Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No.137 of 2012

Dated 14th December, 2012

Coram : Hon'ble Mr. Justice P.S. Datta, Judicial Member

Hon'ble Mr. V.J. Talwar, Technical Member

In the matter of:

Western Electricity Supply Co. Ltd. (Wesco)
Through its Managing Director
Burla, Sambalpur, Odisha
Pincode – 768017

…….Appellant(s)

Vs.

1. Orissa Electricity Regulatory Commission
   Through its Secretary
   Bidyut Niyamak Bhawan,
   Unit-VIII, Bhubaneswar-751 012,
   Odisha.

2. OCL Iron & Steel Ltd.,
   VIll:Lamloi, Po: Garvana,
   Rajgangpur, Odisha-770017
   Through its Chief Executive Officer.

3. M/s OCL India Ltd.,
   At/PO : Rajgangpur, Distt : Sundergarh,
   Odisha – 770017
   Through its Chief Executive Officer.

4. Grid Corporation Ltd. (Gridco)
   Janpath, Bhubaneswar, Odisha
   Through its Managing Direcor,
   Pincode – 751022.

…Respondent(s)

Counsel for the Appellant(s) : Mr. Suresh Tripathi, Advocate

Counsel for the Respondent(s) : Mr. R. M. Patnaik,Mr.P.P. Mohanty, Mr.D. Mishra for R-3, Mr. Ranvir Singh & Ms. Shruti for R-2, Mr. Rutwik Panda and Mr.B.K. Nayak for R-1

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The Western Electric Supply Company Ltd. (WESCO), a distribution licensee having been aggrieved with the order of the Odisha Electricity Regulatory Commission dated 31.1.2012, the respondent no.1 herein, passed in connection with a proceeding , being no. 85 of 2011 filed by the appellant before the Commission under the OERC (Conditions of Supply) Code, 2004, on the ground of the said order allegedly being violative and contemptuous ,apart from being illegal, of this Tribunal's Judgment dated 5.8.2011 passed in Appeal no.171 of 2010 and Appeal no.187 of 2010 has come up in this Appeal as an appellant with prayer for setting aside the said order in order that this Tribunal's order dated 5.8.2011 passed in the aforesaid two appeals is implemented.

2. M/s OCL and Iron & Steel Ltd., the respondent no 2, has a captive generation plant of 14 MW installed capacity and the surplus power of 4 MW was being supplied to the respondent no.3, namely M/s OCL India Ltd. (a cement company) through an independent 11 kV feeder. The said cement company is also a consumer of the appellant having a contract demand of 43.5 kVA and is availing supply at 132 kV. The said cement company, called OCL approached the Commission being Case no.10 of 2008 with a prayer that since it was a captive consumer, it was not liable to pay cross subsidy surcharge while availing open access. The Commission by the order dated 1.12.2008 rejected the prayer. An appeal was preferred by the said OCL being Appeal no.20 of 2008 before this Tribunal and the appeal was also dismissed by order dated 3.9.2009.

3. With this first round of litigation in background started the next phase of litigation. In its desire to see that the surplus power is mopped up, the Commission directed by an order dated 30.6.2009 the CGPs in the State to come into agreement with respondent no.4 GRIDCO. Accordingly, the GRIDCO entered into agreement on 14.10.2009 with the M/s OCLI&S agreeing to sell power at 11 kV to GRIDCO. The

arrangement was such that GRIDCO shall sell such power to the appellant at the Bulk Supply Tariff and the appellant in turn will sell the said power to the cement company at Retail Supply Tariff at EHT. The appellant was not a party to the agreement. The Commission, however, by annulling the disputed agreement directed by the order dated 26.8.2010 to enter into a fresh Quadripartite Agreement involving GRIDCO,WESCO, Steel Company and Cement Company mentioning all technical and commercial details. The WESCO was although opposed to any agreement. The Commission, of course, held that the appellant was entitled to wheeling charges. The Commission directed that the sale of surplus power to cement company at 11 kV shall be treated as EHT consumer of the appellant and the maximum demand for billing shall be calculated accordingly although, the contract demand of the cement company with the appellant shall continue as usual. The Commission came to the finding that the cement company can be injected with power at both voltage levels of 132 kV and 11kV in order that the residual power at CGP can be evacuated.

4. Aggrieved with the finding of the Commission dated 26.8.2010 passed in Case no.139 of 2009, both the appellant and M/s OCL&IS filed their respective Appeals being no.171 of 2010 and 187 of 2010

before this Tribunal which by a common Judgment and order dated 5.8.2011 dismissed the same subject to certain observations. This Tribunal upon examination of Regulation 28 of the Supply Code and the relevant Regulations of the State Commission held that the Commission did not follow its own Regulations and the Commission could have directed the appellant that supply to the OCL (cement company) at 11 kV could be treated as a separate connection and with such arrangement the overall objective of mopping up surplus power available within the State would have been achieved without violating any provision of the Act or Regulation. As to the question which was raised before this Tribunal whether the Commission can direct the licensee to charge a certain consumer at a rate different from the applicable rate, the Tribunal upon examination of the provision of section 62 (3) of Electricity Act, 2003 observed that the Act does not permit the Commission to show undue preference to any consumer but differentiation is possible only within the parameters laid down in that section itself and it was not permissible for the State Commission to direct a distribution licensee to charge tariff from a particular consumer at a rate other than the rate specified for similarly placed consumers. The Tribunal further observed that since supply to the cement company from surplus of power to steel company would be at 11 kV the application of EHT tariff even after adjustment of 0.5% towards

transformation losses would amount to undue preference to the cement company by the State Commission as well as would amount to discrimination against the similarly placed consumers but the Tribunal concluded with the observation that as the issue was not raised before the State Commission, liberty was given to the appellant to raise the issue before the State Commission at the appropriate stage. That the 11 kV line is a part of the distribution system of the WESCO was upheld by this Tribunal also.

5. However, in terms of the judgment and order dated 5.8.2011, the appellant again approached the Commission for rectification of the Commission's order dated 26.8.2010 in respect of application of EHT tariff in respect of the cement company by way of review but the Commission by the impugned order dated 31.1.2012 passed in case no.85 of 2011 reiterated its stand adopted in its order dated 26.8.2010 holding that the case deserved a special treatment though such treatment shall not be treated as a precedent. The Commission in its order dated 26.8.2010 overruled the WESCO's objection to give supply at more than one point invoked the Regulation 112 of the Supply Code dealing with 'Power to remove difficulties Clause' which , according to the Commission, gives wide jurisdiction, being it an inherent power to

pass any order regarding which this Tribunal in its Appellate Order dated 5.8.2011 observed that the power was not appropriately exercised in the face of specific provisions in the Regulations to address the issues. The Commissions allegedly ignored the observations of this Tribunal and invented the doctrine of special treatment. Hence the Appeal against the order dated 31.1.2012.

6. The respondent no.2 M/s OCLI&S has filed a counter-affidavit contending that the order dated 5.8.2011 passed by this Tribunal in Appeal nos.171 and 187 of 2010 which is the basis of the appellant's application before the Commission being case no.85 of 2011 for alleged correction of error allegedly crept in the Commission's order dated 26.8.2011 and which is also the foundation of the appellant's present appeal was rightly not followed by the Commission because this respondent no.2 challenged the order of this Tribunal dated 5.8.2011 before the Hon'ble Supreme Court in CA No. 200 of 2012 and the Hon'ble Supreme Court admitted the appeal and when an appeal was preferred before the Hon'ble Supreme Court, the appellant ought not to have approached the Commission seeking for an order in line with the order of this Tribunal dated 5.8.2011. The appellant also has not deliberately pointed out before the Commission about the pendency of

the Civil Appeal preferred by the respondent no.2 against this Tribunal's order dated 5.8.2011. It is contended that the Commission rightly rejected the prayer of the appellant to raise bills on the cement company at prevailing Retail Supply Tariff for HT consumers as the earlier arrangement devised by the Commission was a win-win situation for all the parties concerned and in the interest of all the consumers in the State. The arrangement made by the Commission through order dated 26.8.2010 was to address an extra-ordinary circumstance of acute shortage of power in the State of Odisha.

7. The respondent no.3 M/s OCL India Ltd. (Cement Company) also filed a counter-affidavit contending as follows:-

a) It is contended that against the order dated 5.8.2011 passed in the batch of two appeals as aforesaid, the cement company also preferred an appeal before the Hon'ble Supreme Court which admitted the appeal for hearing.

b) M/s OISL, the CGP did not have any direct connectivity with the State grid. Therefore, the Commission had directed that the surplus power should be evacuated through the existing 11 kV line between OISL & OCL. For this purpose the GRIDCO was directed to procure the surplus power of OISL and sell the same to the WESCO at the Bulk Supply Tariff rate. The WESCO shall sell it to the OCL at the Retail Supply Tariff of EHT category. The

Commission has made the above scheme as a viable commercial arrangement for power evacuation to the state grid and it was not an arrangement for selling power to the OCL at 11 kV based on the applicable Retail Supply Tariff.

c) This was supported by the following observations of the Commission vide its order dated 26.08.2010 passed in Case No.139 of 2009.

"The present contract demand of OCL shall continue unless OCL requests for a change".

"We direct that the simultaneous maximum demand shall be calculated by arithmetic sum of, 132 KV and 11 KV maximum demand indicator through time synchronization of both the apex meters."

"The transformation loss at OCL end shall be computed as 0.5% of the energy input". Such a provision was not necessary if the power supply to OCL were through a separate source at 11 KV as provided in Regulation 28 of the OERC Distribution Code, 2004.

d) The Commission is aware that M/s OCL is extending its facility for 11 kV system only to facilitate utilization of bottled up capacity of OISL-CGP due to typical system configuration continuing due to historical legacy. The Commission therefore, has consciously allowed the above transaction of power as a special case and it would not be taken as precedent for any other EHT consumers.

e) There is no question of showing any discriminatory favour or undue preference to a single EHT consumer (M/s OCL) as claimed by M/s WESCO. No financial benefit accrues to M/s OCL in the

transaction. The Commission in its order dated 26.08.2010 has only taken care to safeguard that M/s OCL is not put into any additional financial liability.

f) Sections 42 and 43 of the Electricity Act, 2003 stipulates the duty of Distribution Company to supply electricity to the consumer. M/s OCL has been drawing power as an EHT consumer through 132 KV line at no point of time, it requested the distribution company i.e. M/s WESCO, Appellant to supply power through 11 kV line.

8. The Commission also filed a counter-affidavit though it has no adversarial role to play. In that counter-affidavit it re-iterated its stand made in the impugned order as also in the order dated 26.8.2010 and denies that undue favour was granted in favour of the cement company. In paragraph no.7 of the counter-affidavit, it stated that it considered the Tribunal's Judgment but it did what it felt good for the State. It stated in the counter affidavit that its stand was to bring about a 'win- win' situation which it achieved.

9. It is against this background that this third phase of litigation arose, this time, according to the appellant, largely because of the alleged defiant mood of the Commission with no inclination to follow the judicial hierarchy and such alleged defiance was sought to be justified with a

sort of interpretation which has been subjected to criticism with all assiduousness by the learned advocate for the appellant Mr. Suresh Tripathy and the Commission's reply through oral argument has been quite a brief one in as much as the learned counsel for the State Commission supported the order impugned which speaks for itself, and so far as the respondent nos.2 and 3 are concerned, their learned advocates also support the Commission not because of commonality of interest but for different reasons.

10. The only point for consideration is whether the Commission was legally justified in passing the impugned order dated 31.1.2012.

11. Our abbreviations for the appellant will be WESCO, for the Orissa Electricity Regulatory Commission as the Commission, for M/s OCL Iron & Steel Ltd. as Steel Company, for M/s OCL India Ltd. as Cement Company and for the GRID Corporation Ltd. as GRIDCO for the sake of convenience.

12. Mr. Tripathy, learned advocate appearing for the appellant makes the following submissions:-

a) This Tribunal in Appeal no.171 of 2010 and Appeal no.187 of 2010 decided on 5.8.2011 analysed the provisions of section 62 (3) to emphasize upon the point that while determining the tariff, the Appropriate Commission cannot show undue preference to any consumer and whatever differentiation is permissible is only in terms of parameters laid down in the provisions itself and the Commission has no jurisdiction to direct a distribution licensee to charge tariff from a particular consumer different from the tariff specified for similarly placed consumers. This Tribunal clearly said in that order that supply to the cement company from surplus power of the steel company would be at 11 kV but charging EHT tariff even after adjustment of 0.5% towards transformation losses would amount to undue preference to the cement company; but the Commission when approached by the appellant for implementation virtually of this order ignored this finding to come out with a novel 'win-win' situation unheard of in law.

b) There cannot be different tariff for the same set of consumers having the same voltage.

c) Once it is held that 11 kV line is a part of the distribution system and not a dedicated line, the conclusion is irresistible that supply at 11 kV to the cement company would be at HT tariff.

d) As defined in clause 2 (u), of the Supply Code, 2004, high tension consumer means one who obtains supply from licensee at high voltage which again is defined in clause 2 (iii) to mean "where the voltage exceeds 650 volts and does not exceed 33,000 volts under normal conditions subject however, to the percentage variation stated in the Indian Electricity Rules, 1956 or in Rules/Regulations

specified under the Act." Since supply to Cement Company is at HT voltage, the applicable tariff is HT.

e) The Commission have betrayed the faith of the statute makers.

13. Mr. Ranvir Singh, learned advocate appearing for the Steel Company submitted as follows :-

a) The very foundation of the present appellant's case is the order dated 5.8.2011 passed by this Tribunal in the batch of appeals being Appeal nos.171 of 2010 and 187 of 2010 but the said order has been challenged before the Hon'ble Supreme Court by the Steel Company in Civil Appeal No. D.36138 of 2011 and the Hon'ble Court admitted the appeal for hearing with C.A. No.200/2012. It is submitted that since the Hon'ble Supreme Court has admitted an appeal for hearing, this present Appeal before the Tribunal ought not to have been preferred by the WESCO and this fact was suppressed by the WESCO in this appeal. The appellant is guilty of *suppresio veri suggestio falsi*.

b) The Commission rightly rejected the prayer for authorizing WESCO to raise bills on Cement Company at prevailing retail supply tariff applicable for EHT consumers as the arrangement was a 'win-win' situation.

c) The arrangement was to be a special arrangement in the interest of the consumers.

14. The cement company represented through learned advocates Mr. R.M. Patnaik and Mr. P.P. Mohanty through oral argument supported the stand of the Commission as it appeared through the Commission's order but it is quite unusual that in the written note of argument it introduced certain point not at all argued orally and the WESCO did not have opportunity to rebut the points. Nevertheless the points asked in the written note of argument of the cement company are to be traversed by this Tribunal. The points are:-

a) Whatever observations have been made by the Tribunal in the batch of the two Appeals being no.171 of 2010 and 187 of 2010 are merely *obiter dicta*. Reference has been made to the decisions of the Hon'ble Supreme Court in *Arun Kumar Aggarwal Vs. State of Madhya Pradesh & Ors. AIR 2011 State Commission 3056, Municial Corporation of Delhi Vs. Gurnam Kaur (1989) 1 SCC 101, State of Haryana vs. Ranbir (2006) 5 SCC 167 and Girnar Traders Vs. State of Maharashtra (2007) 7 SCC 555.*

b) The application of EHT rates of supply of power at 11 kV rates to respondent no.3 does not constitute any discrimination against other HT consumers in the State in terms of Section 62(3) of the Act as both the '*nature*' and '*purpose*' of supply to respondent no.3 is different from that of other HT consumers as (i) other HT consumers are consumers '*on request*' under Section 43 of the Act, whereas respondent no.3 has not any time requested the appellant for supply of power at 11 kV but has instead been asked to consume it at the behest of the State Commission; and (ii) the

supply of power at 11 kV to respondent no.3 is for the specific purpose of evacuation of bottled-up surplus power, which is different from that of other HT consumers(underlining ours).

c) The cement company reiterated that it was desirous of meeting its entire power requirements as an EHT consumer at 132 kV of the appellant and that it has no interest in availing power, whether under open access or otherwise, at 11 kV from the captive power plant of the steel company. This is well-borne out of the fact that the cement company on 07.09.2009 had decided to discontinue availing open access for supply of power from the said captive power plant. Further, in the counter-affidavit submitted in the Case No.85 of 2011 before the State Commission, and the counter-affidavit filed in the present appeal, Cement Company has made it amply clear that it is not interested in drawing power from the captive power plant of steel company.

d) It is well-established that 'consensus and idem' or 'free consent' is a fundamental tenet of contract law, and is recognized under Section 13 and 14 of the Indian Contract Act, 1872. Any direction by this Tribunal which seeks to implement the existing contractual arrangement at HT rates rather than EHT rates would cause financial loss to cement company which it would not otherwise have incurred by being a direct EHT consumer of the appellant.

e) It would be grossly inequitable to compel the cement company to pay HT rates for the power consumed by it through this special arrangement. Reference in this connection has been made in *Namdeo Lokman Lodhi vs. Narmadabai & Others, AIR 1953 SC*

228, Rajkot Municipal Corporation Vs. Manjuben Jayantilal Nakum & Others, (1997) 9 SCC 552 and O.Konavalov v. Commander, Coast Guard Region & Others (2006) 4 SCC 620.

15. Since the Commission represented by Mr. B.K. Nayak and Mr. Rutwik Panda supported the Commission's impugned order; it would be fair to the Commission on our part to reproduce its own words. It appears that though the Commission's order contains 14 paragraphs in its 4 page order , it is the penultimate paragraph no.13 which is in fact the Commission's own reasoning, while the other paragraphs are the submissions of the parties and recapitulation of the history of litigation which will also recapitulate for appreciation of the merit of the appeal. The Commission says as follows:-

''After hearing the parties and perusal of the case records, we reiterate our earlier stand that the present arrangement is a Win-Win situation for OISL-CGP, GRIDCO and WESCO as well as in overall interest of all consumers of the State. With the above arrangement M/s OSIL-CGP could be able to sell and GRIDCO could be able to buy, the surplus power of CGP at OERC determined tariff and WESCO could get the wheeling charges for such power transmitted at the 11 KV line between M/s OSIL and M/s OCL considered as a deemed distribution system of DISCOM. M/s OCL, who is facilitating such transaction for overall benefit cannot be subjected to any financial disadvantageous position for

treating both 132 KV and 11 KV injection as two distinct connection for payment purpose. M/s OCL is fully capable to meet its full requirement of the power drawing power only at one voltage level i.e. 132 KV from DISCOM within its contract demand as a bonafide EHT consumer. The Commission, therefore, has consciously allowed the above transaction of power as a special case and it would not to be taken as precedent for any other EHT consumers. There is no question of showing any discriminatory favour or undue preference to a single EHT consumer (M/s OCL) as claimed by M/s WESCO. No financial benefit accrues to M/s OCL in the transaction. The Commission in its order dated 26.08.2010 has only taken care to safeguard that M/s OCL is not put into any additional financial liability other than what is due from it for its total drawal of power both in term of simultaneous Maximum Demand and energy from DISCOM as a bonafide EHT consumer.''

16. Tempers ran high at the Bar when the learned advocate for the appellant Mr. Tripathy submitted that there is no meaning of the existence of this Tribunal if the judicial hierarchy is not maintained and the Commission passes an order patently beyond the purview of the law. The charge was more serious when in the written note of argument it was stated that by passing the order impugned the Commission betrayed the faith of the statute makers. We prefer to be purely objective and dispassionate because reason is the deity in the temple of justice.

17. It is noticeable that the reasons advanced by the Commission for passing the order are not exactly the reasons advanced by the Steel Company and the Cement Company against the appellant's present appeal and they are different, as such the reasons advanced by the Commission and the reasons assigned by the Steel Company and the Cement Company are to be traversed by this Tribunal.

18. Before we paraphrase our reasons it is necessary to ascertain the subject matter of the earlier two litigations. As noticed earlier, the Steel Company which has a captive generation plant having installed capacity of 14 MW used to supply surplus power of 4 MW to the Cement Company admittedly through an independent 11 kV feeder. At the same time, admittedly the Cement Company is a regular consumer of the WESCO for availing supply at 132 kV at a contract demand of 43.5 MVA. As the WESCO levied cross subsidy surcharge the Cement Company approached the Commission through the case no 10 of 2008 against the WESCO praying for not charging cross subsidy surcharge because it was a captive consumer and was not liable to pay cross subsidy surcharge. This contention did not find favour with the Commission by its order dated 1.12.2008 which this Tribunal upheld in

its appellate order dated 3.9.2009 in Appeal no.20 of 2008. The open access transaction was, however, subsequently stopped by the Cement Company on 07.9.2009. This first round of litigation is only a part of the totality of the history of litigation, but is not directly relevant for the purpose of deciding the present appeal by us.

19. The second round of litigation began with the Commission's direction dated 30.6.2009 in a *suo motu* proceedings being nos.6-20 of 2009 that the GRIDCO should leave no stone unturned to mop up as much power as possible from all sources including the CGPs, and observed that for that purpose the individual CGP should come up with separate agreements with the GRIDCO. The Steel Company's agreement on 14.10.2009, resultantly, with the GRIDCO put an end to the direct supply to the Cement Company of the Steel Company's surplus power of 4 MW to the Cement Company at 11kV. Steel Company's power was purchased by the GRIDCO which was in turn purchased at the Bulk Supply Rate from the GRIDCO by the WESCO which again in its turn would sell the same to the Cement Company at the Retail Supply Rate. Admittedly, neither the Cement Company nor the WESCO was party to the agreement dated 14.10.2009. But the Cement Company did raise no objection. Now, the GRIDCO intimated on 30 10

2009 to the WESCO that it would raise bulk supply bills on WESCO after deducting 0.5% from 11kV metering data towards wheeling loss to equate the supplies at 33 kV to WESCO. GRIDCO' contention was that the open access charges and transmission charges were not leviable as the supply was made to the WESCO only. On 13.11.2009 the GRIDCO asked the WESCO to start immediate supply and should not insist on payment of cross subsidy and wheeling charges, for according to the GRIDCO, the WESCO by supplying at the Bulk Supply Rate to the Cement Company would ultimately gain. The Steel Company filed a petition raising the dispute and the Commission passed its order on 26.8.2010.

20. The Commission had before it six issues. On the question of jurisdiction the Commission said, rightly so, that it has. The second issue as to whether the PPA between the GRIDCO and the Steel Company is binding on the WESCO it was the stand the Steel Company and the WESCO contended that it was a bilateral contract, as such was beyond the adjudication of dispute under the Act, while the Commission ruled that nothing should be done contrary to the law. On the third issue whether the Cement Company should be agreeable to the proposal of the GRIDCO the Commission answered that the billing procedure

provided in the PPA was not accepted by the Cement Company. On the fourth issue as to the mode of transfer of power between the Steel Company and the Cement Company the Commission held that the two companies are free to accept any mode of transfer under the law.

21. The fifth issue and the sixth issue formed the core of the second round of litigation. The fifth issue was whether wheeling charge was still payable to the WESCO with regard to the separate 11 kV line between the Steel Company and the Cement Company and the answer of the Commission was that since 11 kV line along with associated system is a part of the distribution system of the WESCO the WESCO is entitled to wheeling charges for evacuation of surplus power from the Steel Company to the State Grid. The last question was whether there could be supply to a consumer at two voltage levels i.e., 132kV and 11kV. The Commission held that power to the Cement Company can be injected at both the voltages, but the applicable tariff for the latter would be EHT tariff.

22. Since the first argument of both the Cement Company and the Steel Company was that the WESCO is guilty of *suppresio veri*

suggestio falsi because appeals were preferred before the Hon'ble Supreme Court and that the appeals were admitted for hearing it is necessary to know the genesis of the appeals before the Hon'ble Supreme Court. The Commission's order dated 26.8.2010 gave rise to two appeals, one by the WESCO and the other by the Steel Company before this Tribunal which rendered a common judgement dated 5.8.2011. At no stage the Cement Company was the appellant before this Tribunal as it has been a gainer by the Commission's dispensation.

23. It is now seen that the Commission's order dated 26.8.2010 arose out of steel company's petition filed before the Commission praying for adjudication of disputes under Section 86 (1)(f) of the Act, 2003 relating to supply of surplus power from CGP of Steel Company to GRIDCO at 11 kV through the 11 kV bus bar of the cement company. We have further found that before the Commission the aforesaid six issues originated and the Commission answered in the lines as said above. Now, the genesis of the two appeals one preferred by the steel company and the other by the cement company lies in this Tribunal's order dated 5.8.2011 and it is of utmost importance that we reproduce in verbatim this Tribunal's findings. So far as the steel company is concerned, the question was whether the appellant WESCO was entitled to wheeling

charges against the steel company for utilization of his distribution system before the Commission which answered the issue no.5 in favour of the WESCO and so far as the WESCO is concerned the question was whether the Commission coud direct for execution of agreements. This Tribunal while affirming the Commission's finding answered as follows:-

"*85. Next issue to be decided is whether distribution licensee is entitled for wheeling charges for utilization of its distribution system.*

86. Wheeling has been defined in Section 2(76) of the Electricity Act 2003 and is quoted below:
"(76) "wheeling" means the operation whereby the ***distribution system and associated facilities of a transmission licensee or distribution licensee****, as the case may be, are* ***used by another person for the conveyance of electricity on payment of charges*** *to be determined under Section 62;"*

87. From the above definition it is clear that wheeling would involve three ingredients viz.,
I. Usage of distribution system of distribution licensee,

II. Such usage has to be by another person

III. Usage can be only on payment of charges.

88. The line is question is distribution system of the Appellant WESCO. As per impugned order of the State Commission, the Respondent Steel Company would be selling its surplus power to GRIDCO and metering would be done at receiving end i.e. at Cement Company. Thus transfer of power from Steel Company to GRIDCO would take place at Cement Company's installations. Till power is transferred to GRIDCO it remains with the 2nd Respondent Steel Company and therefore another person in terms of Section 2 (76) of the Act would be the Steel Company. Steel Company would be liable to pay wheeling charges for usage of the Appellant WESCO's distribution network in line with the state Commission's Order dated 26.8.2010.

89. Therefore, we are of the view that the 2nd Respondent Steel Company is liable to pay the wheeling charges for usage of this line for export of its power to GRIDCO".

The above finding speaks for itself and it requires no elucidation. Furthermore, so far as the present appeal is concerned, the issue of wheeling charge is not the issue before us. It is the issue of wheeling charge payable to the WESCO by the steel company in respect of which the steel company preferred appeal before the Hon'ble Supreme Court in Civil Appeal no. (D) 36138 of 2011 against the above finding of this Tribunal in Appeal no.187 of 2010 preferred by the steel company. Actually, the impugned order of the Commission dated 31.1.2012 did not affect the Steel Company.

24. So far as the cement company is concerned the question in this Appeal is whether the Commission can direct the WESCO to charge a certain consumer at the rate different from the applicable date as per prevalent tariff order and this question is preceded by and associated with the question whether supply at more than one point is permissible under the Electricity Act, 2003 or Regulations framed thereunder. Our finding in the order dated 5.8.2011 was as follows:-

"47. Next question before us for consideration as to whether supply at more than one point is permissible under Electricity Act 2003 or Regulations framed there under.

48. The Ld Counsel for GRIDCO submitted that earlier when power flow from Steel Company to Cement Company was allowed under open access, though supply to cement Company was at two points, the Appellant had no objection as they were getting cross subsidy surcharge and wheeling charges but now, technically the same arrangement is being objected to only because there would not be any cross subsidy.

49. In our opinion the submission made by GRDICO is not factually correct. It is true that Cement Company was getting supply at two points under open access. But under that arrangement there were two distinct commercial arrangements. Whereas the supply at 132 kV was released as a consumer under Section 43 of the Act, the supply at 11 kV was under open access on payment of cross subsidy & wheeling charges. However, there would be only one commercial arrangement under the proposed arrangement. Consumption at both the points will have to be added and billed as single consumption at EHT tariff. Moreover Maximum Demand (MD) recorded at 15 minutes interval by both meters will have to be added to arrive at simultaneous maximum demand of Cement Company during the billing period. Thus both connections i.e. at 132 kV and 11 kV are to be treated as single connection. The Appellant had submitted that it would have no objection in treating the two connections independent of each other. Consumption at 132 kV to be billed at EHV rate and consumption at 3.3 kV to be billed at HT rate.

50. In the light of above, let us examine the Regulation 28 of State Commission's Supply Code. Regulation 28 of Supply Code provide as under:
"Unless otherwise agreed to, the supply shall be at a single point at the out-going terminals of the licensee, i.e…."

51. In terms of this regulation, supply has to be made at a single point unless agreed to by supplier and consumer. In the present case supplier WESCO has in fact objected to give supply at more than one point. In order to remove stalemate, the State Commission had invoked Power to remove difficulties provided under Regulation 112 of its Supply Code. It is reproduced below:

***"Power to remove difficulties** 112. If any difficulty arises in giving effect to any of the provisions of these Regulations, the matter may be*

referred to the Commission who after consulting the parties affected may pass any general or special order, not inconsistent with the provisions of the Act, which appears to it to be necessary or expedient, for the purpose of removing the difficulty."

52. From the above, it is clear that State Commission has power to remove the difficulties. However, this power can be invoked upon being referred to and also after consulting the parties affected. The Appellant in its Appeal has submitted that invoking Regulation 112 of Supply Code by the State Commission was wholly improper and uncalled for on following grounds:
a. No difficulty had arisen for giving effect to Clause 28.

b. Neither the Appellant nor Cement Company had referred the case to the Commission as required under Regulation 112.

c. Appellant was never consulted by the State Commission as required under Regulation 112.

53. In the light of above, we are of the view that State Commission has not followed its own Regulations. The State Commission could have directed the Appellant that supply to 4th Respondent OCL at 11 kV could be treated as a separate connection. With such an arrangement the overall objective of mopping up surplus power available within the state would have been achieved without violating any provision of the Act or Regulations.

54. Next issue before us is as to whether the State Commission can direct the licensee to charge certain consumer at a rate different from applicable rate as per prevalent tariff order.

55. The Appellant has submitted that the State Commission's direction in the impugned order to supply power to the Cement Company at 11 kV but charge the same at EHT rate is against the Commission's own Tariff Order and against the provisions of Section 62 (3) of the Electricity Act 2003. If the proposed arrangement is ultimately allowed, then such sale to Cement Company would have to be at HV rate prescribed in Commission's tariff order and not at EHV rate as directed by the Central Commission in impugned order.

56. On perusal of records available with us, it appears that the issue was not raised before the State Commission. The State Commission has

given this direction in the impugned order. The relevant portion of impugned order is reproduced below:

*"**The sale to OCL at 11 KV shall be treated as EHT sales of WESCO** and load factor for billing shall be calculated accordingly. The present contract demand of OCL shall continue unless OCL requests for a change. As maximum demand of 4 MW at 11 KV side shall have negligible impact in comparison to 43.5 MVA contract demand of OCL, we direct that simultaneous maximum demand shall be calculated by arithmetic sum of 132 KV and 11 KV maximum demand indicator through time synchronization of both the apex meters. **The transformation loss at OCL end, shall be computed as 0.5% of the energy input." {Emphasis Added}***

57. Since the Appellant has raised the legality of the State Commission's direction on application of EHT rate on supply serviced at 11 kV i.e. HT level, we deem it appropriate to examine and dispose this issue on merits.

58. Let us examine the provisions of Section 62 (3) of 2003 Act which reads as under:

*"62 (3) **The Appropriate Commission shall not**, while determining the tariff under this Act, **show undue preference to any consumer of electricity** but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required." {Emphasis supplied}*

59. Bare reading of this Section would imply that the Act does not permit the Appropriate Commission to show undue preference to any consumer. However, the Commission may differentiate the tariff based on certain parameters defined in the Section itself. Voltage is one of such parameters. The Appropriate Commission may fix different rates of tariff for consumers drawing power at different voltages say at 11 kV and 132 kV. But the Act does not permit the State Commission to direct the distribution licensee to charge tariff from a particular consumer at rate other than the rate for specified for similarly placed consumers.

60. Since supply to the Cement Company from surplus of power of Steel Company would be at 11 kV, application of EHT tariff, even after adjustment of 0.5% towards transformation losses, would amount to

undue preference to Cement Company by the State Commission as well as would amount to discrimination against similarly placed consumers.

61. However, as the issue was not raised at the State Commission level, we give liberty to the Appellant to raise the issue with the State Commission at the appropriate stage".

25. This finding that obviously goes against the cement company and which overruled the Commission's observation in the order dated 26.8.2010 that gave rise to the Appeal before the Hon'ble Supreme Court by the cement company which was also admitted for hearing and the Hon'ble Supreme Court directed hearing of two appeals together. Since we have not been provided with a copy of the Memorandum of Appeal filed before the Hon'ble Supreme Court by the cement company we are not in a position to know the grounds of the appeal.

26. **Pendency of the appeals before the Supreme Court and its effects:-** It is now the contention of both the steel company and the cement company that preference of the two appeals and admission thereof for hearing was enough for the present appellant WESCO not to prefer this instant Appeal no. 137 of 2012 against the Commission's impugned order dated 31.1.2012 . The question, therefore, now is how far this contention is sustainable. According to the learned counsels for the steel company and the cement company, admission of appeal itself entails stay of the inferior court's judgment. We fail to persuade

ourselves to agree to this proposition and we have not been provided with any authority in support of such proposition. On the contrary, we may refer to two decisions of the Hon'ble Supreme Court which lays down the principle that mere filing of appeal would by itself not operate as stay until specific prayer in this regard is made and orders thereon are passed. *In Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd. (2005) 1 SCC 705* the Hon'ble Supreme Court has held *: "It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same". In Madan Kumar Singh Vs. District Magistrate, Sultanpur, (2009) 9 SCC 79* the Hon'ble Supreme Court has reiterated the same and has held *: "It is trite to say that mere filing of a petition, appeal or suit would by itself not operate as stay until specific prayer in this regard is made and orders thereon are passed".* Admittedly, though the Hon'ble Supreme Court admitted the appeals upon condonation of delay, no stay was granted against this Tribunal's findings rendered on 5.8.2011 in the batch of the aforesaid two appeals and there was no legal predicament either to the WESCO or to this Tribunal to proceed with the present appeal against the Commission's

finding that as a special case differential treatment was permissible. None of the parties in the present appeal filed any petition praying for keeping hearing in abeyance till the Appeals before the Hon'ble Supreme Court is disposed of. Nor any oral submissions were made during hearing of the appeal by any of the parties asking for long adjournment till the Appeals of the Steel Company and the Cement Company are disposed of. Therefore, pendency of the appeals before the Hon'ble Supreme Court did not constitute any bar to proceed with the hearing of this present appeal and disposal thereof by this Judgment.

27. **Obiter dicta** :- It is the contention of the cement company that the findings that prima facie seem to be against the cement company from paragraphs 47 to 61 in the batch of two appeals as aforesaid are not really the findings; they are in fact obiter dicta, they constitute an order of remand on the ground that the question whether the supply of power at 11 kV to the steel company should be at EHT rates was not exactly raised before the Commission and when this is an obiter, there cannot be any legal argument that the Tribunal's findings were completely disregarded. The argument ran that this Tribunal did not direct the Commission to give a ditto to what the Tribunal had said. Mr. Tripathy's argument was that a bare reading of this Tribunal's finding from

paragraph 47 to 61 leaves no manner of doubt that the Tribunal decided the question on merit from legal stand point and even the Commission was not in a position to rebut the reasoning of the Tribunal and instead the Commission adverted to a different route wholly unsubstantiable in law solely with a view to sticking to its decision dated 26.8.2010. In order to resolve the issue of obiter dicta, we should quote the decision of the Hon'ble Supreme Court in *Arun Kumar Aggarwal vs. State of Madhya Pradesh and others, AIR 2011 SC 3056* because this has been relied on by the cement company itself.

> *"..it is well settled that obiter dictum is a mere observation or remark made by the court by way of aside while deciding the actual issue before it. The mere casual stament or observation which is not relevant, pertinent or essential to decide the issue in hand does not form the part of the Judgment of the Court and have no authoritative value. The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court. These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the Judgment ."*

We may only add the legal principle on obiter dicta as is found the Black's Law Dictionary (IXth Edition) wherein quotation has been made from William M.Lile's, Brief Making and the Use of Law Books 304 (3d ed. 1914) is as follows:-

> *"Strictly speaking an 'obiter dictum' is a remark made or opinion expressed by a judge. In his decision upon a cause, 'by the way' – that is, incidentally or collaterally, and not directly upon the*

question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion… In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as 'dicta' of 'obiter dicta,' these two terms being used interchangeably." "William M.Lile's, Brief Making and the Use of Law Books 304 (3d ed. 1914)."

It is noticeable that the questions whether supply at more than one point is permissible under the Act or Regulations framed thereunder and whether the Commission can direct the licensee to charge certain consumer at the rate different from the applicable rate as per prevalent Tariff Order were the specific issues framed by the Tribunal on the pleadings of the parties in the batch of two appeals. This Tribunal specifically held as follows:-

a) The supply at 132 kV was released as a consumer under section 43 of the Act, while the supply at 11 kV was under open access on payment of cross subsidy and wheeling charges.
b) In terms of Regulations 28 of the State Commission's Supply Code *"unless otherwise agreed to, the supply shall be at a single point at the out-going terminals of the licensee i.e…."* The WESCO objected to give supply at more than one point.
c) Invoking power under Regulation 112 dealing with 'Power to Remove Difficulties' must precede hearing of the parties affected and if no difficulty had arisen for giving effect to clause 28 of the Supply Code and if neither of the parties approached the Commission for invoking Regulation 112, the said Regulation cannot be invoked. Thus, the State Commission did not follow its

own Regulations and it could have directed the WESCO that supply to the cement company could be treated as a separate connection and with such arrangement the overall objective of mopping up surplus power available within the State would have been achieved.

d) With regard to the crucial question whether sale to the cement company at 11 kV should be treated as EHT sales of the WESCO, the Tribunal reproduced the findings of the Commission which we also reproduce in this appeal as follows:-

*"**The sale to OCL at 11 KV shall be treated as EHT sales of WESCO** and load factor for billing shall be calculated accordingly. The present contract demand of OCL shall continue unless OCL requests for a change. As maximum demand of 4 MW at 11 KV side shall have negligible impact in comparison to 43.5 MVA contract demand of OCL, we direct that simultaneous maximum demand shall be calculated by arithmetic sum of 132 KV and 11 KV maximum demand indictor through time synchronization of both the apex meters. **The transformation loss at OCL end, shall be computed as 0.5% of the energy input. {Emphasis Added}**"*

Then, the Tribunal held that as the question was legal, "*we deem it appropriate to examine and dispose this issue **on merits***".**(Emphasis ours)**

e) The Tribunal referred to the provision of section 62(3) and then said:-

"bare reading of this Section would imply that the Act does not permit the Appropriate Commission to show undue preference to any consumer. However, the Commission may differentiate itself. Voltage is one of such parameters. The Appropriate Commission may fix different rates of tariff for consumers drawing power at different voltages say at 11 kV and 132 kV. But the Act does not

permit the State Commission to direct the distribution licensee to charge tariff from a particular consumer at rate other than the rate for specified for similarly placed consumers. Since supply to the Cement Company from surplus of power of Steel Company would be at 11 kV, application of EHT tariff, even after adjustment of 0.5% towards transformation losses, would amount to undue preference to Cement Company by the State Commission as well as would amount to discrimination against similarly placed consumers."

28. Thus, it appears that though the Tribunal said in the order that since the WESCO did not specifically raise the question and in spite thereof, the Commission gave its view without hearing on this point the Tribunal proceeded with the examination of this legal issue on merit with liberty to the WESCO to get an order of the Commission at an appropriate stage. In the circumstances, it cannot be said that what the Tribunal has held is mere obiter or an order of remand.

29. With regard to the question of **discriminatory treatment** in fixing tariff for allegedly favouring the cement company, it is quite unusual and improper for a litigant to come up with a ground not adverted in the pleading, not raised before the trial court, not even advanced through oral argument but advanced for the first time in the written note of argument to the behind and back of the adversary. This practice must be nipped in the bud. Written note of argument is a summary of what

has been argued through oral hearing. In our judicial system, hearing takes place for weeks, for fortnights and in some cases for months. It is not permissible to place a new ground in the written argument which was not told in the pleadings, before the first court and before the appellate court through oral hearing. It is contended in the written note of argument that this Tribunal in *Rajasthan Engineering College Society Vs. Rajasthan Electricity Regulatory Commission & Others (Appeal no. 39 of 2012 decided on 28.08.2012) elucidated* the provision of section 62 (3) of the Act to state the differential tariff is permissible considering the *"nature of supply and the purpose for which the supply is required"*. It is better we quote sub-section (3) of section 62:-

> *"The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required."*

In the aforesaid decision, this Tribunal said that "*the term purpose for which supply is required is of very wide amplitude and may include many other factors to fix differential tariffs for various categories of consumers".* It is further contended in the written argument that in *Northern Railway vs. Delhi Electricity Regulatory Commission & Others (Appeal no.268 of 2006 decided on 13.3.2007)* this Tribunal permitted differential treatment and we quote the exact lines of that Judgment

which have been underlined by the cement company in their written argument and the lines are:-

> *"The purpose of supply of electricity to the two organizations can thus be distinguished. The DMRC can be distinguished from the appellant in terms of age. The purpose of supplying electricity to the two organizations namely the appellant and DMRC can also be said to be different. For the Railways, the purpose of supply of electricity is to maintain its operation at the existing level except for the nominal increase by the year whereas the purpose of supply of electricity to DMRC is to create an altogether new transport system for the City of Delhi.*
>
> *18. It was pointed out at the time of arguments that the appellant is carrying passengers at a fare much lower than that charged by DMRC. This itself indicates the financial strength of the appellant vis-à-vis DMRC. This factor also can be included in understanding the purpose of the supply of electricity. The purpose of supporting the establishment of DMRC for providing the Mass Rapid Transit System, a crying need for the people of Delhi, is itself one great ground for treating the DMRC as a separate class of consumers. It can, therefore, be safely stated that the purpose of supply of electricity to the DMRC is different from the purpose of supply of electricity to the appellant and therefore, 62(3) of The Electricity Act 2003 permits preferential treatment to DMRC as compared to the appellant".*

With quoting the decisions as above in the written argument, it is contended that the nature and the purpose of supply to the cement company is different from the case of other HT consumers because other HT consumers in the state are consumers 'on request' of the distribution licensee but the cement company is not a consumer 'on request'. Again, the purpose of placing the cement company in respect of supply of surplus power of 4 MW is the purpose of evacuation of

bottled-up surplus power to meet the demands of the State of Odisha. No argument can be as silly, as ill-conceived and as shallow like the one written in the written argument. Even the learned Commission did not have the misadventure to place this in their order. The decisions quoted by the cement company are absolutely factually different from the facts of the present case. This Tribunal in the batch of two appeals when examined this question on merit did not reach any finding in the line invented by the cement company in the written note of argument. Neither the nature nor the purpose are in the case of the cement company can be said to be distinct and different from the other HT consumers. Evacuation of bottled-up surplus power cannot be the purpose for treating the cement company on a special footing. Again, the argument that a consumer can be one on request and a consumer can be one without request is a very bad logic. It was the very initial case of the cement company that since it was receiving power from the steel company as a captive consumer at 11kV it was not liable to pay cross subsidy. This contention was negated by the Commission and the Commission's view was upheld by this Tribunal in Appeal no.20 of 2008. Neither the nature nor the purpose can differentiate the cement company receiving surplus power of the steel company at 11 kV so as to fix EHT tariff for it and this would be a naked discrimination in favour of

the cement company not contemplated in sub-section (3) of Section 62 of the Act, 2003.

30. It was the contention in the written argument that the cement company granted a conditional consent to the contractual arrangement, the condition being that no financial loss should accrue to it should it be required to participate in extending its infrastructure to source surplus power of the concerned captive generating plant. It is the contention that before the Commission this contention was placed. It is difficult to appreciate the point; no contractual obligation can override the Statute. Since supply to the cement company from the surplus power of the steel company is at 11 kV application of EHT tariff in respect of the cement company would violate the provision of section 62 (3) of the Act. The 11 kV line from the steel company to the premises of the cement company is a part of the distribution system of WESCO. This Tribunal held in the batch of two appeals as aforesaid :-

> "*Since supply to the Cement Company from surplus of power of Steel Company would be at 11 kV, application of EHT tariff, even after adjustment of 0.5% towards transformation losses, would amount to undue preference to Cement Company by the State Commission as well as would amount to discrimination against similarly placed consumers.*"

31. It is the contention that it would be grossly inequitable to compel the cement company to pay HT rates and reference has been made to

the decision of this Tribunal in *Noida Power Company Limited vs. Uttar Pradesh Electricity Regulatory Commission (Appeal No.26 and 36 of 2007 decided on 8.5.2008)* and the decisions of the Hon'ble Supreme Court in *Namdeo Lokman Lodhi vs. Narmadabai & Others AIR 1953 SC 228; Rajkot Municipal Corporation Vs. Manjuben Jayantilal Nakum & Others (1977) 9 SCC 552, O. Konavalov vs. Commander, Coast Guard Regions & Others (2006) 4 SCC, Secretary, Haryana State Electricity Board vs. Suresh & Others (1999) 3 SCC and Niemla Textile Finishing Mills Limited vs. the 2nd Punjab Industrial Tribunal.* The principle enunciated in these decisions is on facts having no similarity or identity to the facts at hand and these decisions are of no avail to the cement company.

32. "**Win-Win situation**" is the logic of the Commission behind treating the cement company as EHT consumer in respect of supply of the surplus power at 11kV from the steel company on two grounds namely, a) the transformation loss at OCL end shall be computed as 0.5% of the energy input, and b) treating the cement company at EHT consumer would to be not to put additional financial burden. This Tribunal clearly held that even after adjustment of 0.5% towards transformation loss application of EHT tariff would amount to undue preference to the cement company. When justice is according to the law

there cannot be any win-win situation. Where the law is specific, when the Commission has its own Regulations, they are to be applied and implemented. We have no separate court of equity. Equitable considerations are ingrained in our laws; as such there is no scope of digression from the law enacted by the law makers which include the Commission itself as it framed its own Regulations and Code.

33. It is not the reasoning of the Commission that the nature and purpose of supply to the cement company in respect of supply at 11 Kv is different from other HT consumers. The Commission did advance no factual and legal argument from which it could be deciphered that the legal reasoning of this Tribunal was dissented from on clearly discernable legal grounds and in that case we would be always open to rectify. The Commission virtually admitted that it gave undue preference to the cement company. The Commission was aware of it, as its wordings suggest so in no uncertain terms. In such circumstances, the observation that it was to be treated **as a special case** is plainly not acceptable. When the law has been declared by the Parliament and the subordinate legislation has been framed in the legislative capacity by the Commission itself, there is no scope to say that it was treating a case as a special case and in doing so; it would be travelling beyond legal justice to advance a cause unknown to law. Treating an entity specially when

other equals are treated not so specially and when differentiation is not possible, there cannot be a special case and this is more so when the Courts are inferior courts subordinate to a judicial hierarchy. To give a special treatment to somebody in non-special situation when law is one and uniform would amount to the disobedience to the law. A judicial authority may be high, but that is of no great significance: what is significant is that the law is higher and is above the heads of us all. There was no necessity to tell these things in so many words since the Commission itself realized the position, yet it used the terms 'as a special case'.

34. That we were not wrong in our earlier finding is amply borne out when the Commission says in the impugned order that their order should not be treated as a precedent. This expression is only reserved to the Hon'ble Supreme Court which invokes its power under Article 142 of the Constitution to arrive at a just decision but even then the Hon'ble Supreme Court has said that in number of cases that the exercise of the power under Article 142 is not aimed at superseding the Statutes of the Parliament. So far as we the inferior courts and tribunals are concerned, we cannot say that a certain decision of ours would be so special that it would not constitute as a precedent for others to follow because we are meant to follow the law and interpretation of law must not be such as to

virtually abrogate the law. When the Parliament has reposed confidence in us we are to discharge such confidence by following the law and there is no escape from it.

35. The WESCO's plea that it cannot show undue preference to the cement company by treating it as EHT consumer was answered by the Commission in this way that the cement company did not have any financial benefit and care has been taken so that it is not put to any additional financial burden. This argument is pitted against by counter argument that by treating the cement company as EHT would be disadvantageous to the WESCO and it would stand as discrimination also as against other similarly placed consumers. This argument of the appellant cannot be defeated. The fact is that supply to the cement company is at HT voltage and when this is so, the applicable tariff would be HT. The Commission's own Supply Code, 2004 makes a distinction between HT and EHT and the tariff is also differently fixed by the Commission itself for the two categories of consumers. To repeat, justice, equity and good conscience is inherent in the law itself and apart from the law, there is no need to search for justice, equity and good conscience. The contractual arrangement cannot be uncorresponding to the law.

36. Argument was placed that the **'power to remove difficulty'** clause is a wide power which the Commission can exercise at any given situation and at any point of time. Fundamentally, this is not correct. In every modern statute, such clause appears which is exercisable normally by the Executive for removal of difficulty by general or special order. This power to remove difficulty is exercisable only to give effect to the provisions of the Statute and not to make any departure which the Statute does not expressly warrant for. If the law is clear and ambiguous and can be applied in a given situation, there is no scope to say that this power to remove difficulty clause can be invoked by the Commission to reach a decision which is expressly contrary to the law. Ordinarily, this power is exercised when the operation of a Statute is at a nascent stage. There was no difficulty to give effect to provisions of the Electricity Act and those of the Supply Code, 2004.

37. Again, if the Statute has provided for exercise of **inherent power** which is different from the 'Power to remove difficulties Clause' and which is a judicial power, then it can be exercised only to advance the cause of justice and to prevent the abuse of the process of law. Further, such inherent power is not at all exercisable when there is specific provision of law to address a remedy. When there is no specific provision in a given situation inherent power can be exercised.

38. The Commission said in the impugned order that their order would serve the **overall interest of all consumers of the State**. It is common knowledge that law cannot be a case-specific, it is generic and the law makers while making the law do not fail to notice of the welfare of the people. Therefore, by distraction from the law welfare of the people is not achieved.

39. We in the circumstances are unable to persuade ourselves to endorse the view of the Commission. Situated thus, we allow the appeal and set aside the order of the Commission by holding that in respect of supply of surplus power of the CGP Steel Company to the cement company at 11 kV, the appropriate tariff would be according to the Act, 2003, Commission's Tariff Order and the Supply Code, 2004, the HT tariff. No cost.

(V.J. Talwar)
Technical Member

(Justice P.S. Datta)
Judicial Member

Reportable/Not reportable

pr