



**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

Civil Appeal No. 7432 of 2025

**Punjab State Power
Corporation Limited**

...Appellant

Versus

**Talwandi Sabo Power
Limited & Ors.**

...Respondents

with

Civil Appeal No. 7436 of 2025

J U D G M E N T

K. VINOD CHANDRAN, J.

The appeals are filed by the Punjab State Load Despatch Centre (PSLDC) and the Punjab State Power Corporation Limited (PSPCL) against the judgment of the Appellate Tribunal for Electricity (APTEL) reversing the order of the Punjab State Electricity Regulatory Commission (SERC). The impugned order sets aside the finding of *'misdeclaration of Declared Capacity'* as found by the PSLDC on four days in January 2017. Initially, misdeclaration was found for five days i.e. on 10.08.2015, 15.01.2017, 17.01.2017, 24.01.2017 and 31.01.2017

leading to a levy of penalty coming to Rs.162,74,72,865/- by Memo No. 278 dated 15.03.2017, out of which a penalty of Rs.74,27,27,159/- stood deducted from the pending bills. At the instance of the State Generating Station, Talwandi Sabo Power Limited (SGS or TSPL, alternatively) directions were issued by the High Court referring the matter, first to the Commercial and Metering Committee and then to the State Grid Code Review Committee. Dissatisfied with the proceedings thereat, again on the directions of the High Court, the matter was referred to the SERC which affirmed the findings of the PSLDC that the SGS had failed to demonstrate its capacity on four occasions in the month of January 2017 but rejected the finding of misdeclaration in the month of August 2015. The APTEL reversed the said order and deleted the findings of misdeclaration, and the resultant penalty.

Appellants; in support of the SERC: -

2. Shri M.G. Ramachandran, appearing for the PSLDC at the outset pointed out that the energy requirement in the State varies with the demand, being high during May to September; the paddy season, and comparatively lower for the remaining months of the year. Reference was made to Schedule-7 of the Power Purchase

Agreement (PPA) which provides for a two-part tariff, one; on the capacity based on the Declared Capacity/Capability (DC), a fixed charge, and a variable charge on the energy scheduled for supply. The SGS, the generator, is required to declare the electricity generation capacity in megawatts (MW) for every given day, the scheduling of which is decided by the PSLDC based on the anticipated requirements of PSPCL, equal to or below the declared capability. Even if the scheduling required by the PSPCL is lower it has an obligation to pay the fixed charges, the difference being termed as deemed generation, subject to incentives and disincentives based on the percentage of declared availability as determined annually. The PSLDC exercises statutory functions under Section 32 of the Electricity Act, 2003 (the Act of 2003) to oversee, monitor and control the availability schedule and despatch of electricity as generated by the SGS and supplied to PSPCL.

3. The Punjab State Grid Code, 2013 (SG Code) provides for detailed steps for declaration of capability, scheduling and despatch as also enables revision of injection and drawal schedule on a real time basis relatable to the requirements, subject to forced outages, bottlenecks etc. The PSLDC has overriding powers insofar as calling

upon the SGS at any point of time to revise the schedule which has to be effective from the 4th time block, the first being counted as that in which the revised schedule is issued, each of such time blocks being of 15 minutes duration. The SGS is also required to declare the possible ramping up/ramping down of generation in every time block which in the present case has been declared as 1% per minute. The very purpose behind the regulatory measure as provided in the SG Code ensures that the SGS faithfully declares its capability and maintains it throughout, subject to revisions, despite the schedule being lower and its readiness to ramp up or down being occasioned at every revision sought for, by the PSPCL through the PSLDC.

4. The PSPCL being unable to draw the full capacity of the declared availability enables the generator to have the benefit of deemed generation of the declared availability with significant consequences on the capacity/fixed charges. This unwittingly gives an opportunity to the generator to declare far more than its capacity, on an estimation of the drawal requirements of the procurer and also in certain instances, make undue gain at the cost of the procurer and the consumers at large. To curb such unfair practices the SG Code provides for steps to curb misdeclarations by way of issuing warning

notices and then show-cause notices against any indulgence in *gaming* as per Regulation 11.3.12 or for imposition of penalty for misdeclaration in the event of failure to demonstrate the declared capacity as required by the PSLDC. Regulation 11.3.13 brings in a strict liability which is the penalty imposed in the present case. Learned Senior Counsel also took us through the findings of the SERC which have been reversed by the APTEL on misconstruing the provisions of the Act and the Grid Code. Reliance was placed on ***Union of India vs. Dharamendra Textile Processors***¹ to distinguish a penalty arising on a civil liability from one arising in a criminal liability, the requirement of *mens rea* being absent in the former.

5. Shri Shubham Arya appearing for the PSPCL adopts the arguments addressed by the PSLDC and points out that though the penalty is payable to the PSPCL, the ultimate beneficiary is the consumer since the PSLDC has an obligation to account for the entire penalty which would be reflected in the tariff, based on the profit or income generated by the PSPCL, passed on to the consumer by reduction in tariff. A portion of the penalty imposed having been deducted, the same was paid with applicable interest/payment

¹ (2008) 13 SCC 369

surcharge as per the PPA so as to ensure that PSPCL does not suffer any further liability of surcharge/interest, but under protest and subject to the final decision in the above civil appeals. It is pointed out that the demonstration of capability has to be either in the four-time blocks or as per the 1% ramp up per minute, also declared by the SGS of which the former gives the SGS a better elbow room by way of more time being available for the demonstration by achieving the declared capability. The 1% ramp up per minute is also a declaration made by the SGS which too has to be strictly adhered to. Regulation 5.3.8 is pointed out to contend that the ramp up/ramp down percentage is prescribed by the SG Code itself.

Respondents; in support of the APTEL: -

6. Shri Sajan Poovayya commenced with the declaration of fidelity of the SGS he represents, vouched by the fact that it had not once run into rough weather in the last nine years of the relationship. On the discord now alleged, even according to SLDC and PSPCL, the demonstration of its declared capacity had to be done within four-time blocks from the receipt of the notice and the CERC also adjudicated the issue as to whether such demonstration was achieved in the 4th time block. Hence, the ramp up rate of 1% is

inconsequential insofar as Regulation 11.3.13 of the SG Code is concerned. In fact that regulation does not specify a time in which the demonstration had to be carried out and, in such circumstances, neither 4th time block nor the 1% ramp up can be determinative of the factum of demonstration. Further, since no time was specified, even in the notice issued, demonstration could be at any time of the day on which it is required. It is argued that what is alleged is *gaming* as a consequence of the misdeclaration, which required a finding of deliberate intention with the motive of making money; ie: to earn undue capacity charges, without which finding, there can be no misdeclaration alleged or penalty imposed.

7. Reliance is placed on ***TPDDL v. PPCL***² dated 29.11.2023 of the CERC wherein an identical issue was considered. Misdeclaration of the declared capability is established only when the generating station lacks the necessary fuel or coal to generate power upto its declared capability or its power plant is shutdown or under repair due to faulty machinery, thus causing restriction in the generating capacity of the station. On all the four days of the alleged

² *"Tata Power Delhi Distribution Limited v. Pragati Power Corporation Limited and Others"* in Petition No.199/MP/2019

misdeclaration, the TSPL's plant had generated power on multiple time blocks as per the declared capacity and this demonstrates that the SGS had the necessary coal stock and was technically capable of generating power up to its declared capacity: putting to peril any allegation of misdeclaration.

8. Reliance was also placed on the judgment dated 11.12.2007 of the APTEL in **PSEB v. CERC**³ wherein less than 1% deviation was found to be within practical limits; not necessarily justifying an allegation of *gaming* by the generating unit. The 1% ramp up rate is merely a normative value and has no relation to the actual operation of the generation capability of the SGS and even regulation 5.3.8 provides only for a possible generation as per the ramping up/down rate as declared by the SGS. The decision of this Court in **Excel Crop Care Ltd. v. CCI**⁴ is relied on to argue that if two possible interpretations are possible, both being reasonable, especially while considering a penal provision, the Court should lean towards the interpretation which exempts the penalty rather than one which imposes it.

³ "Punjab State Electricity Board v. CERC" in Appeal No. 79 of 2007

⁴ (2017) 8 SCC 47

9. Allegation of discrimination is raised citing the case of Nabha Power Limited, another generating station of the State of Punjab, which too injected power less than its declared capacity on multiple occasions, but was absolved from any imposition of penalty. It is asserted, on the strength of the words employed in the provisions of the SG Code that there should be an enquiry with appropriate hearing afforded, to the generating station to find *gaming* and that conclusion of misdeclaration leading to *gaming* can be arrived at only when there is a *mala fide* intention found on the generating station, to earn undue profits, by the measure employed of misdeclaration. It was specifically pointed out that the CERC despite finding in its order that the act of the generating station has to be '*deliberate or intentional*' and there should be '*motive found to make money*' either as undue capacity charges or to benefit from deviation; the principle was lost sight off while the penalty was affirmed. There is also an alternate contention taken that the finding in the present case is only of a deviation which is regulated by the CERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2014⁵.

⁵ The DSM Regulations

10. Mr. Vishrov Mukerjee, learned Counsel for the respondent, follows up with the assertion that misdeclaration and deviation are distinct, the former being a misdemeanour while, to find deviation, there need not be any inquiry into the intent or obtainment of illegal gain. Misdeclaration can be found only by an inquiry into the intent and the monetary gain achieved by such misdemeanour. Insofar as the demonstration of the declared capability in a time block is concerned, the notice issued by the SLDC did not specify the time frame in which it had to be achieved and hence the SERC ought not to have found misdeclaration without an inquiry into the intent behind such alleged misdemeanour. The table relating to scheduling, despatch and net drawal, as extracted by the SERC is specifically pointed out to show that demonstration was achieved within the required time blocks or at least in the same day; which we will deal with a little later.

The Order of the SERC: -

11. The SERC by Annexure A50 order found that as and when notice is issued by the SLDC to demonstrate the DC, the SGS has to comply with it as per the ramp up/ramp down rate under Regulation 11.3.10 of the SG Code and on failure it would be liable for penalty on the

ground of misdeclaration. However, it was also found that in the instant case, the PSLDC had allowed the petitioner to implement the directions from the 4th time block and hence no literal interpretation could be adopted. The SERC found that *gaming* in Regulation 11.3.4 and deliberate over/under declaration of plant availability in Regulation 11.3.12 has the same connotation and that the act of the generator has to be deliberate or intentional and there should be a motive to make illegal enrichment. As far as the monitoring procedure delineated under Regulation 13.5 of the SGCRC, it was found to be distinct from Regulation 11.3.12 and 11.3.13, dealing with only monitoring and evaluation of the performance of the generating plants. A 12% margin as provided by the DSM Regulations is to ensure maintenance of grid discipline and grid security as envisaged under the Grid Code. The intention of providing deviation volume limit is to curb tendency of users to deviate drastically from the schedule, under threat of deviation charges. The DSM Regulations were found to be not applicable in the case of demonstration of DC governed by the provisions of the SG Code.

12. On the basis of the above interpretation, the factual matrix was examined, and it was found that in December 2016, the SLDC noticed

a regular pattern of generation, below the scheduled declaration, for which notices were issued pointing out that this would tantamount to misdeclaration of declared capability resulting in SG Code violation. On 19.12.2016, on receipt of such communication through email, the SGS was found to have lowered its declared capability. Again on 30.12.2026, a pattern was detected with a maximum under injection of 27% recorded under one time log, when again warning notices were issued. Yet again, rather than increasing the generation, the SGS lowered its declared capability. The SERC specifically emphasised the analysis of injection in December 2016 as projected by the PSLDC, wherein the SGS failed to deliver requisite generation in 387 time blocks out of the total 459-time blocks, taking the under generation to 84.13% of the time blocks corresponding to the declared capability. This led to notices being issued on the times specified on the four dates in January 2017. The declared capability, the scheduled generation, actual injection and the deviation in various time blocks after the notice period were tabulated. The SERC analysed it to find a misdeclaration for reason of failure of SGS to demonstrate the declared capability on it being sought by the SLDC; the details of which will be dealt with by us in our own analysis. The

SERC found misdeclaration on the four specified dates in the month of January 2017 for which the penalty was imposed, as per the corresponding monthly capacity charge payment; the computation of which we need not go into.

The Impugned Order: -

13. The APTEL noticed Regulation 11.3.10; which mandates declaration of generation capability, Regulation 11.3.12; empowering SLDC to issue a notice alleging *gaming* and Regulation 11.3.13; enabling SLDC to require demonstration of declared capability, to find that there is no time limit specified for demonstrating the declared capability. It was found that the SERC had erroneously relied on the ramp rate as the measure for demonstration of capability and declined the contention of the appellants herein that the SGS is required to demonstrate generation on the 4th time block on receipt of notice. It was held that Regulation 11.5 (xi) is in a totally different context of revision of schedule and does not govern demonstration of DC. As far as the misdeclaration of declared capability, reliance was placed on the order of the CERC in ***TPDDL***², which according to the APTEL held that misdeclaration can be found only when there is absence of adequate coal stock or

when the plant is under shutdown or repair due to faulty machinery. The SGS on 17.01.2017 raised technical issues of the coal handling plant which necessitated downward revision and shutdown, duly communicated to the PSLDC. Finding that ramp rate or the 4th time block, does not apply insofar as demonstration of DC is concerned it was observed that the notices issued also did not specify any time block within which the declared capability had to be demonstrated, which in any event, was demonstrated on the very same day.

14. On facts, it was found that on each of the days complained of, the DC was demonstrated on 15.01.2017, within 4th and 6th time blocks with a slight deviation and on 24.01.2017, on the 7th and 8th time blocks with deviation of 1.02% and 0.34% respectively. The order dated 11.12.2007 in **PSEB v. CERC**³ was relied on to hold that the deviation of less than 1% of DC is within the practical limits and shall not be considered as *gaming* by the generating company. The APTEL set aside the findings on misdeclaration on the four dates in January 2017 and directed refund of the penalty amounts adjusted in the bills payable. The APTEL however concurred with the findings of the SERC that the DSM Regulations do not govern the demonstration of declared capability.

Adjudication: -

15. At the outset we have to notice that the argument put forth, by the SGS of *force majeure* conditions having impeded demonstration of DC was hastily resiled from, on our querying on the specifics. We are also not impressed by the assertion of fidelity in the last 9 years of relationship with the Distribution Company, which the SGS swears by, which also has to be continued for another 16 years. Morality in past conduct, though attractive by itself, can seldom be a justification for deviation from express terms of a contract especially when there is a strict liability enforced without reference to a guilty mind; the *mens rea*. The PPA admittedly provides for fixed capacity charges and variable energy charges as is seen from Annexure A1 produced along with Civil Appeal No.7436 of 2025 (the documents from which appeal is referred to, by us in this judgment).

16. The fixed capacity charges are to be paid based on the contracted capacity at normative availability, specified as equal to 80%, subject to incentives and disincentives, dependent on the percentage of availability achieved, annually. For an availability beyond 85%, as per Clause 1.2.4 of Schedule 7 of the PPA, an incentive at the rate of 40% of the Quoted Non Escalable Capacity

Charges (QNECC) for the contract year, subject to a maximum of that corresponding to the availability in excess of 85% is payable. This is applicable on an annual basis and included in the monthly tariff demand in the first month of the next contract year. A disincentive in the nature of a penalty is determined as per Clause 1.2.5 of the Schedule when the availability for a contract year is less than 75%, inviting a penalty at the rate of 20% of the simple average capacity charge for all months in the contract year applied on the energy corresponding to the difference between 75% and the availability during such calendar year, also a civil liability. The fixed charges being applicable to the contracted capacity, the incentives and disincentives will depend upon the availability which would be determined on the basis of the Regional Energy Accounts (REA) maintained for the year.

17. The '*Scheduling and Despatch*' are regulated by Part IV of the SG Code which has that nominal heading. As is clear from the objectives Regulation - 11.2, the SG Code delineates the procedure for scheduling of the net injection/drawals of the State Entities on a day-ahead basis, streamlining the flow of information between the SLDC and the State Entities, herein being the SGS; the generator-

TSPL, and the PSPCL; the procurer. The SGS in the instant case as per the PPA, is obliged to maintain three units, each having the capability of generation of 660 MW. The SG Code provides for a procedure of submission of capability/capacity declaration by the SGS and the drawal requisition by the procurer of power, who carries out distribution to the consumers. Regulation 6.3.8 of the '*Operational Planning*' mandates that all distribution licensees/users shall provide to SLDC their estimated demand for each 15-minute block for the ensuing day with estimates of load in discrete blocks, a day ahead at 11.00 hours of each day. '*Steps in Scheduling*' in Part IV, Section 11 by sub-clause (i) under Regulation 11.4 requires the SGS to intimate the station-wise ex-power plant MW and MWh capabilities, foreseen for the next day between 00.00 to 24.00 hrs in time blocks of 15 minutes interval to the SLDC. Similarly, sub-clause (ii) requires the distribution licensees to intimate the overall requirement in MW and MWh for the next day on 15 minutes interval to the SLDC by 11.00 hours of the previous day after receipt of information as provided under sub-clause (i). The SLDC also is required to finalise by 15.00 hours of the previous day the generation schedule of the SGS and the drawal schedule of each distribution licensee for the next day, for

each 15 minute time blocks. The variable energy charges are payable on the scheduled generation, this being capable of revision on a real time basis, within the declared capacity. The deviations from that scheduled and actually injected is dealt with by the Unscheduled Interchange (UI) charges.

18. The general conditions under Part IV, Section 11 deals with the measure of *gaming* and the demonstration of declared capability (or 'capacity'; alternatively used herein). Regulation 11.3.2 requires the SLDC to issue despatch instructions as delineated hereinabove to regulate all generation and imports from SGS, in accordance with the 15-minute day ahead generation schedule as finalised by the SLDC. As per Regulation 11.3.4, the SLDC is responsible for; (i) coordinating the scheduling of all generating stations within the State (ii) real time monitoring of the station's operations (iii) checking that there is no *gaming* in its availability declaration, or (iv) in any other way revision of availability declaration and injection schedule, switching instruction, meter data processing, collections/disbursement of UI payments, outage planning etc.; each of these being separate and distinct aspects/obligations.

19. '*Gaming*' is defined as an intentional misdeclaration of a parameter related to commercial mechanism in order to make an undue commercial gain; clearly requiring a finding of a guilty intent and illegal enrichment. Regulation 11.3.4 while emphasising that the SLDC shall ensure that there is no *gaming* in scheduling, in the event of a suspicion enables the SLDC to disallow the energy corresponding to suspected *gaming* from UI account till a final decision is taken. Regulation 11.3.12 obliges the SGS to declare the plant capability faithfully, in accordance with their best assessment. Over/under declaration of plant capability resulting in deviation from schedules, given on the basis of their capability declarations, requires the SLDC to serve notice of *gaming* and affording an opportunity to the SGS to explain the situation with necessary backup data. The deviation in injection from the scheduled or capability declared also should have resulted in monetary gain either as undue capacity charge or as the charge for deviations from schedule. We fully concur with the respondent's contention that *gaming* requires *mens rea* coupled with illegal enrichment which requires an inquiry fully complying with the principles of natural justice.

20. However, the SERC, according to us, in its order mistook the present allegation as one of *gaming* and erroneously found imperative - *'intention and a motive to make money'*, to impose penalty for the misdeclaration alleged. True, despite the above finding, though in this case, there was no enquiry into a deliberate attempt to profiteer, the penalty was upheld; rightly so as we would presently demonstrate. We are in favour of the contention of the appellant that demonstration of declared capability and deviation from the despatch schedule are quite distinct and different in themselves and more so from *gaming*.

21. Demonstration of the declared capability of a generating station is provided for in Regulation 11.3.13, which, for its relevance, is extracted hereunder: -

"11.3.13 The SGS shall be required to demonstrate the declared capability of its generating station as and when asked by the SLDC. In the event of the SGS failing to demonstrate the declared capability, the capacity charges due to the generator shall be reduced as a measure of penalty. The quantum of penalty for the first misdeclaration for any duration/block in a day shall be the charges corresponding to two days fixed charges. For the second misdeclaration the penalty shall be equivalent to fixed charges for four days and for subsequent mis-

declarations, the penalty shall be multiplied in the geometrical progression over a period of a month.”

22. The demonstration as required by Regulation 11.3.13 is a stand-alone provision, the penalty for which is ingrained therein. There is no reason to intermingle the concepts of *gaming* and demonstration of declared capability, even though both can be found literally to be misdeclarations leading to two different consequences, the former, requiring *mens rea* and the latter inviting strict liability. We are also of the opinion that the responsibilities of the SLDC as listed under Regulation 11.3.4 are also distinct in nature. While checking on *gaming*; having the ingredients of intention and illegal enrichment, is one of the responsibilities, coordination of scheduling and real time monitoring of the generating station's operations are matters which fall under '*better system operation*' the responsibility to ensure which is also cast on the SLDC by Regulation 11.5 (xi); extracted here under, for emphasis : -

“(xi) If, at any point of time, SLDC observes that there is need for revision of the schedules in the interest of better system operation, it may do so on its own and in such cases, the revised schedules shall become effective from the 4th time block, counting the time block in which the revised schedule is issued by SLDC to be the first one.”

23. We cannot accept the finding of the APTEL that the above Regulation applies only to revision of schedules, which is governed by Regulation 11.5.(vii) enabling revision of schedules/declared capability to become effective from the 6th time block. The notice to demonstrate declared capacity is to ensure due adherence to time blocks in the event of revision which could be sought as high as the declared capacity itself and to meet specified contingencies. Regulation 11.5 of Part IV, Section 11 has the nominal heading of '*Revision in injection/drawal schedule on real time basis*', providing for revision of injection or drawal schedule by the SLDC on the various conditions delineated thereunder. Demonstration of DC is a measure of ensuring that the SGS has the ability to generate the capacity declared on a real time basis and that the declaration is made faithfully, especially when fixed charges are paid on the declared capability and incentives earned for annual generation in excess of 80% of the declared capability. Sub clauses (i) to (v) of Regulation 11.5 though do not regulate the demonstration of declared capability, it definitely has a bearing on that aspect. Ensuring better system operation is to ensure its efficacy and functionality as juxtaposed with the integrity of the declaration made,

which is not akin to a normal revision as contemplated under Regulation 11.5(vii). The demonstration of capability checks the efficiency of the system to respond to every contingency, including that provided under Regulation 11.5 (i) to (v), on a real time basis, which response has to be materialized within four-time blocks. Thus, the fourth time block is relevant for demonstration, which mandate is as per sub-clause (xi) of Regulation 11.5, extracted herein above. The alacrity and expedition with which the SGS responds, is the hall mark of the integrity of its declaration.

24. Demonstration of declared capability we reiterate, stands on a different footing from gaming. On notice being issued by the SLDC, the same has to be demonstrated within the 4th time gap, the first being the one in which the notice is received. In so far as deviation is concerned, it is governed by the DSM Regulations, which term has been defined as the total actual injection minus total scheduled generation in a time block, for a seller, and for a buyer, total actual drawal minus its total scheduled drawal, again in a time block. In fact, Regulation 6.1 of the DSM Regulations specifies that the provisions of the Grid Code and that of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission)

Regulations, 2008 as amended from time to time shall be applicable for declaration of capacity, scheduling and elimination of *gaming*. The DSM Regulations as found by the SERC and the APTEL hence, do not govern a measure adopted to curb either demonstration of the declared capacity or *gaming*.

25. A conspectus of the above, according to us, would indicate that a deviation simplicitor would neither amount to *gaming* nor misdeclaration for failure to demonstrate declared capability. But a failure to demonstrate DC and a measure employed of *gaming* would definitely constitute a deviation. Likewise, a failure to demonstrate declared capability, on notice issued, would not necessarily lead to an allegation of *gaming*, which if raised, as we have already found, should be commenced with a notice, proceeded with an inquiry, affording a reasonable opportunity to the SGS.

26. Insofar as the ramp up or ramp down is concerned, we cannot but notice from the SGS that it is provided under the nominal heading of '*Governor Action*'. Thermal generating units having electrohydraulic governor system as per the SG Code is to be operated under restricted governor mode of operation, the features of which are delineated under the SG Code itself. Ramp up/ramp

back is a recommended rate for changing the governor setting as per Regulation 5.3.8 of the SG Code, which is not applicable herein.

27. From the above discussion what comes to fore is that the SG Code in its operation and scheduling and despatch contemplates breach by the SGS on four facets : (i) over-injection and under-injection, covered in UI Regulations (ii) deviation, reckoned by the DSM Regulations (iii) *gaming*, contemplated under Regulation 11.3.4 read with 11.3.12 and 11.3.20 (iv) demonstration of declared capability, specified under Regulation 11.3.4 read with Regulation 11.3.13 and 11.5 (xi). *Gaming* in relation to the SG Code contemplates an intentional misdeclaration of capacity by a generating station in order to make an undue gain through UI charges or otherwise. We reiterate that the notice issued in the instant case is not one for *gaming*; for which the finding of *mens rea* and illegal enrichment is mandatory, that too in pursuance of an inquiry in compliance of principles of natural justice.

28. The decision in ***TPDDL²***, according to us, has been misread both by the respondent and the APTEL. Therein, the TPDDL, the procurer of electricity sought for holding respondent No.1, the SGS, liable for misdeclaration of declared capacity on the ground that at

various instances it had failed to supply power, despite claiming a higher capability. It was argued by the SGS that this was caused due to frequent tripping during the winter months, for reason of the filters of the generating units getting choked due to combination of fog and dust. In paragraph 22, APTEL only emphasized that the availability/capability of a generating station is primarily declared based on the availability of fuel and the plant's machinery. This was only in the nature of an observation that the stock of fuel and the functionality of the plant are the perceivable grounds on which declaration of capacity is made and not that these should be the subject of enquiry when an allegation of misdeclaration is raised. It was also observed that in the said case there was no reported instances of unavailability of fuel or the machinery being under shutdown or repair, causing restriction to the generating station's capacity. There were only a few technical issues reported like choking of filters which, as noticed in paragraph 27 was verified and confirmed by the SLDC as not amounting to misdeclaration. The deviation between the scheduled and the actual generation was to be addressed under the DSM Regulations, was the finding.

29. The observations made in paragraph 22 definitely cannot be taken as the National Electricity Regulatory Commission (NERC) having found that a misdeclaration can be raised only if there is absence of sufficient stock of coal or when the machineries in the plant were under repair or shutdown, warranting a verification on that count. A misdeclaration could also occur when, despite the availability of coal or the plant being ship-shape, higher capability is declared, with an intention to profiteer which practice is termed as *gaming*. Again, a higher capability could be declared despite non-availability of coal or repair or shutdown of plant, the veracity of which declaration could be verified by demanding a demonstration of capability; the measure incorporated to take in such situations. The availability of coal and the due functionality of the plant, as per the PPA, is the obligation of the SGS. Any problems surfacing on running of the generation unit, in the course of the day, could be brought to the notice of the SLDC and the procurer, enabling also a revision of declared capacity as per the SG Code. The respondent as we observed had attempted to raise a contention of *force majeure* which was hastily abandoned on our query to substantiate it, which contention was also not raised before the SERC or the APTEL.

30. In the present case on 15.01.2017 one of the plants of the SGS was shut down and the same was communicated to the SLDC. However notice was issued to demonstrate the declared capability as emanating from the two operational units, which the SGS was unable to demonstrate. No consequence arose to both parties even when there was shut down of one among the three plants, since the procurer scheduled their necessity below that possible of generation from the two functional plants. The consequence arose when the SGS was not able to demonstrate even that capability declared on the strength of the functional plants.

31. The demonstration of declared capability invites strict liability if the declared capability is not achieved within four time-blocks, treating the time block in which the notice of demonstration is received as the first block. This is also a measure of ensuring that the SGS has declared its capability faithfully and in accordance with the SG Code, since the procurer has the liability to pay in accordance with the generation schedule as formulated by the SLDC as per the '*Steps in Scheduling*' in the SG Code, even if the drawal of the procurer is lesser than the scheduled generation and the declared capability. The procurer is liable to pay fixed charges in accordance

with the declared capability and variable charges as per the generation schedule. The SLDC who has finalized the generation schedule of the SGS and the drawal schedule of the procurer hence is empowered to seek demonstration, to verify the veracity of the capability declared. The failure of the SGS would be because of absence of sufficient stock of coal, repair of machinery or any other reason which the SGS should have reckoned before intimating the station-wise power plant capabilities, as per the SG Code, or seek revision if a reduction of capability is occasioned on a real time basis.

32. *Dharamendra Textile Processors*¹ considered the issue as to whether Section 11-AC of the Central Excise Act, 1944 imposes a mandatory penalty on evasion of duty and whether *mens rea* is an essential ingredient in levying penalty; thus, clothing the authority with a discretion in the matter of the quantum of penalty imposed. The dictum in ***Chairman, SEBI v. Sri Ram Mutual Fund and Anr.***⁶ was approved wherein it was held that *mens rea* though *sine qua non* for criminal or quasi criminal proceedings, it cannot result in a straitjacket formula without looking at the language and scheme of the Act. If the imposition of penalty arises from a breach of civil

⁶ (2006) 5 SCC 361

obligation, then the mere use of the word 'penalty' would not be determinative of whether the nature of proceedings is criminal or quasi criminal. The contravention, whether it be with a guilty intent or not if it leads to breach of a civil obligation, the absence of *mens rea* will not be of any consequence. The penalty as coming out from Regulation 11.3.13 of the SG Code is a civil liability since the obligation of the SGS to generate power in accordance with its declared capability flows from the contract, a civil obligation. A default therein as coming out from a failure to demonstrate declared capability attracts penalty, without anything more, making its imposition imperative, as per the statutory scheme. The said measure of imposition of penalty does not call for any finding of *mens rea* or a finding of illegal profiteering as would be required when there is an allegation of *gaming*.

33. In considering the failure to demonstrate the declared capacity on each day, we have looked at the spread sheets of '*Summary of Declared Capacity, Schedule Generation, Actual Generation and Deviation*' for each of these days, as produced before us across the Bar by the respondent. On 15.01.2017, one of the three units were on reserve shutdown, and the day started with a declared capacity of

1563.80 MW, and scheduled generation of 616 MW. The deviation, as per the SLDC was minimal, though existing. On the time block between 5:45 to 06:00, the SGS sent a revision of declared capability, hiking it up to 1841.40 MW. The SLDC at 07:50 and 08:23 revised the schedule generation and a demonstration notice was sent in the time block of 09:30 to 09:45. The declared capability revised by the SGS, in the course of the day to 1841.40 MW was not at all achieved on the said day, much less on the 4th time block from the time block in which the notice was received.

34. On 17.01.2017 only one unit was running, the second being under reserve shutdown and the third on scheduled shutdown due to fault in the plant. The declared capacity as on the start of the time blocks of the day was 1229.80 MW, which was revised by the SGS in the time block 02:30 to 02:45. The SLDC sought the first revision of scheduled generation and a second revision. respectively at 03.43 & 05:23. A demonstration notice is admitted to be received at 8:15 hours and based on it the declared capacity of 922.80 MW, as reduced in the course of the day, was to be achieved in the 4th time block from then. However, on the second time block from the issuance of demonstration notice, the SGS sought a downward

revision of the declared capacity at 08:58 hours and revised it to 250 MW. The SGS not only failed to demonstrate the declared capacity but sought the declared capacity to be reduced after the demonstration notice was issued. Yet again, the declared capacity was revised to 150 MW on the same day.

35. On 24.01.2017, the declared capacity commenced with 1600 MW and the scheduled generation was 924 MW which was revised on a total of nine occasions in the course of the day, by the SLDC. Obviously, finding no positive response, a demonstration notice was issued by the SLDC received by the SGS at 14:48 hours. The declared capacity and the scheduled generation, both at 1650 MW was neither achieved at the 4th time block nor at any time after that.

36. The situation was slightly better on 31.01.2017 when the declared capacity commenced with 1473.12 MW and the scheduled generation was 924 MW. Two demonstration notices were issued; one received by the SGS at 08:20 hours and the other at 09:23 hours. The declared capacity was not achieved at the 4th time block from the first notice. However, at the 3rd time block from the first notice, that is the 7th time block from the first notice it was achieved. The finding of misdeclaration insofar as the failure to demonstrate the declared

capacity, on each of these days thus stands established unequivocally.

37. PSEB³ was in the context of the generating stations using both gas and liquid, to fire their plants; the use of gas being more economical. The allegation was of substitution of fuel, thus receiving more than the due share of variable charges by under-declaring the generation capacity on gas, while declaring more on liquid fuel. The excess generation alleged by use of gas came to 1% of the declared capacity on gas, which was found to be within practical limits, relatable to gross calorific value of gas received on a day-to-day basis, totally inapplicable to the instant case.

38. On the above reasoning, we set aside the order of the APTEL and restore the order of the SERC. We also modify the restored order to the extent of interfering with the finding that Regulation 11.3.13 provides the procedure to deal with the measure of *gaming* under Regulation 11.3.4 & 11.3.12; which we have found to be distinct misdemeanors and the finding that on imposing penalty based on a failure to demonstrate the declared capability, '*deliberate intention and motive to make money*' are necessary ingredients; which we have found otherwise. The consequences of such reversal insofar as the

affirmation of the penalty imposed and the resultant interest liability if any, shall necessarily follow. Any surcharge paid on the bills only for reason of deductions made of the penalty imposed, based only on the reversal of the order of the SERC shall also be refunded to the PSPCL, with interest/surcharge at the same rate since the SGS had the benefit of such amounts in the ensuing period after the order of APTEL.

39. The appeals are allowed with the above directions.

40. Pending applications, if any, shall also stand disposed of.

..... J.
(SANJAY KUMAR)

..... J.
(K. VINOD CHANDRAN)

**NEW DELHI;
MAY 20, 2026.**