIL, and provides for handing over of the vacant physical possession of plant and machinery to the lessee, the petitioner, for use and enjoyment of the plant and machinery during the period of lease. However, although such a document is compulsorily registerable under the Transfer of Property Act and the Registration Act as above and also that unless registered, as per section 49 of Registration Act, these oral agreement of lease cannot be adduced as evidence of transactions affecting such property, the proviso to this section does recognize that a document can be unregistered and may be received as evidence of a contract of ‘any collateral transaction not required to be affected by registered instrument’. The learned counsel for the petitioner has also cited the ruling of the Hon’ble Supreme Court in this regard in civil appeal No.5904 of 1999 (AIR 2000 SC 2523) in which the apex court has held that non-registration of lease-deed compulsorily registerable, is not fatal to the creation of the lease. The Hon’ble Supreme Court has also held that “when lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the Court to determine whether there was in fact a lease otherwise than through such deed”. It has been further held that when the possession of immovable property has been handed over to a lessee on the basis of payment of consideration of monthly rent and the lessee has agreed to pay such rent, “the legal character of such possession has been attributed to a jural relationship between the parties”. Such a jural relationship, in this case, it has been argued, has to be treated as that of a relationship between a lessee and a lessor. In the present case, there is no dispute that an oral agreement of lease has been entered into between MIEL and MIL and the petitioner is in possession of the ferroalloys manufacturing facilities of MIL in Raipur and the Board has been wheeling power from MIEL’s power plant to these facilities since 2004. As already mentioned, the Board has recognized this lease agreement in the supplementary agreement (dated 11.6.2004) to the electricity supply agreement of 13.1.2004 between the Board and MIL. The second supplementary agreement of 2.4.2005, which has been titled the ‘second supplementary agreement towards leasing out of plant’, also recognizes the existence of the lease and provides for MIL, the original signatory to the agreement with the CSEB to indemnify the Board in case of “any default in payment due and owing to CSEB for consumption of the electricity by the Monnet Ispat” (the petitioner). The question about the lease agreement being legal or otherwise was never raised at any point of time while the Board continued to provide its wires for wheeling of power by MIEL to its manufacturing activity at MIL in Raipur. That MIEL was and is in possession of the building, plant and machinery of MIL in Raipur was never in question and that the petitioner was using its electricity

generated at its plant at Mandir Hasaud in this premises was also never in question. The lease thus did exist on the ground and at no point of time was this questioned by CSEB. The Board at this point of time cannot raise the question of the legal validity of the lease a matter which is not its direct concern. Secondly, in order to ascertain if the use of power is for captive consumption the legal validity or otherwise of transaction of lease may not be relevant. What is relevant is the purpose of use of the electricity wheeled to the premises of MIL.

6. The respondent has also raised doubts about the claim of the petitioner that the manufacturing activity in the premises of MIL has in fact been carried on by the petitioner after taking over these premises on lease. In proof thereof the petitioner has submitted the application made to the Central Excise Department on 19.1.2004 requesting them to grant the petitioner a new registration in place of the registration given earlier to MIL. In reply to this application the local Central Excise office has issued a registration certificate for the new manufacturer on 21.4.2004, in favour of the petitioner for "manufacturing of excisable goods at 216, sector-C, Urla Industrial complex, Birgaon, Raipur", which is the premises of MIL. The petitioner has also produced documents to show that he has been paying Central Excise and filing monthly returns from April 2004 onwards to Central Excise Department in respect of the manufacturing in these premises. He has also filed proof of his paying lease rent to MIL since Jan. 2004. In view of such overwhelming evidence we have no doubt that it is the petitioner who is carrying out manufacturing activity of ferroalloys at the premises of MIL located in Urla Industrial Area, Raipur, as his own.

7. The next issue is whether the qualifications laid down in Rule 3 of the Electricity Rules, 2005 (the Rules, for short) for a captive generating plant should be applied in this case. It has been contended by the respondent that MIL is a separate company and it does not hold 26% of the ownership of the power plant and does not use 51% of aggregate electricity generated in such plant to qualify as a captive user, as laid down in Rule 3. This contention has no relevance to this case because it is not MIL who is seeking the status of a captive consumer. MIEL, which fully owns the CPP and has also taken over the manufacturing facility of MIL through a lease agreement, is using the same. Thus the power being used is for the purpose of 'own use' of MIEL only. Therefore the question of application of the requirements laid down in Rule 3 does not arise in this case. The fact that MIL is a separate company is of no consequence to the matter of the captive use by MIEL of the electricity generated by it. In fact, not only the matter of existence of the lease has been recognized by the Board but the Board has also been treating the supply of power as captive consumption. There is no change in the situation today because of the new lease agreement of 20.4.2006.

8. The next issue is about grant of open access to MIEL for carrying power to its manufacturing facility in Urla from its generating plant at Mandir Hasaud through the wires of the Board. The wheeling agreement which the Board had entered into with MIEL earlier and which was valid till 13.1.2007 should have been continued as it is but for the promulgation of the Intra-State Open Access Regulations, 2005, by this Commission on 30.7.2005. The Regulations saved subsisting wheeling agreements. Since the subsisting wheeling agreement with the petitioner was to expire on 13.1.2007, the Board rightly advised the petitioner that after that date wheeling arrangement can be continued only in terms of the Open Access Regulations.

However, the question of captive use was also raised and pending decision on this matter open access agreement has not been executed. Non-captive use of electricity would entail payment of cross subsidy surcharge by MIEL apart from the wheeling charges, and the entitlement to open access will also be called in question. The issue as to whether the use of power in the manufacturing facility of MIL at Urla is captive use by MIEL having been resolved as above, grant of open access to the petitioner should not pose any problem. We had provisionally allowed open access to the petitioner with effect from 14.1.2007 since the wheeling agreement with CSEB was expiring on 13.1.2007. In continuation of this provisional order, open access be granted to the petitioner for wheeling of power to his manufacturing facility at Raipur from his generating plant at Mandir Hasaud, for captive consumption, subject to its fulfilling all the conditions of the Open Access Regulations as also the Chhattisgarh Grid Code promulgated by the Commission.

Sd/-
Member

Sd/-
Chairman