

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**Appeal Nos. 32 of 2007, 164, 165 of 2006 & Revision
Petition Nos. 1 & 2 of 2007**

Dated: December 6, 2007

Present:

Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member
Hon'ble Mr. H.L. Bajaj, Technical Member

Appeal No. 32 of 2007

IN THE MATTER OF:

Malwa Industries Ltd.
Village Harijan, Kohara-Machiwara Road,
Distt. Ludhiana (Punjab)
Having its registered office at
230, Industrial Area-A,
Ludhiana (Punjab)-141 003 ... Appellant
V/s.

1. Punjab State Electricity Regulatory Commission,
SCO No. 220-221, Sector 34-A,
Chandigarh-160 022
2. Punjab State Electricity Board,
The Mall,
Patiala (Punjab) -147 001 ... Respondents

Counsel for the Appellant(s) : Ms. Mandakini Singh for
Mr. Ramji Srinivasan

Counsel for the Respondent(s) : Mr. M.G. Ramachandran,
Mr. Anand K. Ganeshan and
Ms. Swapna Seshadri for PSERC
Ms. Suruchi Suri for PSEB

Appeal No. 164 of 2006 & Revision Petition No. 1 of 2007

IN THE MATTER OF:

Chattisgarh State Electricity Board,
Danganiya, Raipur 492013,
Represented by its Additional Superintending
Engineer (Commercial) ... Appellant

V/s.

1. Chattisgarh State Electricity Regulatory Commission,
Civil Lines Raipur-492013, represented by its Chairman
2. Shri Bajrag Power & Ispat Ltd.,
522/C, Uria Industiral Area, Raipur,
Represented by its Managing Director ... Respondents

Counsel for the Appellant(s) : Mr. K. Gopal Choudary

Counsel for the Respondent(s) : Mr. M.G. Ramachandran,
Mr. Anand K. Ganeshan and
Ms. Swapna Seshadri for PSERC
Mr. Karan Mehra for Vandana Global
Mr. Sanjay Sen & Mr. Manoj Madhvan for
Bajrang (SBPIL)

Appeal No. 165 of 2006 & Revision Petition No. 2 of 2007

IN THE MATTER OF:

Chattisgarh State Electricity Board,
Danganiya, Raipur 492013,
Represented by its Additional Superintending
Engineer (Commercial) ... Appellant

V/s.

1. Chattisgarh State Electricity Regulatory Commission,
Civil Lines Raipur-492013, represented by its Chairman
2. Vandana Global Ltd.,
Vandana Bhavan,
M.G. Road, Raipur,
Represented by its Director ... Respondents

Counsel for the Appellant(s) : Mr. K. Gopal Choudary

Counsel for the Respondent(s) : Mr. M.G. Ramachandran,
Mr. Anand K. Ganeshan and
Ms. Swapna Seshadri for PSERC
Mr. Karan Mehra for Vandana Global
Mr. Sanjay Sen & Mr. Manoj Madhvan for
Bajrang (SBPIL)

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

By this common judgment, we propose to dispose of
three appeals and two revision petitions as the point in issue

relates to transfer of surplus electricity generated by a company through its captive power plants to its sister concerns set up by its share holders. Appeal No.32 of 2007 is being treated as the lead case.

2. Appeal No.32 of 2007 is directed against the order of the Punjab State Electricity Regulatory Commission (for short 'PSERC'/'Commission') dated January 10, 2007 in Petition No. 10 of 2004, whereby the PSERC rejected the petition of the appellant seeking permission to transfer surplus electricity generated by its captive power plant to its sister concern namely Malwa Cotton Spinning Mills Ltd. until the appellant completes its expansion programme, after which, the whole power generated through its CPP would be utilized by the appellant itself. The petition preferred by the appellant before the PSERC was based on the following averments:-

- i) The appellant is installing 6 M.W. captive power plant at its premises at Machchiwara, Ludhiana, Punjab;
- ii) The CPP would run on biomass;

- iii) The appellant shall use its own dedicated existing power distribution system within the premises and no infrastructure from the Punjab State Electricity Board (for short 'PSEB') would be needed;
- iv) On installation of CPP, the existing connection of the PSEB from which the appellant draws power shall be maintained but the load may be reduced;
- v) The appellant has a cluster connection of 66 KV with single meter for three units at Machchiwara as per the following details:-
 - a) one unit belonging to the appellant;
 - b) Two units belonging to its sister company namely, Malwa Cotton Spinning Mills Ltd.
- vi) The existing DG set installed at the premises of the appellant shall be used as an auxiliary supply and accordingly PSEB connection and DG set will be used during regular maintenance of CPP or break down.
- vii) On installation of the CPP, the appellant shall consume not less than 65% of the electricity generated through CPP. Ultimately the appellant proposes to use 100% of the electricity generated through CPP after expansion of capacity of its unit for manufacture of denim. In the meanwhile, the appellant be allowed to transfer surplus power generated by the CPP to its sister concern, having

two adjoining units. The supply to the sister concern shall be made through already existing dedicated power distribution system within its premises and no infrastructure from PSEB will be required.

3. The PSERC rejected the prayer of the appellant on the following two grounds:

(i) the so-called sister concern of the appellant with reference to the electricity generated by the CPP set up by the appellant does not comply with the conditions of ownership as well as consumption as laid down in Rule 3 of the Electricity Rules, 2005(hereinafter called 'Rules of 2005'); and

(ii) transfer of electricity from the CPP to its so called sister concern cannot be permitted, even by using dedicated transmission lines without a licence under Section 12 of the Electricity Act, 2003 (for short 'Act of 2003').

4. We have heard the learned counsel for the parties.

5. It was vehemently argued by the learned counsel for the appellant that the appellant fulfils the requirements of Rule 3 of the Rules of 2005 in as much as the captive users including two units of Malwa Cotton Spinning Mills Limited hold much more than 26% of the ownership in the CPP and not less than 51% of the aggregated electricity generated in the CPP will be consumed for the captive use. Learned counsel submitted that the Commission was under a misapprehension that the sister concern alone should hold 26% of the ownership in the CPP. He also submitted that the interpretation placed by the Commission on Rule 3(1) of the Rules of 2005 and Explanation 1(c) to the Rule is erroneous. It was pointed out that according to the Commission the first part of the definition of ownership contained in explanation 1(c) refers to generating stations set up by a special purpose vehicle, while second part of the explanation relates to proprietary ownership of a CPP covered under Rule 3(1)(a). It was urged that the first part of explanation 1(c) does not merely apply to generating stations set up by a special purpose vehicle alone but it also applies to

proprietary ownership of a CPP set up by a company or any other body corporate including company like the appellant. The learned counsel also canvassed that no licence is required by the appellant for supply of surplus power to its sister concern. On the other hand, it was submitted by the learned counsel for the PSEB and the counsel for the Commission that the appellant does not fulfil the requirements laid down in Rule 3 of the Rules of 2005 for being held as captive generating plant. It was also contended that Malwa Cotton Spinning Mills Limited cannot be treated as sister concern of the appellant. This being so, it was urged that it is not legally permissible for the appellant to supply its surplus power to Malwa Cotton Spinning Mills Limited. The learned counsel also submitted that the appellant cannot in any event transfer the surplus power to Malwa Cotton Spinning Mills Limited as it has not obtained a licence in accordance with Sections 12 & 14 of the Act of 2003.

6. We have considered the submissions of the learned counsel for the parties.

7. First of all, it must be clarified as to what the captive generating plant means? The task is made easier as the term has been defined by Section 2(8) of the Act of 2003. Section 2(8) is set out below:-

“ Captive generating plant” means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such cooperative society or association;

8. The aforesaid definition of expression ‘captive generating plant’ specifies what the expression means and what it includes. The use of the word ‘means’ in the definition clause indicates that the definition is meant to be exhaustive but the use of the word ‘includes’ in the definition clause expands its meaning. In *Kasilingam vs. P.S.G. College of Technology*, AIR 1995 SC 1395, it was held that the use of the word ‘means’ in the definition clause shows that the definition of the expression is a hard & fast definition and no other meaning can be assigned to it than is put down in the definition. It was further held that the word ‘includes’ when used in the definition clause enlarges the meaning of the expression being

defined. In Mahalakshmi Oil Mills Vs. State of Andhra Pradesh, AIR 1989 SC 335, it was held that the word 'includes' is generally used in the interpretation clause in order to expand the meaning of the words 'occurring in the body of the Statute'. To the same effect is the decision of the Supreme Court in CIT vs. Taj Mahal Hotel, AIR 1972 SC 168, wherein it was held that the word 'include' is often used in interpretation clauses in order to enlarge the meaning of the words and phrases occurring in the body of the statute and when it is so used these words and phrases must be as comprehending not only such things as they signify according to their nature and import but also those things which interpretation clause declares that they shall include. Since Section 2(8) of the Act of 2003 in the beginning uses the word 'means' to define a 'captive generating plant', the definition is to be considered as an exhaustive one. The subsequent use of the word 'includes' in the definition clause, however, extends the meaning of the above said expression. It does not in any way curtail the width of the opening part of the definition of 'captive

generation plant’, which means a power plant set up by any person to generate electricity primarily for its own use. It merely enlarges the meaning of the expression being defined without changing or altering its basic meaning.

9. Thus, a captive generating plant is one which is set up by any person for generating electricity primarily for his own use. This includes a power plant which is set up by any cooperative society or association of persons for generating electricity primarily for use of their members. The word ‘primarily’ has not been defined in the Electricity Act but the accepted meaning of the term is ‘mainly’ or ‘mostly’. Therefore, any person claiming to have set up a captive generating plant must use the power generated by it mainly for its own use. That means while most of the power is to be used by it, the surplus or remaining power may not be used by it but it still would come within the definition of ‘captive generating plant’. In order to lend clarity to the provision, the word ‘person’ occurring in clause 2(8) of the Act of 2003 needs to be explained. For this purpose, we need to refer to the definition

of 'person' in Section 2(49) thereof. This provision gives inclusive definition to the word 'person'. According to it 'person' includes any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person. Therefore, a company or body corporate or association or body of individuals or artificial juridical person falls within the definition of 'person'. Undoubtedly, the appellant is a person, since it is a company incorporated under the Companies Act.

10. As per the averments made in the amended petition (before the PSERC) filed by the appellant, the appellant is to consume not less than 65% of the electricity generated by CPP and ultimately it proposes to use 100% of the electricity generated by it. The averment that the appellant is to consume 65% of the power generated has not been properly traversed. This being so, the appellant fulfils the criteria for the application of Section 2(8) of the Act under which power generating plant of the appellant is to be considered as a captive generation plant.

11. The Central Government in exercise of powers conferred under Section 176 of the Electricity Act, 2003 (Act 36 of 2003) has made rules called 'The Electricity Rules, 2005'. Rule 3 of the Rules of 2005 lays down the requirements of Captive Generating Plant. Rule 3 being the primary rule on the basis of which the Commission has held that the generating plant of the appellant does not fulfil the criteria needs to be set out for the purpose of interpretation of its relevant provisions:

“3. Requirements of Captive Generating Plant – (1) No power plant shall qualify as a ‘Captive Generating Plant’ under section 9 read with clause (8) of section 2 of the Act unless –

(a) in case of a power plant –

(i) not less than twenty six per cent of the ownership is held by the captive user(s), and

(ii) not less than fifty one per cent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered co-operative society, the conditions mentioned under paragraphs (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one per cent of the electricity

generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten per cent;

(b) In case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including -

Explanation - (1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and

(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustration

In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen per cent of the equity shares in the company (being the twenty six per cent proportionate to Unit A of 50 MW) and not less than fifty one per cent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

(2) It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

Explanation – (1) For the purpose of this rule –

- (a) “annual basis” shall be determined based on a financial year;*
- (b) “captive user” shall mean the end user of the electricity generated in a Captive Generating Plant and the term “captive use” shall be construed accordingly;*
- (c) “ownership” in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;*
- (d) “Special Purpose Vehicle” shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity”.*

12. As per Rule 3(1)(a), the power plant in order to be considered as captive generating plant is required to satisfy the twin test:-

- (i) not less than twenty six percent of the ownership must be held by the captive user (s), and*
- (ii) not less than fifty one per cent of the aggregate total electricity generated in the plant, determined on an annual basis, is consumed for the captive use.*

The two provisos to Rule 3(1)(a) are in the nature of exceptions to it.

In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory vs. Subhash Chandra Yograj Sinha*, AIR 1961 SC 1596, it was held that “as a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule”.

Again in *S. Sundaram Pillai and Ors. vs. V.R. Pattabiraman & Ors.* (1985) 1 SCC 591, it was held that “while interpreting a proviso, care must be taken that it is used to remove special cases from the general enactment and provide for them separately”.

In *Macbeth vs. Ashley*, LR 11 (1870-75) 352, the House of Lords held that the exception cannot be allowed to swallow up the general rule. This decision was taken note of by the Supreme Court in *Raghuthilakathirtha Sreepadangalavaru Swami (Sree) vs. State of Mysore*, AIR 1966 C 1172.

In *Director of Education (Secondary) vs. Pushpendra Kumar*, (1998) 5 SCC 192, it was held that “a provision in the nature of an exception cannot be so construed as to subsume

the main provision and thereby nullify the right conferred by the main provision”.

13. Having regard to the aforesaid decisions, it can be safely stated that a proviso is in the nature of a qualification or an exception and it does not nullify, subsume or swallow the general rule.

14. This being the position, the two provisos, which are exception to the aforesaid main rule have no application to the instant case as the case of the appellant squarely falls in Rule 3(1)(a).

15. Rule 3(1)(b) has also no application as it applies to generating station owned by a company formed as special purpose vehicle for setting up of generating stations. It needs to be pointed out that it is not the case of the parties that the generating station in question is owned by a company formed as a special purpose vehicle for the generating station. Therefore, Rule 3(1)(b) is of no application.

16. It was submitted that while Rule 3(1)(a) determines status of power plant as captive, based on ownership, Rule 3(1)(b) deals with status of captive power plant set up by a company formed as special purpose vehicle. It was further submitted that the word 'ownership' in Explanation 1(c) to Rule 3 of the Rules of 2005 applies to CPP set up by a company formed as special purpose vehicle only and not to the CPP owned by association of persons. The term 'ownership' is defined by Explanation 1(c) to Rule 3 of the Rules of 2005.

The explanation reads as under:-

“ownership” in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant”.

17. First part of the Explanation 1(c) applies to a company or any other body corporate which has set up a generating station. Since the appellant is a company incorporated under the Companies Act, therefore, the first part of Explanation-1(c) shall apply and ownership shall mean equity share capital with voting rights. First part will apply to all captive power

plants in the ownership of a company notwithstanding the fact that the company has not been constituted by a special purpose vehicle. No limitation can be read into the first part of explanation 1(c). It cannot be held that the first part only applies to companies formed by a special purpose vehicle and not to any other company or body corporate. Reading a limitation will do violence to the language of Explanation 1(c). First part of Explanation 1(c), therefore, is applicable to the case of the appellant. Rule 3(1) (a) (i) read with Explanation 1(c) requires that not less than twenty six per cent of the ownership shall be held by the captive user(s). Letter 's' in brackets has been suffixed with the word 'user' indicating that the captive users collectively or singly must have not less than twenty six per cent of the ownership in the power plant. In case there is one captive user, it should be minimum twenty six per cent and in case there are two or more than two captive users, still it should be twenty six per cent. Minimum twenty six per cent of the ownership in the power plant is to be held collectively by the captive user(s) and not individually.

Otherwise the provision [Rule 3(1)(a)(i) of the Rules] would have been to the following effect:—

‘No power plant shall qualify as a captive generating plant under Section 9 read with clause (8) of Section 2 of the Act of 2003 unless-

(a) in case of power plant not less than twenty six per cent of the ownership is held by a captive user’....

18. The framers of the rules have not used the letter ‘a’ before captive user in Rule 3 rather it has used the letter ‘s’ in brackets suffixed to the word ‘user’, thereby clearly indicating that the ownership of the captive users in the power plant collectively should not be less than twenty six per cent. In the amended application, the share-holding of the promoters in the appellant company has been given. The share-holding is as follows:-

Shareholder Category	Equity Shares owned	
	Number	%
Promoters		
Malwa Cotton Spinning Mills Limited	9,630,700	23.93
Rishi Growth Fund Private Limited	9,390,000	23.33
Neelam Growth Fund Private Limited	9,323,000	23.17
Jangi Growth Fund Private Limited	9,302,600	23.12
Sub Total (A)	37,646,300	93.55

Promoter Group

S.A. Growth Fund Private Limited	185,400	0.46
Sub Total (B)	185,400	0.46
Total Promoter and Promoter Group holdings (C=A+B)	37,831,700	94.01
Other Investors		
Aeneas Evolution Portfolio Limited	1,417,000	3.52
Minivet Limited	750,000	1.86
Prime Holding Private Limited	150,000	0.37
Divoja Investment And Finance Private Limited	47,000	0.12
Sub Total (D)	2,364,000	5.87
Others (E)	45,600	0.11
Total share capital (F=C+D+E)	40,241,300	100.00

19. It is well settled that a company is a legal entity, separate and independent of its shareholders. It owns hundred percent ownership of its assets. This being so, CPP in question is owned by the appellant. Besides the appellant is also a captive user of the generating plant. Though the ownership of the CPP is that of the company but for the purpose of Rule 3(1)(a) read with explanation (1)(c) ownership in relation to the CPP will mean the equity share capital with voting rights of captive users. As seen from above, the total shareholding of the main promoters is 93.55%. Therefore, their

ownership/voting rights for the purposes of the Rule are to the extent of 93.55%, which is obviously much more than 26% of the ownership in the power plant. The other criteria laid down in Rule 3(1)(a)(ii) which requires not less than fifty one per cent of the aggregate electricity generated in such plant, determined on an annual basis must be consumed for the captive use is also being fulfilled as per the averments made in the amended petition. It is categorically stated therein that the consumption of power is 100% by the appellant herein and its sister concern and 100% of the CPP ownership is held by the captive users.

20. Thus, both the criteria laid down in Rule 3 for considering the power plant owned by the appellant as CPP are satisfied.

21. The next question to be considered is whether, the appellant requires a licence to transfer surplus power generated by it to its sister concern.

22. Section 9 deals with captive generation. Section 9 has been recently amended by Act No. 26 of 2007 dated May 28, 2007. Section 9, after amendment, reads as follows:-

“9. Captive Generation – (1) *Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:*

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of Section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission”.

23. According to proviso to sub-section (1) of Section 9, no licence is required under the Act of 2003 for supply of electricity generated from a captive generating plant to any licensee and to any consumer subject to the regulations made under sub-section (2) of Section 42.

24. It is significant to note that in case the captive power plant chooses to supply electricity to any 'consumer', no licence is required. If this is so, it does not stand to reason that when the captive generating plant supplies electricity to its own sister concern, it would need to have a licence. A 'consumer' could be a 'sister concern' or 'any other consumer'. The word 'consumer' has been defined by Section 2(15) of the Act of 2003. The definition clause reads as follows:-

"consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be"

25. From the aforesaid clause, it is clear that the word 'consumer' has been used in a very wide sense. Consumer means any person who is supplied with electricity by a licensee or Govt. or by any other person. Therefore, it is not necessary that supply to a consumer by a CPP should be made by a licensee or the Government. Consumer even includes a person whose premises for the time being are connected for the purposes of receiving electricity with the works of a licensee. There is no dispute that Malwa Cotton Spinning Mills Ltd., a sister concern of the appellant, is connected with the Works of the PSEB. This is clear from the reply of the PSEB to the amended petition filed by the appellant herein. In para (g), it is stated that Malwa Cotton Spinning Mills Ltd. has an existing load of 850 KVA. It is also stated in para (e) of the reply that the respondent has allowed a cluster sub-station of 66 KV under account no. LS-17 for a cluster of 4 industries including Malwa Cotton Spinning Mills Ltd. (Worsted Division) and Malwa Cotton Spinning Mills Ltd. (Processing House). Once the sister concern is connected with the Works of the

PSEB, it falls within the definition of 'consumer'. Therefore, under Section 9(1) of the Act of 2003, surplus power from the captive generating plant can be supplied by the appellant to its sister concern, Malwa Cotton Spinning Mills Ltd. without a licence but subject to the Regulations framed under subsection (2) of Section 42.

26. It was submitted by the respondents that the word 'supply' occurring in second proviso to Section 9 means sale to a licensee or a consumer as per Section 2(70) of the Act of 2003 and not transmission or distribution for which licence is required. We do not find any force in the argument. Sale cannot be complete without transfer of the item sold. In other words, sale comprehends transfer of property in goods, which in the case of power can be achieved only by transmission of energy to the consumer or licensee. The purpose of the amendment would be frustrated in case it is held that the owner of a captive power plant would be required to take out a licence for delivery of electricity to the licensee or a consumer. The whole object of the amendment is that every unit of

electricity should be usefully employed and not wasted. There are endemic power shortages in the country and the entrepreneurs need to be encouraged to set up generating stations. The amendment is to facilitate supply of electricity by the captive plants. In case restrictions are read into the second proviso to Section 9 (1) of the Act of 2003, as inserted by Act No. 26 of 2007, it will be difficult to attract investment in the sector.

27. In the matter of Universal Cables Limited & Anr. Vs. Madhya Pradesh Electricity Regulatory Commission & Anr. (Appeal Nos. 20 of 2007 & 77 of 2007 & IA No. 99/07), this Tribunal has already taken a view that the consumer can take electricity from the CPP and the CPP does not require a licence to supply electricity generated by it subject to Regulations framed under sub-section (2) of Section 42.

28. It is not necessary to refer to the other provisions of the Act of 2003 in view of the interpretation placed by us on second proviso to Section 9(1). The Judgment of the Bombay High Court dated April 4, 2005, rendered in Bhushan Steel

Limited, in writ petition No. 882 of 2005, is not applicable to the case in hand in as much as this was a Judgment rendered prior to the amendment of Section 9 of the Act of 2003. Besides, it was not a case of supply of power to a sister concern of a company owning the CPP but the supply was for a third party.

29. Before parting with the matter, we may also point out that the PSEB shall have control over the dedicated transmission lines set up by the appellant for supply of power to the sister concerns. The PSEB can make its own arrangement for switching and metering that may be necessary for keeping a check on the supply of electricity to the two Divisions of the sister concern of the appellant.

30. Accordingly, the appeal is allowed and the Order of the Punjab State Electricity Regulatory Commission is set aside. The Punjab State Electricity Regulatory Commission shall decide the petition afresh in the light of the observations made by us.

31. No costs.

Appeal No. 164/06 and Revision Petition No. 1 of 2007

32. This appeal and the revision petition are covered by the decision rendered by us in Malwa Industries Ltd.(Appeal No. 32 of 2007) and therefore, the appeal and the revision petition merit dismissal.

33. Before the Commission, the second respondent, which is a company, had filed a Chartered Accountant's certificate to the effect that the share capital of the second respondent is about 9.45 crore of which Shri Bajrang Metalics and Power Ltd. (for short 'SBMPL') holds shares worth Rs. 2.70 crore as on September 30, 2005. Thus, the shareholding of SBMPL in the second respondent company works out to 28.57% of its total shareholding, which satisfies the first condition specified in Rule 3(1)(a) of the Rules. The Commission came to the conclusion that the consumption of power from the CPP, by the second respondent and its sister concern, SBMPL qualifies to be treated as the 'own consumption' of the appellant and

therefore, the petition of second respondent needs to be accepted subject to the condition that the consumption of electricity by the captive users shall not be less than 51% over a financial year, and in case it is not so, it would be treated as 'supply of electricity by a generating company' in terms of provisions of Rule 3(2) of the Rules of 2005.

34. In the circumstances, therefore, the Commission was of the view that the CSEB is entitled to charge for wheeling of electricity.

35. The order of the Commission being in consonance with the conditions laid down by rule 3(1)(a) of the Rules of 2005 and the view taken by us in Appeal No. 32 of 2007, there is no scope for any interference with the orders passed by the Commission. Accordingly, the appeal and the revision petition are dismissed but with no order as to costs.

Appeal No. 165/06 and Revision Petition No. 1 of 2007

36. This appeal and the revision petition are covered by the decision rendered by us in Malwa Industries Ltd. (Appeal No. 32 of 2007) and therefore, the appeal and the revision petition merit dismissal.

37. It has been found by the Commission on the basis of the certificate of the Chartered Accountant that the ownership of the power plant is held by the captive users to the extent of 28.83% and they will be consuming 51% of the aggregate electricity generated in the plant alongwith respondent no. 2, which has set up the CPP. Therefore, both the following conditions as laid down in Rule 3(1)(a) of the Rules stand satisfied:-

- (a) not less than 26% of the ownership of the generating plant must be held by the captive users; and
- (b) not less than 51% of the aggregate total electricity generated in the plant, determined on an annual basis, is consumed for the captive use.

38. Since the case of the second respondent is covered by main Rule 3(1)(a) of the Rules of 2005, there is no requirement that the sister concerns ought to consume power in proportion to their shareholding in respondent no.2. Accordingly, the appeal and revision petition are dismissed. 'No costs'.

(Justice Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member

(H.L. Bajaj)
Technical Member

Dated : December 6, 2007