In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

APPEAL NO. 220 OF 2015

Dated: 14th December, 2018

Present: Hon'ble Mr. Justice N. K. Patil, Judicial Member
Hon'ble Mr. S.D. Dubey, Judicial Member

In the matter of:

M/s. Tata Sponge Limited
P.O. Joda, District – Keonjhar
Odisha – 758 034 ...Appellant(s)

Versus

1. **Orissa Electricity Regulatory Commission** ...Respondent No.1
Bidyut Niyamak Bhawan, Unit – VIII
Bhubaneswar – 751 012

2. **North Eastern Electricity Supply Company of Odisha Limited**
Plot No. N-1/22, Nayapalli, Bhubaneswar
District - Khurda, Odisha – 751 015 ...Respondent No.2

3. **Grid Corporation of Orissa Limited**
Janpath, Bhubaneswar,
District – Khurda – 751 022
Odisha ...Respondent No.3

4. **Orissa Power Transmission Corporation Limted**
Janpath, Bhubaneswar,
District - Khurda – 751 022 ...Respondent No.4

5. **State Load Despatch Center,**
Mancheswar, Bhubaneswar
Distt: Khurda, Odisha ...Respondent No.5

Counsel for the Appellant(s) :	Mr. M.G. Ramachandran Mr. R. M. Patnaik Mr. P.P. Mohanty Ms. Anushree Bardhan Mr. Arnav Dash Mr. Arnav Behere Mr. Ashok K.Parija, Sr. Adv.
Counsel for the Respondent(s) :	Mr. Rutwik Panda Mr. G. Umapathy Ms. Anshu Malik Mr. Aditya for R-1 Mr. R.K. Mehta Ms. Himanshi Andley for R-2 & R-3 Mr. R.B. Sharma Mr. Mohit Mudgal for R-4 & R-5

JUDGMENT

PER HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER

1. The Appellant herein assailing the legality and validity and propriety of the Impugned Order dated 03.01.2013 on the file of Odisha Electricity Regulatory Commission (hereinafter referred to as **"Respondent No.1/OERC"**), Bhubaneswar to the extent that the Respondent No.1/OERC directed the GRIDCO/Discom to verify the CGP status of the Appellant on actual basis for the FY 2012-13 without considering the sale of power to State Grid as self consumption of the parent industries and without considering the resolution of the State Cabinet dated 10.04.2012, wherein it was decided that "the injection made by CGPs to the State Grid during period of invocation of Section 11 of the Electricity Act, 2003 will

be considered as deemed self consumption in the FY 2011-12 and FY 2012-13".

2. M/s. Tata Sponge Iron Limited (hereinafter referred to as **"Appellant/TSIL"**) is a consumer of electricity in the area of supply of North Eastern Electricity Supply Company of Odisha Limited and is also aggrieved by the Order dated 23.12.2014 in Review Petition passed in case no. 26 of 2013 on the file of the Odisha Electricity Regulatory Commission felt necessitated to present this Appeal for considering the following questions of law:

   A. Whether the State Commission has rightly disallowed the injection of power by the captive generating plants of the State including Appellant for the Financial Year 2012-13 as self consumption for computation of CGP status?

   B. Whether the State Commission has rightly interpreted the notification dated 10.04.2012 of the State Government?

   C. Whether the State Commission is right in directing to accept the injection of power made by the captive generating plants of the State including the Appellant during the period of invocation of Section 11 for the Financial Year 2012-13 as self consumption of CGP for computation of CGP status in the absence of withdrawal of the said notification?

   D. Whether the State Commission has rightly refused to interfere on the issues except the issue relating to invocation of Section 11 of the Electricity Act, 2003 while deciding the issue of CGP status of the captive generating plants of the State?

   E. Whether the State Commission has rightly rejected to consider the issue of short term open access permission to the Appellant and its associated company namely M/s. Tata Steel Limited

(having more than fifty one percent share on the captive generating of the Appellant), while deciding the issue of CGP status of the Appellant?

F. Whether M/s. Tata Steel Limited having more than fifty one percent share on the captive generating plant of the Appellant is entitled to draw power from the captive generating plant of Appellant through short term open access for self consumption?

G. Whether in view of the provisions of Section 9 read with Clause 8 of Section 2 of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005, the Ferro Alloy Plant of M/s. Tata Steel Limited can consume power generated from the captive generating plant of the Appellant Company through open access for captive use or not?

H. Whether the consumption of power by the Ferro Alloy Plant of M/s. Tata Steel Limited from the captive generating plant of Appellant being a captive user will be taken into consideration as self consumption while deciding the issue of CGP status of the Appellant?

I. Whether the injection of power by the captive generating plant of the Appellant to the state grid for the financial year 2012-13, pursuant to the notification issued under Section 11 of the Electricity Act, 2003, which was not withdrawn by the State Government and refusal of short term open access permission by the Respondents for captive consumption by the Ferro Alloy Plant of M/s. Tata Steel Limited being a captive user will be construed as self consumption for computation of captive status of the Appellant or not?

J. Whether the refusal of short term open access permission for self consumption by the Ferro Alloys Plant of Tata Steel Limited being the captive user, which was forced to daw the power from the distribution company by paying the gross subsidy thereon is justified or legal?

K. Whether the captive generating plant of Appellant being a co-generation plant is entitled to the benefit for non-drawal of power in respect of renewable energy?

3. Brief facts of the case in nutshell are as follows:-

A. That M/s. Tata Sponge Iron Limited, Appellant is a Company registered under the provisions of the Companies Act, 1956 having registered office at Bilaipada, P.O. Joda, District-P.O. Joda, District-Keonjhar, Odisha – 758034.

B. That the Appellant has set up a sponge iron manufacturing plant at Joda, District-Keonjhar, Odisha – 758 038. It has also installed co-generation based Waste Heat Recovery based Captive Generating Plant of 1x18.5+1x7.5 = 26 MW capacity in its plant premises and has installed 3 nos. of Direct Reduced Iron (DRI)/Sponge Iron Kiln of 2x375+1x500=1250 TPD capacity. In these metallurgical processes fossil fuel (coal) is used along with iron ore and dolomite in a kiln to produce heat energy, which is utilized for manufacturing of sponge iron or Direct Reduced Iron.

That there are three numbers of flue gas (from Sponge Iron Plant) based Waste Heat Recovery Boiler (WHRB) installed in the Plant for generation of steam. The steam so generated from WHRB-I & WHEB-III are passed through 18.5 MW Steam Turbine Generator

and the steam generated from WHRB-II is passed through 7.5 MW Steam Turbine Generator to generate power.

C. That the Appellant is having co-generation with three numbers Waste Heat Recovery Boilers utilizing waste heat from the sponge iron plants, for power generation under bottoming cycle, in terms of Clause 5.1(11) of Resolution No.A-40/95/IPC-1 dated 6th November, 1996 issued by the Ministry of Power, Government of India.

D. That captive generator plant has a process in which it simultaneously produces two or more form of useful energy including electricity. Thus as per Section 2 (12) of Electricity Act, 2003, the Appellant is treated as co-generation plant.

E. In the year 1982, the Appellant was incorporated as a company under the provisions of Companies Act, 1956 and it was formerly known as Ipitata Sponge Iron, which was a joint venture of Tata Steel and the Industrial Promotion and Investment Corporation of Orissa. In the year 1991, the Appellant became an associate company of Tata Steel Limited which is having more than fifty percent share of the Appellant Company.

F. In the year 2009, there was acute shortage of power in the State of Odisha. Grid Corporation of Odisha, Respondent No.3 herein, filed fifteen applications before the State Commission for procurement of surplus power from captive generators and the said applications were registered as Case No. 6 – 20 of 2009 on 28.02.2009, the State Commission was pleased to pass the order directing the captive generating plants to inject their surplus power to the State Grid.

G. Hence things thus stood on 30.06.2010, Respondent No.2/NESCO

herein submitted an application before the State Commission seeking direction to Respondent No.3/GRIDCO to furnish realistic data of 27 nos., of CGPS with monthwise total generation. Captive consumption and sale to GRIDCO/outside in MU during 2009-10 to licensees for calculation of cross subsidy surcharge and permit licensees to collect cross subsidy surcharges from the captive users in their licensed area who have not complied with their captive use status during 2009-10 as per Electricity Rule 2005.

H. The Respondent No.2/NESCO has filed the petition No. 129 of 2010 on the file of Odisha Electricity Regulatory Commission, the 1st Respondent herein. On being served notice, the Respondent CCPPO contended that in view of the invocation of Section 11 of Electricity Act, 2003 by the State Government, they have maximized their injection to the State Grid to help GRIDCO to tide over power deficit scenario in the State during the year 2009-10. As a result we have lost their CGP status as per Electricity Rules, 2005. This is a temporary phenomena and once Section 11 of the Electricity Act, 2003 is revoked they would rescind back to their CGP status. As the mother industries were never the consumer of the distribution licensee nor did it reflect in their ARR there is no need to pay cross subsidy surcharge to the Discoms.

I. The Respondent No.5/SLDC herein represented through their representative contended that the Appellant have misinterpreted the Open Access regulation of the Commission and in the present case the CGPs have sold their surplus power to GRIDCO for resale to Discoms. Therefore, the Discoms cannot claim cross

subsidy surcharge from the industries whose CGPs have lost their CGP status as per Electricity Rule, 2005

J. After hearing the learned counsel for the Appellant and learned counsel for the Respondents on the basis of the pleadings available on record, the 1st Respondent/Odisha Electricity Regulatory Commission, Bhubaneswar after evaluation of the oral, documentary evidences and other relevant materials available on the file by assigning cogent and valid reasons in paragraph 10-11 having directed the Respondent No.3/GRIDCO to verify the CGP status of the industries supplying the power to the State GRIDCO for the FY 2009-10, 2010-11 and FY 2011-12 in the line with aforesaid resolution of the State Government and on actual basis for the FY 2012-13 that is not considering sale of power by CGPs to the State Grid as self consumption of the parent industry. In case it is found that any CGP has lost its status in spite of such computation of power transaction, the DISCOM may approach the Commission on the issue of cross subsidy in case to case basis. With these observations the case stand disposed of.

K. Not being satisfied with the Impugned Order passed by the 1st Respondent/OERC, the Appellant presented this Appeal seeking appropriate relief as stated supra.

L. Shri M.G. Ramachandran, learned counsel appearing the Appellant submitted that the Appellant/TSIL herein has set up a sponge iron manufacturing plant at Joda in the district of Keonjhar, Odisha. It has also installed co-generation captive generating plant in the same premises. Since 1991 M/s. Tata Steel Limited holds

more than 51% of equity share of Appellant/TSIL. The Tata Steel Limited has a Ferro Alloy Plant at Joda in the district of Keonjhar. The CGP of the Appellant is connected at Joda sub station of OPTCL at 132 kV voltage level whereas the Ferro Alloy Plant of Tata Steel is also connected to the same grid of OPTCL at 132 kV voltage level. In terms of Section 9 read with Section 2(8) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005, the ferro alloy plant of M/s. Tata Steel Limited can consume power generated from the generating plant of Appellant as captive user and the Appellant is also entitled to open access.

M. The State Government pursuant to a decision of the Cabinet issued further notification dated 10.04.2012 inter alia stating "the injection made by CGPS to the State Grid during the period of invocation of Section 11 will be considered as deemed self consumption in the FY 2011-12 and 2012-13". By that time the State Government issued another notification dated 23.07.2012 pursuant to the notification dated 25.11.2011 stating that the directions given to CGPs therein would apply till 31.07.2012 only.

N. It is the further case of the Appellant that, the said notification dated 23.07.2012 must be quashed as being contrary to the decision of the Cabinet dated 10.04.2012 wherein the benefit given in the notification under Section 11 of the Electricity Act, 2003 was made applicable for the entire financial year 2012-13. To substantiate his submission he placed reliance on the judgment of the Supreme Court of India in case of State of Bihar v. Suprabhat Steel (1999) 1 SCC 31; Pg.36, Para 7. The State Commission has allowed the prayer in the review petition of the Appellant pertaining to applicability of the notification under Section 11 of the Electricity Act, 2003 for the entire financial year 2012-13.

O. Counsel appearing for the Appellant submitted that, in spite of the above ruling by the State Commission, NESCO and other authorities are interpreting the direction to be limited till 31.07.2012 notwithstanding the law laid down by the Hon'ble Supreme court, the order dated 23.12.2014 passed by the State Commission and the decision of the Cabinet dated 10.04.2012 wherein the benefit given in the notification under Section 11 of the Electricity Act, 2003 was made applicable for the entire financial year 2012-13. On 20.06.2011 and 23.02.2013, M/s. Tata Steel Limited applied for short term open access permission, which was not granted by SLDC without assigning any reasons. In the aforesaid circumstances, if the open access permissions would have been granted in favour to Tata Steel being the shareholder of Appellant and being entitled to be a captive user, the electricity from the captive generating plant of Appellant could have consumed fifty one percent of power generated from the CGP to meet the requirement of provisions of Rule 3 of Electricity Rules, 2005.

P. It is the case of the Appellant that M/s. Tata Steel Limited/Appellant was drawing power from NESCO to meet its requirements which clearly evidences that adequate infrastructure was available and therefore, the denial of open access by SLDC is misconceived and liable to be rejected. It is further case of the Appellant that the order dated 03.01.2013 was made applicable for the FY 2010-11, FY 2011-12 and FY 2012-13 in spite of the prayer of NESCO being limited to the period 2009-10. Further no notice was given before extending the period covered by the said order beyond that what was prayed for and consequently, the Appellant was deprived of an opportunity to make its submissions in respect

thereof to its prejudice. To substantiate his submissions he placed reliance on the decision in case of R.V. Madhvani & Ors. V. T.P. Madhvani (2004) 1 SCC 497, Pg.508, Para 14 of this judgment.

Q. Admittedly M/s. Tata Steel Limited was restrained by way of refusal of short term open access permission to consume the power generated from the captive generating plant of the Appellant being a captive user. On the other hand M/s. Tata Steel Limited was forced to draw power from the distribution company. NESCO, being the distribution company in the instant case has claimed the cross subsidy surcharge from the Appellant alleging the less consumption of power i.e. less than fifty one percent of the aggregate electricity generated in its CGP. The Appellant contended that the Appellant has been prevented from achieving CGP status due to the misconceived and illegal inaction/denial with respect to grant of short term open access. From the aforesaid facts, it is clear that all the Respondents are hand in glove to claim the cross subsidy surcharge from the Appellant without justification.

R. The counsel appearing for the Appellant contended that the State Commission has failed to appreciate that the consumption of power by the ferro alloys plant of M/s. Tata Steel Limited from the captive generating plant of Appellant being captive user will be taken into consideration as self consumption while deciding the issue of CGP status of the Appellant. The State Commission had also not framed any issue regarding refusal of short term open access permission by the Respondents for captive use. Further, NESCO being the distribution company has been collecting or trying to collect the cross subsidy twice for the same self consumption of power i.e. by way of refusal of short terms open

access permissions, the Ferro Alloys Plant of M/s. Tata Steel Limited was forced to draw power from NESCO and for non drawal of captive power by the Ferro Alloy plant of M/s. Tata Steel Limited being the captive user, the captive generating plant of the Appellant was prevented from consuming fifty one percent of generated power without any ground. It is also submitted that from the year 2009 to 2012 there was acute shortage of power in the State. The State Government had issued notifications under Section 11 of the Electricity Act, 2003 from time to time, wherein the direction was issued to all the captive generating plants to maximize their generation to the full capacity and inject the same to state grid in public interest. On 25.11.2011, the State Government issued a notification under Section 11 of the Electricity Act, 2003 directing all the captive generating plants to maximize their generation to the full capacity and inject the same to State Grid. The said notification was never withdrawn by the State Government. On 10./04/2012, the State Cabinet decided that "the injection made by CGPs to the State Grid during period of invocation of Section 11 will be considered as deemed self consumption in the FY 2011-12 and 2012-13". Electricity cannot be stored hence Tata Sponge was forced to inject its power to the State Grid after signing the power purchase agreement with GRIDCO.

S. Having regard to the facts and circumstances of case as stated above, counsel appearing for the Appellant submitted that the Appellant should not be penalized for the act of omission and/or commission on part of the State Government (when the State Commission has itself held that the State Commission cannot limit the cabinet decision to the month of July, 2012 and further for the

act of omission and/or commission on part of the SLDC. The SLDC is maintaining the energy accounting of all generation and supply of electricity within the State. The supply of power by the Appellant GRIDCO-NESCO-Tata Steel Limited and supply of power by GRIDCO-NESCO-Tata Steel is through the same integrated system in the state of Orissa. The quantum of power supplied by various resources are only adjusted through Energy Accounting. In view of above SLDC should be directed to adjust in the Energy Accounting for the FY 2012-13 the quantum of power now accounted as supplied by the Appellant to the GRIDCO as being supplied by the Appellant-NESCO-Tata Steel Limited. The quantum of consumption by Tata Steel as captive user of the electricity generated by the Appellant should accordingly be computed by following the above Energy Accounting and Adjustment. To substantiate the above submissions the learned counsel appearing for the Appellant placed reliance of the judgment in case of U.P. SEB v. Shiv Mohan Singh, (2004) 8 SCC 402, Union of India v. Major General Madan Lal Yadav [1996 (4) SCC Pg. 127], B.M. Malani v. Commissioner of Income Tax and Anr. 2008 (10) SCC Pg. 617, Kushweshwar Prasad Singh v. State of Bihar (2007) 11 SCC Pg. 447.

T. Therefore it is submitted that in view of the decisions of the High Court and Apex Court and law laid down by the Apex Court and High Court in above judgment, the Impugned Order passed by the 1st Respondent/OERC cannot be sustainable, it is liable to be set aside at threshold.

4. **Per Contra, The** learned counsel appearing for the 1st Respondent/OERC has filed his written submissions and contended that the present Appeal filed by the Appellant against order dated 3.1.2014 and 23.12.2014 passed by OERC in Case No. 129 of 2010 and in Review Petition being Case No. 26 of 2013 is devoid of merits. Hence the Appeal filed by the Appellant is misconceived.

4.1 The Impugned Order passed by the Respondent No.1/OERC pertains to the issue of cross subsidy surcharges from the generator, who have not maintained their status as CGP and selling more than 49% total generation to GRIDCO or third party for the period FY 2009-10 to FY 2012-13. It arose from the petition No. 129 of 2010 filed by DISCOMs seeking to allow them to collect cross subsidy surcharge from the captive power plant users in their license area. 1st Respondent/OERC disposed of the Petition on 03.01.2013 in accordance with law holding that CSS could not be leviable to the CGPs till June 2012 in view of notification issued by the State Government under Section 11 of the Electricity Act, 2003.

"11. The notification of State Govt. relates to a situation where the Generating unit of the Consumer Industry had helped the State Grid during power deficit situation and in the process might have lost its CGP status as per the Electricity Rule, 2005. It was an extra-ordinary situation where State Govt. in its resolution had specifically allowed power consumed by the State Grid as deemed self consumption. Hence, the contention of the DISCOMs that this Resolution of the State Govt. is only applicable for exemption of ED

for power consumed by parent industries is not tenable. Once the CGP status is determined all the liabilities and incentives due to that status also follow. Therefore, we are of the opinion that in case the CGPs have not lost their status in accordance with the aforesaid resolution of the State Govt. by injecting surplus power to the Grid for State requirement, the transaction can't be termed as open access transaction and consequently does not attract payment of cross-subsidy surcharge to DISCOMs. However, we are of the opinion that such computation be applicable only for the past financial year 2009-10, 2010-11 and 2011-12, but not for the current FY 2012-13 where Section 11 has not been invoked for the full financial year. Since the financial year 2012-13 has not yet come to an end and Section 11 has been invoked till June, 2012 a decision regarding CGP status for FY 2012-13 can't be taken now. As per the existing rules the annual generation has to be taken into account for determining the prescribed percentage for self-consumption and the CGP during the remaining period (from June, 2012 to March, 2013) may increase their self consumption and retain their CGP status independently of invocation of Section 11.

Therefore, for the FY 2012-13 the power injected by the CGPs to the State Grid should not be treated as self consumption for computation of CGP status.

12. Hence, it is directed that GRIDCO/ DISCOMs have to verify the CGP status of the industries supplying power to the State Grid for the FY 2009-10, 2010-11and 2011-12 in line with the aforesaid Resolution of the State Govt. and on actual basis for the FY 2012-13 i.e. not considering the sale of power by CGPs to the State Grid as self consumption of the parent Industry. In case it is found that any CGP has lost its status in spite of such computation of power

transaction, the DISCOMs may approach the Commission on the issue of the Cross-subsidy in case to case basis."

4.2 Therefore, the Appellant M/s. TSIL not being satisfied with the Impugned Order passed by the Respondent No.1/OERC filed Review Petition being Case No. 26 of 2013 and raised certain issues which had no bearing to the original proceedings filed by the DISCOMs. Respondent No.1/OERC while rejecting the issues raised by the appellant, disposed off the review application by extending the period upto end of FY 2012-13 (i.e. upto 31st March 2013) by its order dated 23.12.2014 and inter alia held as under

"Therefore, we direct that injection made by CGPs to the State Grid during the period of invocation of Section-11 of the Electricity Act, 2003 as per Govt. Order should also be considered as deemed self-consumption in the FY 2012-13."

4.3 Further learned counsel appearing for the Respondent No.1/OERC submitted that with regard to the other issues raised in the review petition, OERC inter alia held that :

"7. The promotion of Co-generation and renewable energy is not the subject matter of the order sought to be reviewed but a separate issue. Therefore, this is not an error apparent on the face of the record rather this is an appeal by the Petitioner in disguise.

8. The contention of the petitioner that the Open Access Regulation will not be applicable to them in view of the Co-generation associated with the generation and power supply to one of its plant. In fact, relevant rules and regulations have been considered by the

Commission while issuing the said order. In general, there is no error apparent on the face of record requiring any modification. The issue raised by the petitioner is in the manner of computation of captive power by DISCOMs which is not acceptable to the petitioner. For this, there are other remedies available under the law and, therefore, Commission does not intend to interfere with the order dt.03.01.2013 as a review.

9. The petitioner has raised the issue of delays and refusal of SLDC to allow Open Access to the petitioner. Such issues are not a part of order in Case No.129/2010 since this order relates to the cases supplying power to the Grid under instructions from Govt. under Section-11 of the Act, 2003. Functioning of SLDC is not a part of this order and, therefore, Commission is not inclined to incorporate this in the above order as a review.

4.4 That State Commission has inclined to incorporate this issue in the above order as the review. It is well settled that the scope of review is limited and cannot exceed the scope of original case. As stated above the original proceedings arose from the petition filed by DISCOMs seeking to allow them to collect cross subsidy surcharge from the captive power plant users in their license area. Further he submitted that in Appeal filed by the Appellant may be dismissed as devoid of merits.

5.0 **Per contra**, the Shri R.K. Mehta, learned counsel appearing for the Respondent No.2/NESCO & Respondent No.3/GRIDCO has filed his written submissions, he contended that the instant Appeal filed by the Appellant to the extent State Commission directed

GRIDCO/Discoms to verify the CGP status of the Appellant on actual basis for FY 2012-13 without considering the sale of power to the State Grid as self consumption of the parent industry and without considering the resolution of the State Cabinet dated 10.04.2012. The counsel submitted that the ground on which the Appellant has challenged the order dated 03.01.2013 is devoid of any merit. Hence the Appeal filed by the Appellant may be dismissed.

5.1 The counsel further contended that as per Notification dated 10.04.2012 of Government of Odisha the power injected by CGPs to the State Grid during the period of invocation of Section 11 of the Electricity Act, 2003 i.e. upto June, 2012 was to be deemed as self consumption in FY 2011-12 and 2012-13 for the purpose of CGP status under Rule 3 of Electricity Rules, 2005 and as per notification dated 23.07.2012 under Section 11 was extended upto 31.07.2012. Consequently power injected by CGPs to the State Grid during the period of invocation of Section 11 i.e. upto 31.07.2012 only was to be deemed as self consumption in FY 2011-12 and 2012-13 under Rule 3 of the Electricity Rules, 2005. As per data supplied by GRDCO the self consumption of the Appellant, Tata Sponge Iron Limited during the FY 2012-13 comes to 47.9%. It is thus submitted that the contention of the Appellant is misconceived and untenable. Another contention which has been raised by the Appellant with regard to the Review order dated 23.12.2014 is that M/s. Tata Steel Limited holds 50% of share in the captive generating plant of the Appellant. Tata Steel Limited was denied short-term Open Access permission to consume the power generated by the Captive Generating plant of Appellant and was forced to draw power from

the Distribution company, i.e. NESCO which has claimed cross subsidy surcharge from the Appellant on the ground that the Appellant has consumed less that 51% of the Electricity generated in the CGP.

5.2 It is submitted that since the Appellant has consumed only 47.9% of the electricity generated during the period 2012-13, as per first proviso to Section 9 of the Electricity Act, 2003, the entire generation of the CGP has to be treated as supply of Electricity by a generating company and the Appellant is liable to pay cross subsidy surcharge amounting to Rs. 5.90 Crore to NESCO. Therefore, on this ground also the instant appeal filed by the Appellant is liable to be rejected.

5.3 The counsel appearing for Respondent No.2 and 3 contended that it was the 5th Respondent/SLDC and not NESCO which was to grant open access. It appears that open access was denied due to technical reasons. . Since the Appellant was aware that injection of power to the State Grid only upto 31.07.2012 was to be treated as self consumption as per notification dated 23.07.2012, and it did not have open access permission, any generation by the Appellant must have been with the intention to sell the same. He further contended on behalf of the Appellant that the open access Regulations will not be applicable to them in view of the co-generation associated with the generation and power supply to one of its plant has been rightly rejected by the Commission on the ground that the said plea was not raised in the original Petition and cannot, therefore, be allowed to be raised for the first time in the Review Petition. Therefore it is most respectfully submitted that the Appeal is devoid of any merit and is liable to be dismissed.

6.0 Shri R.B. Sharma, the learned counsel appearing for the Respondent No.4/OPTCL and Respondent No.5/SLDC filed joint reply on behalf of OPTC Limited and SLDC, Bhubaneswar

6.1 At the outset, each and every statements, allegations, submissions, made by the Appellant in the Appeal are being denied that is contrary to and/or inconsistent with that is stated herein. It is respectfully submitted that nothing herein should be deemed to have been admitted unless the same is expressly admitted herein.

6.2 Contending that the main issue in the instant Appeal has been filed against order dated 03.01.2013 passed by the 1st Respondent/OERC in Case No. 129 of 2010 to the extent that the Commission had directed the GRIDCO/DISCOMs to verify the CGP status of the Appellant without considering the sale of power to the State Grid as self consumption and Appeal against the order dated 23.12.2014 passed by the Commission in Case No. 26 of 2013 to the extent that the Commission disallowed the prayer to consider the sale of power to the State Grid as self consumption in the event of refusal of open access permission for supply of power to its associated company. The Appellant has raised certain issues which are not relevant to activities of Odisha Power Transmission Corporation Limited as transmission licensee and SLDC, Bhubaneswar as System Operator. Hence, both OPTCL and SLDC have no view to offer on those paragraphs of the Memorandum of Appeal. Only paragraphs relating to grant of approval for wheeling of power from the Appellant's CGP at Joda to M/s. Tata Steel Limited, Joda have been dealt and the reply on this limited issue in the Appeal is submitted.

6.3 M/s. Tata Steel Limited having a Ferro Alloy Plant (FAP) at Joda had requested SLDC for issue of approval for wheeling of 10 MW RTC (Round the Clock) power from CGP of M/s. Tata Sponge Iron Limited, Joda through intra-State open access transaction with effect from 01.03.2013 to 31.03.2013. The CGP of the Appellant is connected at Joda sub station of OPTCL at 220kV voltage level whereas the applicant M/s. Tata Steel Limited (FAP), the drawee utility is connected to same Joda sub station of OPTCL at 132 kV voltage level. The procedure for allowing short term open access transactions has been detailed in Regulation 7(2) of the Orissa Electricity Regulatory Commission (Terms & Conditions for Open Access) Regulations, 2005. In accordance with this procedure, SLDC shall allow short term open access transaction only after consulting the concerned transmission and/or distribution licensee(s) whose network(s) would be used for such transaction. As per the OERC Regulation 2005, 5th Respondent/SLDC requested 4th Respondent/OPTCL the transmission licensee to issue consent for the transaction applied for by the Applicant M/s. Tata Steel Limited (FAP). In response to the procedure, OPTCL intimated the breakdown of one of the 220/132 kV, 100 MVA Auto-Transformers at Joda sub station on 09.02.2013 resulting into constraint in power supply through Joda sub station. Thus, the open access transaction was not feasible owing to the non-availability of adequate transmission facility. It was also intimated that the open access transaction requested by M/s. Tata Steel Limited (FAP) may be considered after commissioning of the Auto-transformer. The information filed by the Appellant in Annexure I and Annexure J to the Appeal very clearly show that the Appellant was aware of the non availability of adequate transmission facility owing to the

breakdown of one of the 220/132 kV, 100 MVA Auto-transformers at Joda sub station on 09.02.2013. in the light of this information, the contention of the Appellant that the open access was not granted deliberately is false, frivolous and baseless. It may further be stated if the Appellant was so concerned about the open access then it was open for him to raise the issue before the Commission as per 2nd proviso to Section 9(2) of the Electricity Act, 2003. It is further reiterated that the roles of OPTCL as transmission licensee and SLDC, Bhubaneswar as System Operator are very limited on the issues raised in this Appeal and is clarified in above paragraphs. Therefore he submitted that the Appeal filed by the Appellant is misconceived, liable to dismissed as devoid of merits.

6.4 Further he submitted that the open access transaction was not allowed on the ground of non-availability of adequate transmission facility. Therefore, the 1st Respondent/OERC by relying on material available on records passed appropriate order as permissible under relevant provisions of the Electricity Act, 2003 and the relevant rules. Therefore interference by this Tribunal is not called for on the ground that no irregularity or legal infirmity has been pointed out by the Appellant. The Appellant have failed to make any ground to entertain the instant Appeal. Therefore he submitted that the Appeal filed by the Appellant may be dismissed with cost in the interest of equity and justice.

7. We have heard the learned counsel for the Appellant and the learned counsel for the Respondent Nos. 2 to 5 at considerable length of time and after carefully consideration of the order Impugned passed by the Respondent No.1/Odisha State Electricity Commission and after careful perusal of the Written submission and

rejoinder filed by the counsel appearing the parties and after critical analysis of entire relevant material available on records and the pleadings available on the record, the only issue that arises for consideration is:-

"Whether the Impugned Orders passed by the Respondent No.1/Odisha State Electricity Commission dated 03.01.2013 and 23.12.2014 (in case No. 129 of 2010 and case No. 26 of 2013 respectively) on the file of the Respondent No.1/Odisha State Electricity Commission, Bhubaneswar so far it relates to challenge made in the present Appeal is sustainable in law".

8. The principal submissions of the learned counsel appearing for the Appellant Shri M.G. Ramachandran are that in light of the Cabinet Notification dated 10.04.2012 stating that the injection made by the CGPs to the State Grid during the period of invocation of Section 11 would be considered as deemed self consumption for the FY 2012-13 and by that time the State Commission issued another Notification dated 23.07.2012 pursuant to the Notification dated 25.11.2011 stating that the direction given to the CGPs therein would apply only till 31.07.2012. The Notification dated 23.07.2012 must be quashed as contrary to the decision of Cabinet decision dated 10.04.2012 on the ground that the benefit given in the Notification issued under Section 11 of the Electricity Act, 2003 was made applicable to the entire FY 2012-13.

8.1 To substantiate his submissions he placed reliance on the judgments of the Apex court in case of State of Bihar v. Suprabhat Steel (1999) 1 SCC 31; Pg.36, Para 7. The Respondent No.1 has allowed the prayer in the Review Petition of the Appellant pertaining

to applicability of the notification under Section 11 of the Electricity Act, 2003 for the entire financial year 2012-13. This aspect of the matter has not been considered by the. Respondent No.1/Odisha State Electricity Commission. Therefore, in spite of the settled law laid down by the Apex Court as stated at supra, the State Commission, NESCO and other authorities are interpreting the direction to be limited till 31.07.2012 notwithstanding the law laid down by the Hon'ble Supreme court, the order dated 23.12.2014 passed by the State Commission and the decision of the Cabinet dated 10.04.2012 wherein the benefit given in the Notification under Section 11 of the Electricity Act, 2003 was made applicable for the entire financial year 2012-13. On 20.06.2011 and 23.02.2013, M/s. Tata Steel Limited applied for short term open access permission, which was not granted by Respondent No.5/SLDC without assigning any reasons. Therefore, if the open access permissions would have been granted in favour of Tata Steel being the shareholder of Appellant and being entitled to be a captive user, the electricity from the captive generating plant of Appellant could have consumed fifty one percent of power generated from the CGP to meet the requirement of provisions of Rule 3 of Electricity Rules, 2005. This aspect of the matter has not been considered by the State Commission.

8.2 The Appellant M/s. Tata Sponge Limited was drawing power from NESCO to meet its requirements which clearly evidences that adequate infrastructure was available and therefore, the denial of open access by Respondent No.5/SLDC is misconceived and liable to be rejected and that the order dated 03.01.2013 was made applicable for the FY 2010-11, FY 2011-12 and FY 2012-13

in spite of the prayer of NESCO being limited to the period 2009-10.Further he was quick to point out and vehemently submitted that no notice was given before extending the period covered by the said order beyond that what was prayed for and consequently, the Appellant was deprived of an opportunity to make its submissions in respect thereof to its prejudice. To substantiate this submission, he placed reliance on the decision in case of R.V. Madhvani & Ors. V. T.P. Madhvani (2004) 1 SCC 497, Pg.508 as held in Para 14 of this judgment. On this ground alone the ordesr impugned passed by the State Commission are required to be vitiated.

8.3 The learned counsel appearing for the Appellant contended that the Appellant has been prevented from achieving CGP status due to the misconceived and illegal inaction/denial with respect to grant of short term open access. It is established beyond reasonable doubt that all the Respondents are hand in glove to claim the cross subsidy surcharge from the Appellant without justification. Hence on this ground also orders impugned are liable to be set aside. The counsel for the Appellant contended that the State Commission has failed to appreciate that the consumption of power by the Ferro Alloys plant of M/s. Tata Steel Limited from the captive generating plant of Appellant being captive user will be taken into consideration as self consumption while deciding the issue of CGP status of the Appellant. The State Commission had also not framed any issue regarding refusal of short term open access permission by the Respondents for captive use. The NESCO being the distribution company has been collecting or trying to collect the cross subsidy twice for the same self consumption of power i.e. by

way of refusal of short terms open access permissions, the Ferro Alloys Plant of M/s. Tata Steel Limited was forced to draw power from NESCO and for non drawal of captive power by the Ferro Alloy plant of M/s. Tata Steel Limited being the captive user, the captive generating plant of the Appellant was prevented from consuming fifty one percent of generated power without any ground. Therefore he submitted that the Impugned Order passed by the State Commission is liable to be set aside at threshold.

8.4 Finally, he submitted that having regard to facts and circumstances of the case the Appellant should not be penalised for the act of omission and/or commission on part of the State Government and on the ground that the State Commission cannot limit the cabinet decision till the month of July, 2012 and further for the act of omission and/or commission on part of the SLDC. The SLDC is maintaining the energy accounting of all generation and supply of electricity within the State.

8.5 To substantiate his principal submissions the learned counsel appearing for the Appellant placed reliance of the judgment of the Hon'ble Supreme Court in case of U.P. SEB v. Shiv Mohan Singh, (2004) 8 SCC 402, Union of India v. Major General Madan Lal Yadav [1996 (4) SCC Pg. 127], B.M. Malani v. Cmissioner of Income Tax and Anr. 2008 (10) SCC Pg. 617, Kushweshwar Prasad Singh v. State of Bihar (2007) 11 SCC Pg. 447.

9. **Per Contra, The** learned counsel appearing for the 1st Respondent/OERC contended that the Appeal filed by the Appellant is liable to be dismissed as devoid of merits on ground

that orders passed by the State Commission are strictly in consonance with the relevant provisions of the act and regulations and rules. The Appeal is liable to be dismissed as misconceived on the ground that the Impugned Order pertains to the issue to cross subsidy surcharge from the generator who have not maintained their status as CGP and selling more than 49% total generation to GRIDCO or third party for the period FY 2009-10 to FY 2012-13. It arose from the petition No. 129 of 2010 filed by DISCOMs seeking to allow them to collect cross subsidy surcharge from the captive power plant users in their license area. 1st Respondent/OERC disposed of the Petition on 03.01.2013 in accordance with law holding that CSS could not be leviable to the CGPs till June 2012 in view of notification issued by the State Government under Section 11 of the Electricity Act, 2003 and the 1st Respondent/OERC after careful consideration of relevant materials available on the file by assigning cogent and valid reasons has rightly justified in passing the appropriate order and interference by this Tribunal does not call for.

9.2 The Respondent no.2 and 3 contended and submitted that Respondent No. 1/OERC after thorough evaluation of the oral, documentary evidence and other relevant materials available on the file by assigning cogent and valid reasons and also taking into consideration has passed the reasoned orders and interference by this Tribunal does not call for. The counsel further contended that as per the Government Notification issued by the Government of Odisha the power injected by CGPs to the State Grid during the period of invocation of Section 11 of the Electricity Act, 2003 i.e. upto June, 2012 was to be deemed as self consumption in FY

2011-12 and 2012-13 for the purpose of CGP status under Rule 3 of Electricity Rules, 2005 and as per Notification dated 23.07.2012 notification under Section 11 was extended upto 31.07.2012. Consequently power injected by CGPs to the State Grid during the period of invocation of Section 11 i.e. upto 31.07.2012 only was to be deemed as self consumption in FY 2011-12 and 2012-13 under Rule 3 of the Electricity Rules, 2005. As per data supplied by GRDCO the self consumption of the Appellant, Tata Sponge Iron Limited during the FY 2012-13 comes to 47.9%. It is thus submitted that the contention of the Appellant is misconceived and untenable. Another contention which has been raised by the Appellant with regard to the Review order dated 23.12.2014 is that M/s. Tata Steel Limited holds 50% of share in the captive generating plant of the Appellant. Tata Steel Limited was denied short-term Open Access permission to consume the power generated by the Captive Generating plant of Appellant and was forced to draw power from the Distribution company, i.e. NESCO which has claimed cross subsidy surcharge from the Appellant on the ground that the Appellant has consumed less that 51% of the electricity generated in the CGP. Therefore, on this ground the Appeal filed by the Appellant is liable to be dismissed.

9.3 The counsel appearing for Respondent No.2 and 3 contended that the Appellant consumed only 47.9% of the electricity generated during the period 2012-13, as per first proviso to Section 9 of the Electricity Act, 2003, the entire generation of the CGP has to be treated as supply of Electricity by a generating company and the Appellant is liable to pay cross subsidy surcharge amounting to Rs.

5.90 Crore to NESCO. Therefore, on this ground also the instant appeal filed by the Appellant is liable to be rejected.

9.4 The counsel appearing for Respondent No.4 and 5 has filed joint reply and contended that the main issue in the instant Appeal has been against the order dated 3.1.2013 passed in Case No. 129 of 2010 to the extent that the State Commission has directed the GRIDCO and Discom to verify CGP status of Appellant without considering the sale of power to the State Grid as self consumption and Appeal against the order dated 23.12.2014 passed by the Commission in Case No. 26 of 2013 to the extent that the Commission disallowed the prayer to consider the sale of power to the State Grid as self consumption in the event of refusal of open access permission for supply of power to its associated company.

9.5 The counsel for the Respondent No. 4 and 5 have no view to offer on those paragraphs of the Appeal. Only paragraphs relating to grant of approval for wheeling of power from the Appellant's CGP at Joda to M/s. Tata Steel Limited, Joda have been dealt and the reply on this limited issue in the Appeal is filed. He further contended that in view of the Tata Steel Limited having a Ferro Alloy Plant (FAP) at Joda had requested SLDC for issue of approval for wheeling of 10 MW RTC (Round the Clock) power from CGP of M/s. Tata Sponge Iron Limited, Joda through intra-State open access transaction with effect from 01.03.2013 to 31.03.2013. The CGP of the Appellant is connected at Joda sub station of OPTCL at 220kV voltage level whereas the applicant M/s. Tata Steel Limited (FAP), the drawee utility is connected to same Joda sub station of OPTCL at 132 kV voltage level. The procedure for allowing short term open access

transactions has been detailed in Regulation 7(2) of the Orissa Electricity Regulatory Commission (Terms & Conditions for Open Access) Regulations, 2005. In accordance with this procedure, SLDC shall allow short term open access transaction only after consulting the concerned transmission and/or distribution licensee(s) whose network(s) would be used for such transaction. Therefore this aspect of the matter has been rightly considered by the State Commission in the orders and denied the relief sought by the Appellant which is just and reasonable. Further he contended that the open access transaction was not allowed on the ground of non-availability on part of the transmission facilities. Therefore, the Respondent No.1/OERC by relying relevant material available on record passed the appropriate order is permissible under relevant provisions of the Electricity Act, 2003 and the Relevant rules therefore interference by this Tribunal does not call for on the ground that the Appellant failed to point out any irregularity nor legal infirmity in the Impugned Order. Therefore he submitted that the Appeal filed by the Appellant may be dismissed as devoid of merit.

10. **Our considerations and analysis:-**

10.1 After critical evaluation of the submissions of the learned counsel appearing the Appellant and the Respondents it is manifest on the face of the Impugned Order passed by Respondent No.1/Odisha State Electricity Commission, Bhubaneswar that it has not considered the case as per the pleadings available on records and also failed to frame necessary issue for consideration as contended by the learned counsel appearing for the Appellant that the State Commission has not framed any issue regarding refusal of short term open access permission by the Respondents for

captive use and the NESCO being the distribution company has been collecting or trying to collect the cross subsidy twice for the same self consumption of power i.e. by way of refusal of short term open access permissions is not justifiable. And it is subsequently contended no notice was given before extending the period covered by the said order beyond that what was prayed for and consequently, the Appellant was deprived of an opportunity to make its case in respect thereof to its prejudice and has rightly placed reliance on the judgment of the Hon'ble Supreme Court in case R.V. Madhvani & Ors. v. T.P. Madhvani (2004) 1 SCC 497, Pg.508, Para 14 of this judgment. It is noteworthy to refer the judgment of the Apex Court which reads as hereunder:-

"14. .... The procedural aspect demands that on the amendment being allowed, the opposite party has to be given a chance to respond to the amended pleading and if the plea is contested, the court has to give its decision thereon. Not affording an opportunity to the contesting party to contest a plea, which has been allowed to be amended, is negation of justice. In the present case the fact remains that the amendment application of the plaintiff was allowed vide order dated 16-12-1985 when on the same date the appeal against the preliminary decree was disposed of and rate of interest going even beyond what was permitted by way of amendment, was awarded. The decree which was passed for much more than what the amendment allowed. The plaintiff had only sought leave to amend the rate of interest as originally pleaded as 6% per annum to 13% per annum. This amendment was allowed. But in the decree the Court allowed interest to be charged at the prevailing bank rate of interest charged by

nationalised banks from time to time on commercial transactions during the relevant period. Thus the High Court while allowing the prayer for amendment simultaneously passed a decree not only based on the amended plea, but for exceeding it. No amended pleadings were filed. No opportunity was given to the defendants to contest the plea. A bare reading of Order 6 Rule 17 of the Code of Civil Procedure shows that amendment is of a plea contained in the pleadings and the object of allowing the amendment of pleadings is to determine the real questions in controversy between the parties. This means that the parties have to be given a chance to contest the questions in controversy and the court has to give its decision ultimately on such contested issues. This procedure was not followed in the present case. The procedure followed is wholly illegal. This Court had occasion to pronounce on this issue in J.Jermons v. Aliammal. It was held that a new plea cannot be allowed to be raised without effecting amendment of pleadings, without giving reasonable opportunity to the opposite party to file further pleadings and adduce evidence."

10.2 In view of the non considering the case on the basis of the pleadings available on record and without affording reasonable opportunity of hearing to the Appellant, the 1st Respondent/Odisha Electricity Regulatory Commission has erred and proceeded to conclude the proceedings contrary to the pleadings available on the record and the case made out by the parties. Therefore, taking into consideration this aspect of the matter, we do not propose to express any opinion on the merit of the case and case made out by the learned counsel appearing for the parties as stated supra in their reply submissions and written submissions and also reliance

placed on the judgments of the Supreme Court and this Tribunal as referred above we are of the considered view that the Impugned Order passed by the 1st Respondent/Odisha Electricity Regulatory Commission cannot be sustainable in the eye of law and on account of non compliance of total cross of principal of natural justice and the order does not contain any discussions nor reasoning or finding on the basis of the relevant material available on record. Therefore, we hold that order impugned passed by the Respondent No.1/OERC cannot be sustainable and is liable to be set aside on these grounds alone without going into further merits of the case in the interest of justice and equity.

ORDER

Having regard to the facts and circumstances of the case as stated above, Appeal filed by the Appellant is allowed.

The order impugned passed by the State Commission dated 03.01.2013 and 23.12.2014 in case No. 129 of 2010 and case No. 26 of 2013 on the file of the Odisha Electricity Regulatory Commission is hereby set aside to the extent so far as it relates to relief sought in the instant Appeal.

The matter stands remitted back to the 1st Respondent/Odisha Electricity Regulatory Commission for re-consideration afresh and pass the appropriate order after giving reasonable opportunity to the Appellant and the Respondent Nos. 2 to 5 as expeditiously as possible taking into consideration the pendency of case for several years.

The Appellant and the Respondent Nos. 2 to 5 are directed to appear before 1st Respondent/Odisha Electricity Regulatory Commission on 15.01.2019 at 11.00 a.m. to collect next date of hearing.

No order as to costs.

Pronounced in the Open Court on this **14th day of December, 2018.**

(S.D. Dubey)
Technical Member

(Justice N. K. Patil)
Judicial Member

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