IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
APPELLATE JURISDICTIION, NEW DELHI

Appeal No. 60 of 2006

Dated this the 23rd day of November 2006

Present : Hon'ble Mr. justice E. Padmanabhan, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

M/s Monnet Ispat Limited
Mandir Hasaud, Raipur – 492 101
Chhattisgarh ... Appellant

Versus

1. Chhattisgarh State Electricity Board
Danganiya, Raipur – 492 013
Chhattisgarh

2. Chhattisgarh State Electricity Regulatory Commission
Civil Lines,
Raipur – 492 013
Chhattisgarh ... Respondents

Counsel for the Appellant : Dr. A. M. Singhvi, Sr. Advocate
Mr. Shyam Diwan, Sr. Advocate
Mr. Manoj Sharma, Mr. V. K.Munshi &
Mr. Amit Bhandari, Advocates
Mr. Pankaj Singh, Advocate for Monnet Ispat and Mr. Sunil Mittal, Representative of Monnet Ispat

Counsel for the Respondents : Mr. M. G. Ramachandran,
Ms. Taruna Singh Baghel,
Mr. Anand K. Ganesan, Advocates for CSERC
Mr. Valmiki Mehta, Sr. Advocate and
Ms. Suparna Srivastava, Mr. Rahul Srivastava, Advocates for CSEB
Mr. S. N. Chouwan, Superintending Engineer of CSEB

J U D G M E N T

1. The present appeal has been preferred by Monnet Ispat Limited praying for the following among other reliefs :

"(a) To set aside the Impugned Order dated 17th February, 2006 passed by the Second Respondent in Petition No. 30/2005 (M)

(b) To hold and declare that upto 28th February, 2006 the Appellant is governed by Tariff Order No. 3017 dated 24th February, 2004 issued by the first Respondent with the prior concurrence of the State Government and annexed to the fresh Agreement dated 2nd April, 2005 entered into by and between the Appellant and the first Respondent;

(c) It be ordered and declared that w.e.f. 1st March, 2006 the Appellant shall be governed by the Tariff order dated 6th February, 2006 passed by the CSERC in Petition No. 17/2005(M);

(d) To pass any other appropriate order as this Appellate Tribunal may in its discretion deem fit and proper in the facts and circumstances of the present case."

2. Heard Dr. A. M. Singhvi learned counsel appearing for the appellant, Mr.Valmiki Mehta, senior advocate appearing for Ms. Suparna Srivastava for the 1st respondent, Mr.M.G.Ramachandran advocate for the 2nd respondent, Regulatory Commission.

3. The appellant M/s Monnet Ispat Limited (MIL) is a Public Limited Company manufacturing iron etc. and also engaged in the process of iron ore. The appellant has set up an integrated steel plant at Mandir Hasaud in the State of Chattisgarh. The appellant has entered into an agreement with the then MP Electricity Board for the supply of power and the last of such HT agreement was entered on 26th October, 2002.

4. On 27th March, 1997, Monnet Power Limited (MPL for brevity) an independent company was incorporated as a Public Limited Company to generate power and supply electricity among other objects. MPL set up power plant to generate electricity having a capacity of 44.5 MW at Mandir Hasaud in Raipur District in different phases. To begin with for start-up power to start operations of power plant, on 12th November, 2002 MPL entered into a statutory agreement with the Electricity Board for the purpose of electricity up to the maximum of 750 KVA on 33 KV supply line, which was later on increased to 4000 KVA on 132 KV supply line by a supplementary agreement dated 13th August, 2003 entered with the then Electricity Board. By a letter dated 24th January, 2004 MPL approached the 2nd respondent, Regulatory Commission, to fix a reasonable tariff for its start up operations on the sole ground that the rates agreed in terms of the first and supplementary agreement are on the higher side, unreasonable, unviable and excessive besides being not economical to MPL as a generator.

5. MPL by its letter dated 26th February, 2004 reminded the Superintending Engineer of the first respondent, Board, who has entered into a fresh supplementary agreement for the contract demand of 4000 KVA on 132 KV supply line and to fix a reasonable start up power tariff commensurate with its power requirement of short duration emergencies. On 1st May, 2004 a second supplementary agreement was entered between MPL and the Electricity Board for the supply of 4000 KVA power on 132 KV supply line under its start-up power notified vide notification dated 24th February, 2004 in the place of existing tariff. The supplementary agreement entered on 1st February, 2004 along with start up power tariff notification dated 24th February, 2004, have been filed as Annexure P4 & P5 along with this appeal.

6. The material clause of the second supplementary agreement dated 1st May, 2004 reads thus :

> *"(b) Clause 19(a):- The consumer shall pay to the board every month, charges for the electrical energy supplied to the consumer during the preceding month at the Board's tariff applicable to the class of service and in force from time to time. A copy of HT Tariff No. D of Notification No. 05-01/GA/192/B-1 dated 1st March, 1999 as amended applicable to the consumer upto February 2004 is set out in the schedule attached to this agreement.*
>
> *(b):- The consumer is permitted to change in tariff from 132 KV to part tariff in the said premises to start-up power tariff w.e.f March 2004. The tariff applicable to the consumer w.e.f. March 2004 shall be tariff notified vide No. 02-02/SE-I/Tariff/3071 dated 24th February, 2004 as*

amended applicable to the consumer w.e.f. March 2004 is attached to this supplementary agreement."

7. MPL, Monnet Private Limited, pursuant to a scheme of amalgamation merged with MIL the appellant herein. Amalgamation was approved by the High Court of judicature at Bilaspur on 24th September, 2004 made in company petition No. 4 of '04. Consequently, MPL ceased to exist in the eye of law and the benefit of all contracts entered by MPL with all third parties stood transferred in favour of the appellant.

8. After amalgamation, a fresh statutory agreement in the prescribed Form C-9 dated 2nd April, 2005 was entered by the appellant limited to start-up power consumption in supersession of all previous agreements entered in the past. The material clauses in the agreement are :

"2(a) Commencement of this Agreement shall be either from the actual date on which the Consumer has begun to take electrical energy under this Agreement or the day, immediately following the expiry of three months notice of intimation served by the Board's Executive Engineer of the area on the Consumer that supply of electrical energy is available under this Agreement, whichever is earlier.

(b) Subject to the foregoing sub-clause (a) the Consumer shall commence to take electrical energy under the conditions of this Agreement within three months from the date of notice of the intimation referred to in sub-clause (a) foregoing and shall further complete the electrification of his premises within a reasonable time.

xx xx xx

19. The consumer shall pay to the Board every month, charges for the electrical energy supplied to the Consumer during the preceding month of the Board's tariff applicable to the class of service and in force from time to time. A copy of the current. HT tariff start-up power vide no. 02-02/SE-1/Tariff /3071 dated 24.02.2004 as amended applicable to the consumer is set out in the schedule attached to this Agreement.

xx xx xx

28(a) This agreement shall remain in force for a period of Two years from the date of its commencement under clause 2 above. This period shall not be affected by anything stated hereinafter in this clause.

(b) After the period of years mentioned in sub clause (a) above this agreement shall unless terminated as hereinafter provided as deemed to continue upon the same terms and conditions from year to year provided that after the period of years certain stated in sub clause (a) before the termination of such period.

(c) Upon the expiry of such a notice, the Agreement shall terminate without prejudice to the rights which may have accrued hereunder to either party."

xx xx xx

35. This agreement for supply of electrical energy supersedes all previous contracts for supply of energy at the premises entered into and executed by the Board and the Consumer namely:
HT Agreement dated 12.11.02 for 750 KVA Co supply on 33 KV supply agreement dated 13.08.03 for enhancement of CO from 750 KVA on 33 KV to 4000 KVA."

The Tariff notification dated 24th February 2004 was annexed to the 2nd supplementary agreement dated 1st May, 2004.

9. The 1st respondent, Board, moved the 2nd respondent, Regulatory Commission, under Section 64 of The Electricity Act 2003 namely for determination of tariff for various category of consumers in the State of Chattisgarh for the year 2005-06 in the State. The tariff was fixed and notified to be effective from 1st July, 2005 and to remain in force till 31st March, 2006 or till the next tariff determination.

10. As the appellant's start-up tariff dated 24th February, 2004 (Annexure P-5) was not placed before the Regulatory Commission, in Petition No. 5/05 and there was no occasion for the appellant to go before the Regulatory Commission, appear or contest or take part in the public hearing conducted by the Commission. After the tariff order dated 15th June, 2005 the first respondent, Board, itself realized that no tariff has been prescribed for EHV class of consumers under "other HT Industries category". The Commission without notices to the appellant at the instance of the 1st respondent, Board, fixed a separate start-up tariff. The Commission's said proceedings reads thus :

"2. <u>M/s. MONNET ISPAT LTD. AT MANDIR HASAUD:-</u>

This is a 132 KV supply consumer for 2700 KVA CD and using electricity for start-up power to their power plant. Earlier a separate start-up power tariff was approved for this consumer with licence of State Govt. In new tariff order, no separate tariff is provided to this particular activity thereby this activity has to be covered under other HT industries where itself is not available for 132 KV supply."

11. Behind the back of appellant on 15th June, 2005 a tariff order was passed by the Regulatory Commission which the appellant came to know when it received an inflated electricity bill for the month of July, 2005 for a large sum of Rs. 28,15,815/-. The appellant raised objections while paying the bill under protest. On 29th August, 2005 in response to letter dated 2nd August, 2005, the Regulatory Commission, in purported announcement of a new tariff applicable to the appellant for its start-up operations even that order was not communicated to the appellant. Through enquiry the appellant came to know about the tariff order dated 15th June, 2005 and the appellant moved the second respondent, Regulatory Commission, on 12th September, 2005 requesting the CSERC to fix a special tariff applicable to the applicant for its limited start-up operations. Pending the proceedings the appellant remitted the bill at the revised rate under protest. The appellant made additional submissions on 17th January 2006. While the Petition moved by the appellant was pending, the Commission passed the order for start-up power by order dated 6th February, 2006 in Petition No. 17/05 (M) filed by the President, Urla Industries Association Limited and Others. The appellant not being a party to the said tariff determination moved a review Petition on 15th June, 2005 to review the tariff order dated 15th June, 2005 passed in Petition No. 5/05.

12. The period of dispute in the said bill is between 24th September, 2004 and June, 2005. It is pointed out that, the Regulatory Commission not only rejected the application of the appellant for fixing a just and reasonable start-

up tariff for its power generating plant as a separate and distinct category but it has directed the first respondent Board, to re-determine the tariff applicable to the applicant after the date of merger after setting aside the tariff order dated 2nd April, 2004. It is contended that this is an abdication of power by Regulatory Commission in favour of the 1st respondent, Board. Being aggrieved, the present appeal has been preferred on various grounds. Dr. A. M. Singhvi learned Senior counsel appearing for the appellant advanced arguments on behalf of the appellant while Mr. M. G. Ramachandran learned counsel appearing for the second respondent Regulatory Commission and Mr. Valmiki Mehta learned senior counsel appearing for the 1st respondent contested the appeal raising various objections on various grounds. The various contentions advanced and objections raised by the respective party are required to be considered in this appeal.

13. The contesting first respondent filed a detailed counter controverting the appellant's case and contended that no interference is called for, besides pointing out that the appellant has to await the review petition on the file of the second respondent. The learned counsel appearing for the respondents submitted detailed arguments and contested the appeal stating that there are no merits. While considering the grounds the facts as disclosed will be referred for convenience.

14. The following points arise for consideration in this appeal:

A. Whether the appellants' generation plant is a CPP or still continues to be an IPP?

B. Whether tariff order dated 28.2.2004 issued by first respondent is applicable to appellants' generating plant in terms of the agreement entered till 28.2.2006?

C. Whether the impugned order dated 17.2.2006 passed by second respondent is liable to be set aside? To what relief, if any?

All the three points could be considered together conveniently and we are to take note of the pending proceedings before the second respondent Commission filed by the first respondent seeking review, as they have a bearing on the present case.

15. The appellant seeks for re-fixation of tariff with respect to the start up power for its power plant, which is being contested by the respondents. Let us refer to the material facts as set out by either side. Initially a power plant was set up by a generating company, M/s. Monnet Power Ltd. under section 4-A of The Electricity (Supply) Act 1948. The said M/s. Monnet Power Ltd. has since been amalgamated with M/s. Monnet Ispat Ltd. and consequently the IPP has become a captive power plant owned and controlled by the appellant, as the generation of electricity is primarily for the appellant's use. The Regulatory Commission by its order dated 17.2.2006 held that as a result of amalgamation, the agreement already concluded between the first

respondent and M/s. Monnet Power Ltd. for the supply of start up power ceased to be valid and in fact the appellant has entered into an agreement on 2.4.2005 with the first respondent for the supply of start up power to the appellants CPP. All the earlier agreements entered by the appellant and/or by M/s. Monnet Power Ltd. with the first respondent Board ceased to be of any effect as between the parties.

16. Start up power is availed by a CPP or other power generating companies including non-conventional energy producers in emergency to start the generation or which may be required during maintenance, breakdown and unscheduled outages etc. The Regulatory Commission by its tariff order dated 6.2.2006 pointed out that start up power assumes relevance, where CPP is not co-located with its captive consumer can avail start up power from out of the power being drawn from the captive consumer from the Electricity Board. In view of the restrictions imposed by Section 28 of The Indian Electricity Act 1910, M/s. MPL could not have engaged in supplying electricity except with the previous sanction of the State Government. It is in this background either M/s. MPL or M/s. Monnet Ispat Ltd. entered into the agreement with the first respondent Board for drawing bulk power and start up power respectively.

17. That apart the appellant also received supply of power from M/s. MPL by wheeling the same through the first respondents' system after paying

wheeling charges to the first respondent Board. The erstwhile M/s. MPL as well as the present appellant fall under the HT category. The appellant steel manufacturing industry such as the appellant fall under different categories, e.g. integrated steel plant, mini steel plant, ferro alloys unit etc. depending upon its manufacturing process such as arc furnaces, submergence arc furnace, open hearth furnace etc. and voltage-wise consumption at 33 kV and below/132 kV and above. The erstwhile M/s. MPL being power generating station fell under the category of "other industries" availing power at 33 kV or 132 kV, as the case may be.

18. Factually when the erstwhile M/s. MPL commenced commercial production and supplying power to three parties including the appellant herein, it was contractually agreed to be connected with the first respondent Board at 33 kV connection. During those years no specific tariff for start up power was fixed in the tariff then prevailed and the supply was being charged under the category 7 (A) of the tariff order dated 1.3.1999 by the first respondent Board. The said tariff was in the form of a two part monthly tariff with a tariff minimum conditions attached to it.

19. We are not concerned with the details of said tariff at this stage. However, the billing demand comprising of a billing of 75% on contract demand or recorded demand, which was higher as seen from the tariff order dated 1.3.1999 notified by the then M.P. Electricity Board for consumption on 33 kV.

As 33 kV lines were found to be weaker besides resulting in frequent interruptions, for technical and other convenience, the industries shifted themselves to 132 kV connection. As a result of such shifting, tariff payable was higher. This is also clear from the tariff notification dated 1.3.1999 issued by the then M.P. Electricity Board with respect to consumption on 132 kV.

20. As the consumption of CPPs was around 10% of the total installed capacity of the generating units and the consumption did not also exceed 10% load factor, the industries were required to pay additional charges for units consumed on the basis of decided 40% load factor unit, irrespective of there being consumption much lower than the load factor. This resulted in a steep increase in monthly bills at 132 kV and above. Particularly in case of start up power where generating companies were not likely to draw more than 10% of the total load factor. The erstwhile Board thought it fit to rationalize tariff with a view to introduce reasonable-ness as it was found that such a tariff is an impediment to industrial growth. In this background, first respondent introduced tariff for start up power by its order dated 22.2.2004 for generating stations (IPPs) and non-conventional energy producers apart from introducing two-part tariff namely;

Demand charges : Rs. 130 per KVA

Energy charges : Rs. 2.18 per unit of consumption

Minimum charges : Equivalent to demand charges on contract demand

21. This is clear from the tariff order dated 24.2.2004. The billing demand comprised of a billing of 75% of the contract demand or recorded minimum demand, which was higher. The above tariff order dated 24.2.2004 was extended to non-conventional power plants and IPPs, who engaged themselves in the generation of power and who draw power from the respondent Board only for start up purposes. Such tariff was extended to the CPPs as CPPs were operating in conjunction with the main industry, which was drawing power from the first respondent and such drawal of power was also utilized for start up of the CPP.

22. It is pointed out on behalf of the first respondent that a number of power plants came up as CPPs, which provided 100% electricity to the captive industries besides supplying and/or selling power to the other consumers for which start up power is required to be supplied by the first respondent Board. In the light of the said development, the second respondent Commission by its order dated 6.2.2006 passed in petition No. 17/2005 (M) provided for a separate tariff for start up purposes and the same is applicable to all power producers requiring or availing start up power from the respondent Board or generating stations (IPPs) inclusive of non-conventional power producers. According to the contesting respondent, tariff was fixed for start up power for IPPs/CPPs following the decision taken by the first respondent on 24.2.2004

providing for tariff for IPPs availing start up power from the first respondent Board on 132 kV.

23. It is fairly stated that the first respondent Board issued a tariff order dated 22.2.2004, though it ceased to be the competent authority to determine the tariff consequent to the commencement of The Electricity Act, 2003, but such provisions for start up tariff, it is represented , was provided but specially subject to ex-post-facto approval by the second respondent Regulatory Commission. A supplementary agreement was entered between M/s. MPL and the first respondent Board on 1.5.2004 while annexing the tariff order dated 24.2.2004 as a schedule and it was made part of the said agreement. M/s. MPL obviously agreed to the said tariff for availing start up power as an IPP.

24. It is true, such a tariff was not determined by the Regulatory Commission viz. the second respondent. It is stated by the first respondent that the Regulatory Commission became functional in July, 2004 and it has placed all the earlier notifications/circulars relating to tariff since its formation till July, 2004. We are not called upon to decide the effect of such placement in the present appeal or the validity of earlier tariff notified by the first respondent after the commencement of The Electricity Act 2003 nor we are called upon to decide the validity or otherwise of such a tariff at this belated point of time.

25. It is also an admitted fact that the first respondent during the pendency for the tariff application for the F.Y. 2005-06 has submitted, by its letter dated 28.4.2005 the copy of earlier tariff order, the first respondent Board passed, with respect to the generating companies including non-conventional power producers. This is clear from the Annexure R-5 placed before us by the first respondent. It was pointed out by the first respondent that on the date of the tariff order dated 24.2.2004, M/s. MPL had shifted to 132 kV consumption and the benefit of the said tariff was actually availed by M/s. MPL as an IPP. It is also clear from the supplementary agreement dated 1.5.2004 executed by M/s. MPL and the first respondent Board. Factually, M/s. MPL availed the concessional tariff and bills were raised by the first respondent and the same were paid without demur. When M/s. MPL consequent to amalgamation ceased and merged with the appellant, it ceased to be an IPP and became a CPP as a result of which the concession provided for the start up power was no longer available to the appellant.

26. After amalgamation, the appellant a CPP continued to draw start up power and there is no change in the point of supply for such start up power to the appellant a CPP. In that background, a repeat agreement was entered on 2.4.2005 as seen from the Annexure P-7 subject to the same conditions as earlier entered with M/s MPL for change of power for start up operation preceding earlier agreement/supplementary agreement.

27. The second respondent Regulatory Commission by its order dated 17.2.2006 held that M/s. MPL, generating plant, after amalgamation with the appellant, is a CPP as defined in The Electricity Act 2003 and the start up power tariff of the first respondent Board is no longer applicable to such a plant as it ceased to be an IPP on the very admission of the appellant resulting in the existing agreement for start up power ceased to be valid. On amalgamation the appellant had entered into a fresh agreement on 2.4.2005, with the first respondent Board for supply of start up power for its CPP.

28. One of the contentions advanced by the learned counsel for the appellant being that by virtue of the amalgamation, the contract, entered by M/s. MPL, stands assigned or transferred in favour of the appellant Company and therefore it is entitled to the benefit of existing tariff for start up power and consequently the appellant is entitled to the reliefs prayed for in this appeal. We shall now consider the scope of the amalgamation and the consequences thereof IPP viz. becoming CPP in terms of the provisions of The Electricity Act 2003. It is also the contention of the learned senior counsel for the appellant that appellant as a generating company shall be charged tariff as applicable to other CPPs on 132 kV. The learned counsel appearing for the respondents while drawing our attention to the fact of the IPP becoming a CPP consequent to amalgamation the appellant a CPP cannot claim the status of IPP and seek to enforce the tariff prescribed for such IPPs.

29. During March, 2005 the first respondent Board moved the second respondent Commission for approval of its ARR and determination of tariff for various consumers. It is a fact that the first respondent did not intimate a separate tariff for start up power be it an IPP or CPP. The second respondent Regulatory Commission determined the tariff wherein there was no specific categorization of consumers availing start up power. This is clear from Annexure R-5 and R-6 filed by the respondents. The first respondent by its letter dated 2.8.2005 drew the attention of second respondent Commission about the absence of a specific category for start up power and requested to determine the appropriate tariff in that behalf. The second respondent commission after due consideration determined and notified the tariff to be charged for the left out categories including the appellant. By the introduction of the said tariff, once again the Regulatory Commission introduced the monthly minimum charges of the unit equivalent to 20% load factor on the contract demand as against 40% load factor earlier notified besides demand charges on the billing demand for the month irrespective of whether energy was consumed during the month or not. The first respondent Board following the said tariff fixed by the second respondent Commission raised the bills as applicable w.e.f. 1.7.2006.

30. Factually the first respondent also pointed out that such tariff in terms of Clause 19 of the agreement entered on 2.4.2005 which is in force, the appellant is bound to pay at the agreed rate. The second respondent

Commission by order dated 6.2.2006 fixed tariff of consumers availing start up power and the same is applicable to the appellant a CPP.

31. The first respondent has already moved the second respondent seeking for a review of its tariff order dated 6.2.2006 and the same is pending consideration on the file of the second respondent. It is fairly stated by the first respondent and also pointed out by the learned counsel appearing for both the respondents that the tariff applicable to the appellant is subject to the outcome of the review petition of the tariff order dated 6.2.2006 sought for by the first respondent. It is therefore contended that the appellant may be directed to await the decision in the review petition and work out its remedy, if any after the passing of order in the pending review petition.

32. In other words, it is contended by the respondents that the present appeal is unnecessary, premature and there cannot be a specific determination of tariff for the appellant alone by treating it as a special category in this appeal as it relates to tariff exercise. We find, there is force in this submission and in the interest of both the parties, it would be appropriate to direct the appellant to take part in the review petition instead of approaching this Appellate Tribunal and advancing contentions and seeking a novel determination as if it still continue to be an IPP.

33. Adverting to the provisions of The Electricity Act 2003, it is rightly pointed out that the statutory provisions of the said enactment and the words of The

2003 Act, have to be interpreted in its ordinary grammatical sense unless there be something in the context or in the object of the statute in which they occur or in the circumstances in which they are used to show that they were used in a special sense to be different from their ordinary grammatical sense. The golden rule of interpretation is that the words of a statute must prima-facie be given their ordinary meaning. Section 2 (8) defines the expression " Captive Generating Plant". The said definition clause reads thus:

> *" '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".*

Section 2 (28) defines the expression ' generating company' as under:

> *" 'generating company' means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station;"*

On the very definition the appellants' generating plant is a CPP and it cannot claim to be an IPP after amalgamation.

34. Section 7 of The Electricity Act 2003 enables a generating company to establish, operate and maintain a generating station without obtaining a licence under this Act provided such a generating company complies with the technical standards relating to connectivity with the grid referred to in Clause

(b) of Section 73. Section 9 of the Act provides for captive generation and it enables, a person to construct, maintain or operate a captive generating plant and dedicated transmission lines. However, it is further prescribed that the supply of electricity from the generating plant to the grid shall be regulated in the same manner as the generating station of generating company. Sub-section (2) of Section 9 provides that a CPP operator shall have the right to open excess for the purpose of carrying electricity from the generating plant to the destination of his use. The provisions of the act has maintained a dichotomy between a captive generating plant and independent generating plant, and this shall not be lost sight of.

35. It is the contention of the learned senior counsel appearing for the appellant that M/s. MPL, an IPP even after its amalgamation with M/s. Monnet Ispat Ltd. and ceased to be a company, will continue to be an IPP in terms of the agreement already entered into and it shall not be treated as a CPP. Such a contention, in our considered view, cannot be countenanced. Such a contention overlooks the statutory provisions of The Electricity Act 2003 and the dichotomy maintained between a CPP and an IPP. The learned senior counsel appearing for the appellant also emphasized that this contention will follow consequent to the amalgamation as approved and ordered by the High Court.

36. It is a settled law that in the amalgamation of companies the sanction by the company court is supervisory only and the company court is to satisfy itself whether the statutory provisions have been complied with. In Hindustan Lever Ltd. vs. State of Maharashtra 2004 (a) SCC 438, their Lordships of the Supreme Court held thus:

> *" While exercising its power in sanctioning the scheme of amalgamation, the court is to satisfy itself that the provisions of statute have been complied with, that the class was fairly represented by those who attended the meeting, that the statutory majority was acting bona fide and not in an oppressive manner and that the arrangement is such as which a prudent, intelligent or honest man or a member of the class concerned and acting in respect of the interest might reasonably take. While examining as to whether the majority was acting bona fide, the court would satisfy itself to the effect that the affairs of the company were not being conducted in a manner prejudicial to the interest of its members or to public interest. The basic principle underlying such a situation is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties, the same being that it should not be unfair, contrary to public policy and unconscionable or against the law. Once these things are satisfied the scheme has to be sanctioned as per the compromise arrived at between the parties.*

In a later decision, their Lordship of Supreme court held a Scheme under Section 391 of the Companies Act 1956, is a commercial document and such agreement of amalgamation must be construed in a manner as understood.

37. In Saraswati Industrial Syndicate Ltd. Vs. CIT, 1990 Supp SCC 675, their Lordship of the Supreme Court held as to what is a meaning and scope of amalgamation and effect of such amalgamation of two companies and held thus:

> *" Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganization of scheme of arrangement. Reconstruction or ' amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking; the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly ' amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity. The true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But undoubtedly when two companies amalgamation and merge into one the corporate entity of the transferor company loses its entity from the date of amalgamation as it ceases to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation".*

In Administrator of the Specified Undertaking of the UTI Vs. Garware Polyester Ltd. reported in (2005) 10 SCC 682, Supreme Court with reference to Section 391 and 393 of the Company's Act held that a special or new right cannot be found in favour of the appellants therein when the agreement creates no such right.

38. In Singer India Ltd. Vs. Chander Mohan Chadha and Ors. (2004) 7 SCC Page 1, while considering the scope of Section 14 (1) proviso (b) of The Delhi Rent Control Act, which provides for recovery of possession on ground of subletting, assignment or otherwise parting with possession and irrespective of the reasons there-from, and with reference to Section 391 to 394 of the said act, it was held thus:

> *" These cases clearly hold that even if there is an order of a court sanctioning the Scheme of Amalgamation under Sections 391 to 394 of the Companies Act whereunder the leases, rights of tenancy or occupancy of the transferor company get vested in and become the property of the transferee company, it would make no difference insofar as the applicability of Sections 14(1)(b) is concerned, as the act does not make any exception in favour of a lessee who may have adopted such a course of action in order to secure compliance with law".*
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> *xxxxxxxxxxxxx*
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> *"The main principle on which such a course of action can be taken was stated in paragraph 28 of the Report and the relevant part thereof is being reproduced below: (SCC p.639).*
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> *28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to*

defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegalities or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned.

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Therefore, it is not possible to hold that it is the American Company which is still in existence and is in possession of the premises in question. On the contrary, the inescapable conclusion is that it is the Indian Company which is in occupation and is carrying on business in the premises in question rendering the appellant liable for eviction"

38. In the light of the above pronouncements, it is clear that M/s Monnet Power Ltd. ceased to exist and the appellant M/s. Monnet Ispat Ltd. became the owner of the IPP. But in terms of the provisions of the Scheme the appellant claimed the status of an IPP, while in terms of the provisions of The Electricity Act 2003, it squarely falls under the category of CPP, as defined in Section 2 (8) of The Electricity Act 2003. The contention to the contra advanced by the learned senior counsel though attractive cannot be sustained in law. The amalgamation scheme agreement and approval by Company Court will be of no consequence as the provisions of The Electricity Act 2003 operates and it prevails. The contention that the generation still continues to be an IPP cannot be countenanced in the light of the statutory provision and the amalgamation will not come to the rescue of the appellant to claim such

status. Amalgamation scheme, being a commercial agreement, the statutory provisions of The Electricity Act 2003 alone prevail.

39. We do not find any illegality in the view taken by the second respondent Commission in this respect. We hold that the appellant is a CPP and it cannot still claim to be an IPP under the pretext of amalgamation scheme or order of Company Court. Such an interpretation advanced by the learned Senior counsel for the appellant cannot be countenanced. This point is answered against the appellant.

40. The next grievance expressed by the appellant that no opportunity was afforded to it, is without substance. Assuming for the purpose of argument that such grievance warrants a direction, to render substantial justice, we direct the second respondent Commission to give liberty to the appellant to put forth its grievances and the commission may decide the merits of all such claims advanced by the appellant herein in the review petition filed by the first respondent. We do recognize that though legally, the character of the appellant, generating company is a captive power plant but, on ground, nothing changed at all. Be the location, start up power requirement, voltage class, nothing whatsoever had changed. In effect the purpose of power connection was start up power before amalgamation and the same remained so even after amalgamation. The amalgamation had not resulted in discontinuation of the supply of start up power nor was there any change in

the point of supply for such start up power. In law, though IPP did changed to a CPP but without in any way changing the ground reality. The Commission is directed to decide the appellants' claims, while we make it clear that the appellant is only a CPP for all purposes of The Electricity Act 2003. Though various contentions were advanced in this appeal, we leave the same to be open and agitated before the second respondent regulatory commission, as the very determination of tariff with respect to start up power is still under its consideration.

41. We decline to examine the persuasive arguments advanced on behalf of the appellant in the present appeal in respect of various reliefs prayed for as the determination of tariff for start up power is very much pending consideration of the second respondent Commission at the instance of the first respondent utility. Being an appellate authority we will not at all be justified in considering the appellants' claim in this appeal without materials and when more so the appellant had not choosen to go before the Regulatory Commission and urge its case with respect to tariff determination. In the circumstances, we dismiss the appeal with a direction that the appellant may go before the second respondent Commission, urge all its points claims and contention with respect to tariff determination of start up power for CPP, which is pending before it for consideration by way of review petition.

42. With the above direction, we dispose off the appeal. The parties shall bear their respective costs.

Pronounced in the open court on this the 23rd day of November, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr.Justice E. Padmanabhan)
Judicial Member

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