

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY  
Appellate Jurisdiction, New Delhi**

Appeal No. 232 of 2006

Dated this **12<sup>th</sup>** day of **November, 2007**

**Coram : Hon'ble Mr. H. L. Bajaj, Technical Member  
Hon'ble Ms. Justice Manju Goel, Judicial Member**

**IN THE MATTER OF:**

M/s. Tata Steel Limited  
24, Homi Mody Fort Street,  
Mumbai

... Appellant

Versus

1. Orissa Electricity Regulatory Commission  
Bidyut Niyamak Bhawan, Unit-VIII,  
Bhubaneswar – 751012  
District: Khurda, Orissa
  2. North Eastern Electricity Supply Company of Orissa Ltd.  
Januganj, Balasore,  
Dist. Balasore, Orissa
  3. State of Orissa  
Commissioner-Cum-Secretary,  
Department of Energy,  
Orissa Secretariat,  
Bhubaneswar, Dist. Khurda
- ... Respondents

Counsel for the Appellant : Mr. Ashok K. Parija, Sr. Advocate  
Mr. R. M. Patnaik, Advocate  
Mr. K. N. Tripathy, Advocate  
Mr. Prabhu Prasad Mohanty,  
Advocate  
Mr. Venkat Subramaniam, Advocate  
Mr. Sawsay Patnaik,

Ms. Happy Patnaik, Manager Sales  
Co-ordination and  
Mr. Sanjay Patnaik, Chief Resident  
Executive for Tata Steel Ltd.

Counsel for Respondents: Mr. Raj Kumar Mehta, Advocate  
Ms. Suman Kukrety, Advocate  
Mr. Shobhit Jain, Advocate for  
North Eastern Supply Co. of Orissa  
Ltd., Resp. No.2

## **J U D G M E N T**

### **Ms. Justice Manju Goel, Judicial Member**

The challenge in this appeal is to the order of the Orissa Electricity Regulatory Commission (OERC for short) dated 21.07.2006 in Case No. 8 of 2006 whereby it refused to grant 25% discount on energy charges upto 50% load factor to the appellants Fero Alloys industry at Joda for the financial year 2005-06 although similar relief had been granted to four other ferro alloy industries of the State including appellant's other unit at Bamanipal. The

impugned order is assailed on the ground that the appellant's ferro alloys industry at Joda, hereinafter referred to as the Joda unit has been discriminated against in violation of the equality principle enshrined in Section 62(3) of the Electricity Act 2003.

2) North Eastern Electricity Supply Corporation (NESCO for short) in its tariff petition, Case No. 141 of 2004, had prayed for special tariff for four ferro alloy industries viz. Ferro Alloys Corporation (FACOR for short), M/s. Ispat Alloys Limited, M/s. IDCOL Ferro Chrome & Alloys Limited and appellant's ferro alloys Plant at Bamanipal with whom it had entered into special agreements. The Commission after considering the case put forth by NESCO and considering the attending circumstances passed the following order:

*“8.26 In view of the aforesaid facts, the Commission concurs with the proposal of NESCO to allow a special tariff to those industries which had enacted agreement(s) to avail power at the special rate from NESCO upto 09.12.04 irrespective of the contract demand:*

**Table : 44**

***Existing tariff for Power Intensive /Other Industries***

	<i>AT E.H.T.</i>	<i>AT H.T.</i>
<i>Demand Charge</i>	<i>200 KVA</i>	<i>200 KVA</i>
<i>Energy Charge</i>	<i>290 P/U</i>	<i>300 P/U</i>

<i>Consumption in excess 50% LF</i>	<i>180 P/U</i>	<i>200 P/U</i>
<i>Consumption in excess or 60% LF</i>	<i>150 P/U</i>	<i>170 P/U</i>

8.26.1 *The Commission, therefore, without upsetting the existing tariff structure of power intensive industries at HT and EHT directs that the industries covered under special agreement will be allowed a discount of 25% on the energy charges up to 50% load factor.”*

3) It may be mentioned here that the appellant had earlier challenged the tariff order of OERC dated 22.03.2005 on the tariff petition (Case No. 141 of 2004) of respondent No.2, NESCO, the distribution company of the relevant area, in writ petition No. 5959 of 2005. The High Court vide its order of 07.03.06 disposed of the writ petition with the direction “to rehear the objection of the appellant and to pass a reasoned order as expeditiously as possible in terms of Section 62(3) of the Electricity Act”. Following this direction both the appellant and NESCO filed their application and objection respectively.

4) This application of the appellant came to be registered as Case No. 8 of 2006. The appellant pleaded in this application that it’s Joda Unit is equal to the aforesaid four industries, hereinafter referred to as the favoured industries, in respect of load factor, power factor, voltage, consumption of energy and nature of supply

and, therefore, should have been treated alike with those favoured industries, that the appellant had been discriminated because it did not have a special agreement, that the special agreements had been executed for drawing power from NTPC and that such special agreements would not be a ground for discrimination.

5) NESCO filed a reply to the application wherein it alleged that the Joda Unit was not treated as an export oriented industry while allocation was made by the Central Electricity Authority and that no special agreement was executed with Joda unit for tariff at concessional rate as was done with the favoured industries following High Court's judgment in MAs No. 96/2000, 300/2000 & 298/2000.

6) The OERC passed the impugned order, the relevant part of which is as under:

*".... The export oriented units have been treated on a separate footing from other power intensive class of consumers to which these export oriented units belong. The purpose of use by the Appellant Company is different from the purpose of use by the 4 other export oriented industries for which it is appropriate that there could be difference of tariff between the two categories."*

7) The appellant contends that it is similarly situated as compared to the four favoured ferro alloys power intensive industries of the State of Orissa viz. M/s. FACOR, M/s. Ispat Alloys Ltd., M/s.IDCOL Ferro Chrome & Alloys Ltd. and the appellant company's Ferro Alloys Plant at Bamanipal in respect of load factor, power factor, voltage, total consumption of energy, nature of supply and purpose of supply. The appellant alleges that the purpose of supply was manufacture of different types of ferro alloy products and a new classification of export oriented unit on the ground of a different purpose of use could not be justified in view of the provision of Section 62(3) of the Electricity Act 2003. The appellant also contends that M/s. FACOR, M/s. Ispat Ferro Alloys, M/s.IDCOL Ferro Chrome & Alloys Ltd & Ferro Alloys Plant at Bamanipal have since ceased to be Export Oriented units.

8) It may be mentioned here that the petitioner has pleaded that the two grounds of discrimination namely: (1) the appellant's Joda Unit is not an Export oriented unit and (2) the Joda Unit had not executed a special agreement have already been found violative of the provisions of 62(3) of the Electricity Act 2003 by the judgment of the High Court dated 22.03.05. This however, is not correct reading of the order of the High Court. As mentioned above the High Court remanded the case to the OERC for rehearing the objections of the appellant. The order only found that the OERC had not considered the case of the appellant in terms of the

statutory mandate of Section 62(3) of the Electricity Act 2003 and the relief sought by the appellant before the OERC at the time of fixation of tariff had not been dealt with by OERC and no reason had been ascribed therefor. The High Court did not deal with the merit of the appellant's contentions at all.

9) The appeal is contested by the respondent No.2 NESCO. NESCO defends the impugned order as well as the tariff order dated 22.03.05 for the financial year 2005-06 inter alia on the ground that the four favoured ferro alloys industries mentioned above were already availing of concessional tariff under a special agreement on account of their being export oriented units and such benefit could not be extended to the appellant.

10) We have heard the counsel for the parties and have given our anxious thoughts to the subject. We have gone through the record of the previous litigation on the issue. We feel that a brief history of how the four ferro alloy industries got the special concession needs to be related first.

11) On 29.03.94, the Government of India in a meeting held to consider the question of allocation of power from the National Thermal Power Corporation to the units of Ferro Alloys Corporation decided to allocate NTPC power to the export oriented units during off peak hours. The Minister of Power, Government of India wrote

to the Chief Minister of Orissa indicating there in that NTPC would be in a position to supply additional power of its stations in eastern region under certain terms & conditions and also agreed that EOUs shall continue to be the customers of the Orissa State Electricity Board for supply of power during off peak hours. This led to signing of a supplementary agreement between Orissa State Electricity Board and the EOUs for NTPC power during off peak hours.

12) On 01.04.1996, the Orissa Electricity Reforms Act 1995 came into force. Grid Corporation of Orissa (GRIDCO) was formed as successor to the OSEB. Similar agreement was executed between GRIDCO & EOUs for supply of NTPC power during the off peak hours. The Commission approved the retail supply tariff of GRIDCO for the years 1998-99 indicating inter alia that the revenue earned by supply of NTPC power shall go to Transmission & Bulk Supply licensee. Later four distributing companies were formed by divesting GRIDCO of the function of distribution and NESCO came into existence. The favoured industries, also called Export Oriented Units (EOUs) were then required to enter into supplementary agreement for NTPC power with NESCO, for the period beyond 31.03.99.

13) After 31.03.99 the EOUs moved the Central Government and the State Government with a request for some concession to enable

them to compete in the international market to boost export for fetching substantial foreign exchange for the country. On 04.05.1999, the Deputy Secretary, Department of Energy, Government of Orissa, wrote a letter to the Managing Director of NESCO:

*“..... As per Govt. of India Policy directives, NTPC power was made available to the 100% EOUs and was transmitted by GRIDCO to these Industries to make their products competitive in the international market and to boost export for fetching substantial foreign exchange for the country. This aspect was informed to the strategic investors in the information memorandum and due diligence reports. These consumers being the consumers of the Distribution companies, they may be allowed to draw NTPC power as before after observing due formalities and concluding due agreement, since such agreement with GRIDCO is no longer available.*

*The 100% EOUs cannot survive unless the power tariff is reasonable. It is, therefore, suggested that the Distribution Companies may work out a competitive tariff for these EOUs and propose to OERC for approval so as to attract them to adopt DISTCO's tariff instead of requesting to avail NTPC power paying transmission charges and*

*wheeling charges to GRIDCO. Action taken in the matter may be informed to this Department.”*

14) NESCO issued notices on EOUs for termination of the supplementary agreement entered into between EOUs and the GRIDCO which had expired on 31.03.99 and required them to enter into fresh agreements with NESCO. It also mentioned in the notice that the State Government in the Department of Energy, by a letter of 04.05.99 had suggested to NESCO to formulate a suitable off peak tariff at mutually agreed terms and conditions and to send proposal to OERC for necessary approval for availing NESCO power instead of NTPC power.

15) One of the EOUs, M/s. FACOR made a representation to the Government of India following which the Government of India wrote, to the Government of Orissa to issue necessary instructions to the GRIDCO, NESCO & other distributing companies for wheeling NTPC power to the export oriented Ferro Alloy Units in Orissa as per original terms and conditions. A similar letter was issued to GRIDCO. In the meeting held on 25.08.99 held on under auspices of the Ministry of Power, Government of India it was recognized that the ferro alloy industries were in continuous depression and if power was not supplied to the EOUs at viable rates, they would face closure.

16) Following this GRIDCO resolved to accept the tariff proposed by the distribution companies for the supply to EOUs subject to approval of OERC. Thereafter, on 01.09.99 a special agreement was signed between the NESCO & the EOUs for supply of power at competitive rates during off peak hours. NESCO filed an application with OERC for approval of the special agreement between NESCO & other EOUs viz. FACOR, M/s. Ispat Alloys Ltd. & M/s. Tata Iron & Steel Co. Ltd. which was registered as case No.1 of 2000. it was specifically pleaded therein NESCO & the EOUs had agreed to concessional tariff so as to enable the EOUs to compete in the global market and also for the benefit of NESCO as the EOUs consumed 60% of the total power distributed by it.

17) The Commission framed seven issues for consideration. Relevant for the present order are issue Nos. 4 & 6 which are as under :

*“Issue No.4 : Whether a special agreement of the type proposed by the petitioner can be approved in the light of provision at clause 80 and 81 of the Distribution Code.*

*Issue No.6 : Whether the licensee can extend to opposite part 1, 2 & 3 a tariff lower than that has been approved by the Commission.”*

18) The Commission observed that both the Government of India as well as Government of Orissa supported desirability of the concessional tariff for EOUs so as to make these industries survive and compete in international market. The Commission further observed that no policy directive has been issued despite the fact that State Government was entitled to issue policy directives under Section 12 (III) of the Reforms Act 1995. The Commission further found that neither the Government of India nor the Government of Orissa had expressed any intention to make up the revenue loss for subsidized rate. The Commission said that under legal mandate available to it there was no scope for concessional tariff on the ground of foreign exchange earning potential, competitiveness of the industry, financial viability of the company or even purpose of use. The Commission said:

*“We are not prepared to accept the argument advanced before us that the Commission is entitled to create a sub-category for any homogeneous group of consumers and determine a separate tariff for the same as has been done in case of domestic consumers. .... We may however observed that decision for creating a sub-category under “Power Intensive Industries” for prescribing a lower tariff may be taken during the next annual revenue requirement exercise and consequential*

*tariff proceedings ..... We hold that the special agreement proposed by NESCO for allowing concessional tariff to EOUs cannot be approved and hence the petition is to be dismissed”.*

19) The refusal of approval by the OERC led to the filing of the appeals before the High Court of Orissa being MA No. 285, 298, 299 & 380 of 2000. The High Court decided the appeals by common judgment of 25.09.2001, copy of which to annexure 13 to the appeal.

20) Before the High Court, both the Central Government and the State Government supported the prayer for a special tariff for the sake of survival of the export oriented ferro alloy units. The GRIDCO also supported the proposal. NESCO offered to absorb the notional loss caused by reduction in the tariff for the EOUs. High Court concluded:

*“.....It should therefore be reasonable to conclude that execution of supplementary agreement was dictated by commercial consideration in the interest of Export Oriented Ferro Alloys Units as well as the NESCO and in view of the undertaking furnished by NESCO by way of an affidavit before the Commission stating therein*

*that they are not going to pass the burden to any of the consumers, it would have been fair and proper on the part of the Commission to approve the same. Accordingly, I direct the OERC for the approval of the agreement in question.”*

21) The above narration clearly points out the genesis of the special agreements as also the rationale behind treating EOUs as a separate class entitled to favourable treatment in the matter of electricity tariff. The Government wanted to provide incentive to the export oriented ferro alloy industry – obviously to ensure foreign exchange earning. This could be possible only if the tariff for them was substantially lower for otherwise it would not have been possible for them to compete in the international market.

22) The above judgment of the High Court of 25.09.2001 was not challenged before the Supreme Court. The appellant itself was a beneficiary of the judgment. It has been enjoying the benefit of the 25% concession in energy charges for its Bamanipal unit which admittedly was a ferro alloys export oriented unit. The appellant now wants the same benefit for the Joda unit on the ground that the Joda unit being similar to all the export oriented units in respect of load factors etc. and also in respect of purpose of supply i.e. to manufacture ferro alloy products cannot be denied the same tariff. In other words the appellant wants to dispute the

classification of the EOU ferro alloy industries as a sub-category of the power intensive industry. The appellant cannot be permitted to take such a stand after availing of the benefit of favourable tariff for its Bamanipal unit on the ground of its being an EOU.

23) We need to be categorical in pointing out that the appellant never claimed parity for its Joda unit with the four favoured industries mentioned earlier on the parameters of foreign exchange earnings. The appellant never claimed that the Joda unit was also an EOU. In fact in 'Further written submission' dated 12.06.06 filed by the appellant before the OERC, the position was clarified in so many words:

*“2. That this Hon’ble Commission after conclusion of the hearing required the Petitioner to indicate as to why its Ferro Alloys Plant at Joda had not availed NTPC power, which had been allocated by the Central Electricity Authority to the other Ferro Alloys Industries.*

*3. That it is the most respectfully submitted the Central Electricity Authority had only extended the benefit of NTPC power to the Export oriented Units and since the Ferro Alloys Plant, Joda of the Petitioner Company was not an Export oriented unit, the Central Electricity Authority had not allocated NTPC power in its favour.”*

24) The next question to be gone into is whether a sub-category of EOUs could be made under the category of power intensive industries in view of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code 2004 (Code for short. This Code was made on 21<sup>st</sup> May, 2004 in exercise of power conferred by Section 181(2)(t), (v), (w), (x) read with part 6 of Electricity Act 2003 as well as Orissa Electricity Reforms Act 1995. Chapter VIII of the order deals with classification of consumers. 15 classifications like domestic, general purposes, public lighting etc. has been created under Regulation 80 of this Chapter. The 13<sup>th</sup> classification of consumers is power intensive industries. This category is described as under :

*“(13) **Power Intensive Industries** – This category relates to supply of power to industries where power is substantially utilized as raw material involving electro-chemical or electro-metallurgical processes with a contract demand of and above 2000 KVA.”*

25) It is contended that since no sub-classification has been provided in the Code, the sub-classification of export oriented industry cannot be sustained. It is very difficult to accept this proposition in view of the genesis of the sub classification, given above, and adherence to such classifications by OERC as well as

ferro alloy power intensive EOUs including the appellant. Chapter VIII, Regulation No.80 does not say that there cannot be any sub-classification under any of these categories. Regulation 80, opens with the following words:

**“80. Classification of Consumer** – *Licensee may classify or reclassify the consumer into various categories from time to time as may be approved by the Commission and fix different tariffs and conditions of supply for different class of consumers. The present classification is as follows:....”*

26) So far as broad classification is concerned we find the power intensive industry in No.13 as extracted above. The opening words, “the licensee may classify” is indicative of the intention not to make the list of classifications in Regulation 80 to be exhaustive.

27) Regulation 81 deals with special agreements and the same is extracted below:

**“81. Consumers under Special Agreement** – *The licensee may, having regard to the nature of supply and purpose for which supply is required, fix special tariff and conditions of supply for the consumers not covered by the classification enumerated in this Code. For such purpose*

*licensee may enter into special agreements with the approval of the Commission with suitable modifications in the Standard Agreement Form. The tariff in such cases shall be separately approved by the Commission”.*

28) Thus Chapter VIII which deals with classification of consumers not only recognizes 15 classifications enumerated in Regulation 80 but also recognizes further classification of consumers who are covered by special agreements. The four favoured industries are covered by special agreements and as mentioned earlier the rationale behind their classifications is their foreign exchange earning potential which is required to be protected in the interest of country's economic growth and development. Therefore, there is no bar in the Regulations for a sub-category of EOUs under the category of power intensive industries. Further Regulation 81 validates a favourable treatment given to the aforesaid four favoured units by way of special agreements.

29) The appellant contends that a new classification could be permissible under the Electricity Act 2003 only on account of difference in consumers load factor, power factor, voltage, total consumption of electricity, geographical position, nature of supply and the purpose for which the supply is required. The appellant says that the Joda Unit is equal in all respects with the four favoured units and that sub-classification on the plea of different

purpose of supply is wrong. The appellant claims that the purpose of supply in all the cases is manufacture of ferro alloy products. We cannot agree with the appellant. The purpose of supply to the four favoured units was for the production of ferro alloys exportable goods and therefore it was distinct from the other ferro alloy industries which were producing primarily for domestic consumption.

30) The appellant challenges the impugned order on the ground that the special treatment has been given to the four EOUs in view of “legacy of the past” and that legacy of the past could not have been a ground for a favourable treatment. Our attention has been drawn particularly to Para 17 of the impugned order which says as under:

*“17. We would like to iterate that the special tariff allowed to the four Ferro Alloys industries is a legacy of the past based on the recommendations of the licensee. It had become necessary as these units for several years have had the benefit of the status of Export Oriented Units which the Applicant Company does not have. To that extent, the ‘purpose of use’ by these consumers is different from the petitioner company or any other similarly placed electricity consumers for the State. When we say similarly placed industries we mean industries*

*availing power supply at EHT and consuming power at a very high load factor.”*

31) The whole impugned order has to be read in order to understand the intention of the Commission. The Commission has categorically concluded that the four EOUs are covered by special agreements and further that the special agreements were entered into with them because they were EOUs earning foreign exchange for the country. The impugned order cannot be challenged on the ground of a sentence here or a sentence there. The impugned order read as a whole leaves no room for doubt that the Commission had declined to treat the Joda Unit on the same footing as the four favoured ferro alloy units because Joda Unit was not a EOU while the others were.

32) Last but not the least is the challenge to the impugned order on the ground that the aforesaid four EOUs of ferro alloy industry have ceased to be EOUs but are still getting a favourable treatment. It is clarified at the time of arguments that these four EOUs have ceased to be 100% EOUs but they are still exporting a substantial part of their product to foreign markets. It may be mentioned here that during hearing of the arguments a question as to what is the definition of the EOU did crop up. It is clear from the record that initially the four EOUs were exporting 100% or nearly 100% of their products and therefore were being treated as a distinct class.

Admittedly, these four units were treated to be EOUs and no special definition of the term was ever evolved for the purpose of the special agreements either by the Government of Orissa or Government of India or by the OERC. For the present this need not detain us since Joda Unit admittedly is not an EOU as is clear from the additional submissions reproduced above.

33) We are presently concerned with the FY 2005-06. It is not disputed that the special agreements were entered into between NESCO and EOUs they were exporting nearly 100% of their product. In case one or more of them subsequently cease to be 100% EOU it is for NESCO and OERC to deal with such unit or units according to law. This cannot give the Joda Unit an additional ground for equality for reduced tariff. The Supreme Court has dealt with the question of negative quality in various judgments. It will suffice to refer to the judgment of *Union of India and Another Vs. International Trading Co. and Another (2003) 5 SCC 437*, in Para 13 of which the Supreme Court has said as under :

*“13. What remains now to be considered, is the effect of permission granted to the thirty two vessels. As highlighted by learned counsel for the appellants, even if it is accepted that there was any improper permission, that may render such permissions vulnerable so far as the thirty two vessels are concerned, but it cannot come to the*

*aid of the respondents. It is not necessary to deal with that aspect because two wrongs do not make one right. A party cannot claim that since something wrong has been done in another case direction should be given for doing another wrong. It would not be setting a wrong right, but would be perpetuating another wrong. In such matters there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution of India (in short “the Constitution”) cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. Even if hypothetically it is accepted that a wrong has been committed in some other cases by introducing a concept of negative equality the respondents cannot strengthen their case. They have to establish strength of their case on some other basis and not by claiming negative equality.”*

34) In view of the law in respect of negative equality the appellant cannot claim that it is entitled to the same favourable treatment as those EOUs who may still be receiving favourable treatment despite having ceased to be 100% EOU.

35) In view of the above analysis, we are constrained to say that there is no merit in the appeal. The appeal is accordingly dismissed with cost.

Pronounced in open court on this **12<sup>th</sup> day of November, 2007.**

**( Manju Goel )  
Judicial Member**

**( H. L. Bajaj )  
Technical Member**

The End