

**Appellate Tribunal for Electricity**

**(Appellate Jurisdiction)**

**Appeal Nos.136 of 2011, 162 of 2011, 167 of 2011, 137 of 2011**

**and 163 of 2011**

**Dated 21<sup>st</sup> December, 2012**

**Coram** : Hon'ble Mr. Justice P.S. Datta, Judicial Member  
Hon'ble Mr. V.J. Talwar, Technical Member

**Appeal Nos.136 of 2011**

**In the matter of:**

M/s JSW Steel Limited  
Vijaynagar Works,  
P.O. Vijaynagar, Torangallu,  
Bellary District – 583275,  
Karnataka.

.....Appellant(s)

Vs.

1. Karnataka Electricity Regulatory Commission  
6<sup>th</sup> & 7<sup>th</sup> Floor, Mahalaxmi Chambers,  
# 9/2, M.G. Road,  
Bangalore-560001.
2. Chief Electrical Inspector to Government of Karnataka  
32/1-2, 2<sup>nd</sup> Floor,  
Crescent Tower, Crescent Road,  
Bangalore-560001.

.....Respondent (s)

**Appeal Nos.162 of 2011**

Chief Electrical Inspector to Government of Karnataka,  
32/1-2, 2<sup>nd</sup> Floor,  
Crescent Tower, Crescent Road,  
Bangalore-560001.

.....Appellant(s)

Vs.

1. Karnataka Electricity Regulatory Commission  
6<sup>th</sup> & 7<sup>th</sup> Floor, Mahalaxmi Chambers,  
# 9/2, M.G. Road,  
Bangalore-560001.
2. M/s JSW Steel Limited  
Vijaynagar Works,  
P.O. Vijaynagar, Torangallu,  
Bellary District – 583275,  
Karnataka.

.....Respondent (s)

**Appeal Nos.167 of 2011**

Gulberga Electricity Supply Co. Ltd.  
Station Road,  
Gulberga-585 101  
Represented by General Manager (Technical)

.....Appellant(s)

Vs.

1. M/s JSW Steels Ltd.  
Vijaynagar Works,  
P.O. Vijaynagar, Torangallu,  
Bellary District – 583275,  
Karnataka.
2. M/s JSW Energy Ltd.,

P.O. Box No.9,  
Village & Post Torangallu,  
Belleary District – 583 275,  
Karnataka

3. Karnataka Electricity Regulatory Commission  
6<sup>th</sup>& 7<sup>th</sup> Floor, Mahalaxmi Chambers,  
# 9/2, M.G. Road,  
Bangalore-560001.

.....Respondent (s)

**Appeal Nos.137 of 2011**

1. M/s JSW Energy Ltd.,  
P.O. Box No.9,  
Village & Post Torangallu,  
Belleary District – 583 275,  
Karnataka
2. M/s JSW Steels Ltd.  
Vijaynagar Works,  
P.O. Vijaynagar, Torangallu,  
Bellary District – 583275,  
Karnataka.

.....Appellant(s)

Vs.

1. Karnataka Electricity Regulatory Commission  
6<sup>th</sup>& 7<sup>th</sup> Floor, Mahalaxmi Chambers,  
# 9/2, M.G. Road,  
Bangalore-560001.
2. Chief Electrical Inspector to Government of Karnataka,  
32/1-2, 2<sup>nd</sup> Floor,  
Crescent Tower, Crescent Road,  
Bangalore-560001.
3. Deputy Chief Electrical Inspector to Government of Karnataka  
No.54, 3<sup>rd</sup> Cross, Parvatinagar,  
Bellary – 583101

.....Respondent (s)

**Appeal Nos.163 of 2011**

Chief Electrical Inspector to Government of Karnataka,  
32/1-2, 2<sup>nd</sup> Floor,  
Crescent Tower, Crescent Road,  
Bangalore-560001.

.....Appellant(s)

Vs.

1. Karnataka Electricity Regulatory Commission  
6<sup>th</sup>& 7<sup>th</sup> Floor, Mahalaxmi Chambers,  
# 9/2, M.G. Road,  
Bangalore-560001
2. M/s JSW Energy Ltd.,  
P.O. Box No.9,  
Village & Post Torangallu,  
Belleary District – 583 275,  
Karnataka
3. M/s JSW Steels Ltd.  
Vijaynagar Works,  
P.O. Vijaynagar, Torangallu,  
Bellary District – 583275,  
Karnataka.

.....Respondent(s)

Counsel for the Appellant(s) : Mr. M.G. Ramachandran &  
Ms. Swapna Seshadri in A.No.  
136 of 2011 and A.No. 137 of 2011,

Mr. Raghavendra S. Srivastava &  
Mr. Venkita Subramaniam in  
Appeal No.167 of 2011,

Mr. Anantha Narayana with  
Mr.V.N. Raghupathy in A.No.162 of  
2011 and A.No.163 of 2011.

Counsel for the Respondent(s) : Mr. M.G. Ramachandran & Ms. Swapna Seshadri in A.No. 167 of 2011 for R-1 & R-2, A.No.162 of 2011 for R-2 and in A.No.163 of 2011 for R-2 & R-3,

Mr. Anantha Narayana with Mr.V.N. Raghupathy in A.No. 136 of 2011 for R-2 and in A.No. 137 of 2011 for R-2 & R-3.

## **JUDGMENT**

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

1. **Introduction**:- In all, there are five Appeals being Nos.136 of 2011, 162 of 2011,167 of 2011, 137 of 2011 and 163 of 2011. All the five Appeals arise out of two but almost identical orders passed separately on 7.7.2011 by the Karnataka Electricity Regulatory Commission which is one of the Respondents in all the five Appeals. The Appeal no. 136 of 2011, 162 of 2011 and 167 of 2011 relate to the order dated 7.7.2011 which was passed by the Commission in O.P. No.33 of 2010, while Appeal no.137 of 2011 and Appeal no.163 of 2011 relate to the order dated 7.7.2011 which was passed separately by the Commission in O.P. No. 34 of 2010. The Appeal no. 136 of 2011 has been preferred by JSW Steel Ltd. where the Chief Electrical Inspector to Govt. of Karnataka is the Respondent no.2. In Appeal no.162 of 2011,

the Chief Electrical Inspector to the Govt. of Karnataka is the Appellant and JSW Steels Ltd. is the Respondent no.2. Gulberga Electricity Supply Company Ltd. is the Appellant in Appeal no.167 of 2011, while M/s JSW Steels Ltd. and M/s JSW Energy Ltd. are the principal Respondent no. 1 & 2. The Commission is the Respondent no.1 in Appeal no.136 of 2011 and Appeal no.162 of 2011 and Respondent no.3 in Appeal no.167 of 2011. These three Appeals being 136 of 2011, 162 of 2011 and 167 of 2011 form a batch of three Appeals. On the other hand, JSW Energy Ltd. and JSW Steels Ltd. are the Appellants and the Chief Electrical Inspector to Govt. of Karnataka and Deputy Chief Inspector to the said Govt. are principal Respondent nos.2 & 3 in Appeal no.137 of 2011, while in Appeal no. 163 of 2011, the Chief Electrical Inspector to the Govt. of Karnataka is the sole Appellant and M/s JSW Energy Ltd. and M/s JSW Steels Ltd. are the principal Respondent nos .2 & 3 and the Commission is the Respondent no.1 in both the Appeal nos. 137 of 2011 and 163 of 2011 and these two Appeals from the second batch of Appeals. In all the five Appeals, issues of law and fact are almost one and the same and being it so, we prefer to present a common treatment but considering the five Appeals in two separate batches and we summarise our conclusions separately in the concluding part of the judgment touching upon all the five Appeals separately.

2. **Facts of the Appeal no.136 of 2011** :- Originally, Jindal Power Limited had set up a power plant at Torangallu, Bellary District in the State of Karnataka consisting of two generating units namely, 1 X 100 MW and 1 X 130 MW. Four other companies namely, M/s Bellary Oxygen Co. Private Limited, M/s Bhuwalka Pipes Private Limited, M/s Jamshedpur Injection Powder Limited and M/s Padmavathi Ferro Alloys Limited were participating companies and share holders. Then Jindal Power Limited merged with JSW Steel Limited who is the Appellant herein and all the assets of the Jindal Power Limited came to be vested in the Appellant with effect from 1.4.2005 by an order of the Bombay High Court dated 30.09.2005. The other four share holding companies, however, continued to be also the shareholders with the Appellant. The Appellant, JSW Steel Limited operates a steel plant at Torangallu and at the same place where the power plant is situated. It is the case of the Appellant that electricity is transmitted from the generating units to the Appellant's premises through dedicated transmission line and the four share holding companies also get and are entitled to the share of electricity so generated from the power plants. In the cause title of the Appeal a table has been provided showing how right from the financial years 2005-06 to 2009-10 distribution of generation of electricity is made

amongst the five companies including the Appellant with inclusion of auxiliary consumption in respect of the JSW Steel. The Appellant owns more than 26% of the equity share and it also consumes more than 51% of the aggregate generation. Both the Appellants and four share holding companies are captive users in terms of Rule 3 of the Electricity Rules, 2005 read with Section 2(8) of the Electricity Act, 2003. Furthermore, there are two other companies namely BOC India Ltd. (BOC) and Jindal Praxier Oxygen Company Limited (JPOCL) who are job workers as they supply 98-99% of oxygen to the Appellant for the purpose of production of steel and the Appellant also provides water and other facilities to these companies. These two companies are also situated in the premises of the Appellant where both the power plant and the steel plant are situated and the oxygen conversion is integrated to the basic activities of steel manufacturing by the Appellant. Therefore, consumption of electricity by these two companies namely BOC and JPOCL are captive consumption by the Appellant. The other four companies also undertake job work of the Appellant. Now, the Respondent no.2 Chief Electrical Inspector to the Govt. of Karnataka raised the issue of captive status of the Appellant and by a letter dated 18.5.2010 informed the Appellant that the requirements of Rule 3 having not been fulfilled, the Appellant is liable to pay electricity tax under the provisions of Karnataka Electricity (Taxation on Consumption) Act, 1959.

Several correspondences were exchanged by and between the Appellant and the Respondent no.2 but in vain and then the Appellant filed a petition before the Commission being O.P.No.33 of 2010 under Section 40 of Karnataka Electricity Reform Act, 1999 read with Section 185 of Electricity Act, 2003 but by the order dated 7.7.2011 which is impugned herein in this Appeal, the majority of 2 : 1 held as under :-

- (a) The Appellant satisfies the conditions of at least 26% shareholding in the Power plant and more than 51% consumption of electricity generated by the Power Plant and hence the Power Plant is a Captive Power Plant and the consumption by the Appellant amounts to captive consumption;
- (b) The consumption by the four companies can be treated as captive consumption only in those years in which out of 51% of aggregate power generated in the Power Plant, they have consumed electricity in the proportion to their equity participation with a variation of 10%.
- (c) The relationship between BOC India Ltd. and JPOCL on one side and the Appellant on the other side is that of buyer and seller and not one of principal and job worker. Hence, the consumption of electricity by BOC India Ltd. and JPOCL is not consumption by the Appellant.

- (d) The Appellant is entitled to supply electricity thorough dedicated transmission lines which do not use any part of the distribution system of the licensee to its captive consumers.

The minority view was that the rule of proportionality would continue to apply but as the said rule was not satisfied for any of the years the power plant fails to qualify as a captive power plant.

3. **The Grounds of Appeal in Appeal no.136 of 2011:-**

- a) BOC and JPOCL supply oxygen to the Appellant which is necessary for manufacture of steel, as such they perform the nature of job work and it is the Appellant who provides these two companies with water, waste disposal, nitrogen connection, intercom facility, pipe work for gas delivery, fire fighting facilities, space for unloading, storage of equipment etc. etc. Installed capacity of such gas conversion plants is aligned to the requirements of the Appellant and not with the purpose of any business.
- b) All the facilities and inputs provided by JSW Steel to the two companies are netted off on actual basis and the price effectively paid by JSW Steel to the companies for the oxygen and other gases supplied is the conversion charges. The price of electricity supplied gets adjusted with JSW Steel which is not making any revenue or profit whatsoever on the power supply.

- c) The liberalization of the captive generation under the Electricity Act, 2003 was because of the inability of the distribution licensee to meet the growing demand of electricity, particularly, for industrial requirements and, therefore, the captive consumption claimed by the Appellant including for electricity use for conversion of oxygen ought to have been liberally construed to sub-serve the objective of Electricity Act, 2003. The Appellant had entered into an arrangement for dedicated oxygen supply by conversion of its facilities by engaging with the companies having expertise to operate conversion unit and by making available to such company facilities such as electricity, water etc..
- d) Mere sale and purchase of electricity for accounting purposes does not in any manner mean that the consumption of electricity by the purchaser of electricity cannot be treated as captive consumption as a job worker.
- e) The use of electricity by the job worker at cost without any profit arising out of the provision of electricity by the employer will nevertheless be used by the employer notwithstanding that for accounting purpose the transaction is recorded as sale and purchase.
- f) Even when the captive generation unit is set up by a Special Purpose Vehicle or by a company other than the shareholder, the provision of electricity by the generator to the shareholding company will be in the nature of sale and purchase but nevertheless the consumption of electricity by the purchaser – shareholder will be a captive consumption.

- g) The State Commission erred in holding that proportionality of consumption is required to be complied with even for the captive power plant of the Appellant which is an operating company and not a Special Purpose Vehicle.
- h) State Commission has not interpreted the provisions of the Electricity Act, 2003 dealing with captive generation in a proper manner and without considering the commercial realities of a job work arrangement.
- i) The State Commission failed to appreciate that a generating company is entitled to lay down dedicated transmission lines from the place of generation to the place of consumption without using any part of the distribution licensee's system. In this regard, there is no difference between the dedicated transmission lines laid down by a captive generating company supplying electricity to a consumer, captive or non-captive.

4. **Reply of the Respondent no.2 in Appeal no. 136 of 2011 and Memorandum of Appeal of the said Respondent no.2 as an**

**Appellant in Appeal no.162 of 2011:-** Since the reply of Respondent no.2 to the Appeal no.136 of 2011 and the averments of this Respondent no.2 as an Appellant in Appeal no.162 of 2011 are the same we paraphrase the common contentions as follows:-

- a) It is the minority view of the learned single member that is correct, while the learned two members were not correct in their

conclusions which have been summed up in the Memorandum of Appeal by the Appellant in Appeal no.136 of 2011.

- b) If JSW Steel shares are allotted to four other companies and if the two generating units become a division of JSW Steel, in that case the electricity generated from 1 X 100 MW and 1 X 130 MW, shall be for the manufacture of steel of JSW Steel and not for the captive use of the other four companies who have participated in the setting up of 1 X 100 & 1 X 130 MW power plant initially, since mere shareholders of a company cannot be considered as captive users of the generating plant of that company. Therefore, if it is presumed that 1 X 100 and 1 X 130 MW power plant now is solely owned by JSW Steel Limited, then its above four share holders will be having shares of JSW Steel company only and cannot claim to be captive users. Further, if any share holder can claim to be captive user of 1 X 100 & 1 X 130 MW power plant owned by the JSW Steel, then they can claim to be captive user of another 1 X 300 MW power plant set up for the consumption of JSW Steel in the same premises and another 1 X 300 MW power plant which is in the final stages of commissioning. If such an argument is to be accepted, all the share holders of JSW Steel, irrespective of their location for usage of electricity, can claim the captive status for using the electricity generated by JSW Steel as captive consumers either by drawing dedicated transmission line from the generator to the point of consumption or by availing open access, which is highly irrelevant.
- c) JSW Steel Limited and four other companies have not maintained the proportionality as required under Electricity Rules, 2005 which was submitted before the learned State Commission. Rule 3

clearly states that to satisfy the requirement of captive generating plant, the captive users shall have “*not less than 26% of the ownership*” and shall consume “*not less than fifty one percent of the aggregate electricity generated*”. Nowhere in the provision of Rule 3 of Electricity Rules, 2005, it is stated that only 51% of the generation shall be taken for calculation. Hence, interpretation and submission of Appellant that only 51% of the generation shall qualify for calculation is not in accordance with the provisions of Rules. Therefore, for the purposes of calculation to ascertain whether they are within the permissible allowed percentages, entire electricity consumed for captive purpose which is generated from such power plant and the total share holding held by all the captive users shall be taken into account for calculation of percentage.

- d) Based on the submission of the Appellant that the percentage of ownership and utilization of power to the extent of 51% should be calculated, the said minimum requirement of proportionality is not achieved by such calculation also. The participating companies have not fulfilled the minimum consumption requirements considering even 51% consumption.
- e) JSW Steel is contending that JPOCL and BOC India Limited are providing Oxygen etc., to the Steel unit and they are job workers of JSW Steel Company and on the strength of such circumstances, the consumption of electricity by JPOCL and BOC India Limited, the oxygen etc. conversion companies are to be treated as captive consumption by JSW Steel itself. But the JPOCL and BOC India Limited are independent companies, incorporated under the Companies Act having their own identities. Hence, Electricity

consumption by these two companies cannot be considered as consumption of JSW Steel Limited itself, though JSW Steel provides facilities to these companies.

- f) The contention of JSW Steel is that it is supplying electricity to its captive users from its power plant through dedicated transmission line is totally misconceived. Further, the electricity generated from 1 X 100 MW power plant and 1 X 130 MW power plant is also not transmitted through dedicated transmission line to the JPOCL & BOC India Limited.

### **Appeal No.167 of 2011**

5. **Gulbarga Electricity Supply Company Limited**, a distribution company being aggrieved with the order impugned filed a separate Appeal being no.167 of 2011 contending as follows:-

a) JSW Steel Ltd. has been supplying electricity for several years to multiple number of companies in the distribution area assigned to this Appellant. Some of these companies are listed below:-

- i) M/s JSW Steel Ltd.
- ii) M/s Bellary Oxygen Company Private Ltd.
- iii) M/s Bhuwalka Pipes,
- iv) M/s Jamshedpur Injunction Power Limited,
- v) M/s Padmavathi Ferro Alloys Limited,
- vi) M/s JPOCL – Jindal Prax Oxygen Company Pvt. Ltd.,

- vii) M/s BOC India Limited,
- viii) M/s JSW Cements Ltd.

In the above list the companies at sl.no.i) to v) have shareholding in Respondent 1 while those at no. vi) to viii) do not even have any shareholding in Respondent 1. It is the specific case of this Appellant that the above supply of electricity amounts to supply by a generator to consumers and the Respondents are therefore liable to make payment of cross subsidy surcharge and additional surcharge under section 42 of the Electricity Act, 2003 read with Electricity Rules 2005. Although the said contention was canvassed before State Commission, the State Commission has failed to take the same into consideration.

b) The State Commission has failed to take into reckoning the fact that the Respondent in Appeal no.162 of 2011 has not satisfied the requirements of Rule 3 of the Electricity Rules, 2005.

c) As per Rule 3 sub-rule (2) of Electricity Rules 2005, the entire electricity generated shall have to be treated as one generation by a "Generation company" and not "captive generation plant" (CGP). The claim of Respondent no.1 of being a "Captive User" along with other consumers deserved to be rejected due to this violation.

d) The JSW Steel Ltd. along with other equity-holders claiming to be "captive users" in respect of the two generating units are an "**Association of Persons**". Therefore, the 2<sup>nd</sup> proviso in Rule 3(1)(a) of Electricity Rules 2005, makes it obligatory for all such owners who want to be declared to be "captive users" (for a given financial year).

- (i) two together have at least 26% of ownership (as determined by the equity structure of M/s JSW Steel Ltd).;
- (ii) two together consume no less than 51% of aggregate electricity generated in a financial year; and
- (iii) the said minimum 51% electricity consumption shall be in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

While the State Commission has come to the conclusion that the 2<sup>nd</sup> proviso to Rule 3(1)(a) is applicable and that it is obligatory on the part of shareholding companies to consume electricity in proportion to their equity-holding in ownership and has declared that these five companies are an “*Association of Persons*”, the State Commission has at the same time wrongly given a special consideration to M/s JSW Steel Ltd., contrary to Rule 3(1)(a) read with Rule 3(2) of Electricity Rules, 2005, by declaring the electricity consumption by M/s JSW Steel Ltd. for each of the years to be one by a “captive user”.

6. **JSW Steel in its reply as Respondent no.2 in Appeal no.162 of 2011 contends as follows:-**

a) The JSW Steel is not a Special Purpose Vehicle as defined in the Electricity Rules, 2005. In the circumstances, the issue of proportionality which applies to the captive consumption in cases of a Special Purpose

Vehicle does not apply to this Respondent JSW Steel and the captive consumers of electricity from the generating units. The JSW Steel is entitled to use electricity from its generating units and also supply to its shareholders as captive consumption of electricity in terms of Electricity Rules, 2005.

b) The JSW Steel owns and operates the two generating units and consumes more than 51% of the electricity generated from the said units for its steel works and other ancillary activities, thereby satisfying the criteria for captive consumption under the provisions of the Electricity Act, 2003 and the Electricity Rules, 2005. It is stated that the matter in issue decided by the State Commission is regarding the captive status of the said generating units of 100 MW and 130 MW for the consumption by the Appellant and the other consumers.

c) It is also stated that the conveyance of electricity by the JSW Steel to the place of consumption including its steel works and ancillary activities is through lines laid down wholly within the premises of the JSW Steel. No part of the system of the transmission licensee or distribution licensee is used for the generation and supply of electricity to the place of consumption. The State Commission has also accepted the fact that so long as the system of the transmission or distribution licensee is not used, the said line satisfies the requirements of a dedicated transmission line under the provisions of the Electricity Act, 2003. In the circumstances, the issue of the JSW Steel requiring a license to supply electricity or the supply being illegal is wrong and denied.

d) The conveyance of electricity by the JSW Steel to the place of consumption did not in any manner interfere with or use the transmission

or distribution system of the licensees in the State of Karnataka. The bus bars, substation and the lines used for supply of electricity by the JSW Steel is owned, controlled, maintained and operated by the JSW Steel and wholly within the premises of the JSW Steel during the period in question. No part of the line falls outside the premises of the JSW Steel.

7. JSW Energy Ltd. and JSW Steel Ltd. in the reply to Appeal no. 167 of 2011 in fact reproduces their versions in Appeal no.136 of 2011, 137 of 2011 and 162 of 2011 and we need not repeat the same again.

8. **The Issues** :-The point for consideration is whether the learned Commission was justified in passing the impugned order. It bears recall that when we speak of the Commission's finding and order we will have in our mind the majority view because it is the majority view that became the Commission' order . It is the majority view that is subject to attack by the Chief Electrical Inspector of Karnataka and the distribution company namely, Gulbarga Electricity Supply Company Limited and they take the stand that since the rule of proportionality has not been complied with by all the companies according to their share holding the entire generating plant cannot be termed as captive generating plant. Thus, considered

from the stand point of the issues, we may frame the following issues in this batch of three Appeals as aforesaid.

- a) Whether JSW Steels Ltd., the Appellant in Appeal no.136 of 2011 has captive status.
- b) Whether JSW Steels has 26% equity interest in the two generating units.
- c) Whether the other four shareholding companies in JSW Steels Ltd. can claim captive status even when they could not achieve minimum 51% of consumption according to their respective shares.
- d) Whether the rule of proportionality will apply in a given fact situation.
- e) Whether JPOCL and BOC India Ltd. can claim to be captive users.
- f) Whether there has been use of distribution or transmission network by the Appellant in Appeal no.136 of 2011.

9. **Submission of the Appellant in Appeal No.136 of 2011:-**The learned advocate for the Appellant in the Appeal no 136 of 2011 and the principal Respondent in the Appeal no 167 of 2011 makes the following submissions:-

- a) JSW Steel owns 100% proprietary interest / ownership and the four shareholders owning 10.49%(aggregate 6.90%, 0.35%, 0.17% and 3.47%) concurrent/ joint ownership with JSW Steel

and the aggregate remains 100%. Alternatively, with reference to shareholding the percentage of share of JSW Steel Limited comes to 61.63 %, and the second alternative would be that in terms of ownership the JSW Steel after providing for the equity interest of the four shareholders would have ownership of 89.11%

- b) The total consumption of JSW Steel includes consumption inclusive of auxiliary consumption was 714.68 MUs out of total generation of 787 MU. The total consumption of JSW Steel includes consumption by JPOCL, a job worker.
- c) JPOCL and BOC supplied almost the entire quantum of oxygen to JSW Steel.
- d) The entire quantum of nitrogen and argon are also made available to the JSW Steel by the above two companies with no regular commercial use of oxygen.
- e) Section 2(8) of the Electricity Act, 2003 (for short, the Act,2003) does not refer to the percentage of use or ownership.
- f) Rule 3 of the Electricity Rules, 2005 (for short, the Rules) speak of four types of ownership in the Captive Generating Plant, namely, a company , a Cooperative Society, an Association of Persons, and a company in the form of a Special purpose Vehicle.
- g) Though under the Company law the Company is an independent legal entity the shareholding is recognised as ownership for the purpose of Rule 3 of the Rules the provisions of the company law will not strictly apply.
- h) It is well settled principle of law that once a legal basis or legal fiction has been adopted; all the consequences of such legal fiction

have to be given effect to. Reference has been made to the decisions in *State of A.P. vs Vallabhapuram Ravi (1984) 4 SCC 410*, *American Home Products Corporation vs Mac Laboratories (P) Ltd, (1986) 1 SCC 465*, *State of Bombay vs. Pandurang Vinayak, AIR 1953 SC 244*.

- i) The ownership needs to be considered with reference to specific captive generating unit and not with reference to as a company as a whole or even the plant as a whole in terms of Rule 3 (1) of the Rules.
- j) The Explanation 1(c) to Rule 3 of the Rules, 2005 also recognises the concept of ownership as being proprietary interest and control over the generating station or equity shareholding.
- k) The captive power plant of JSW Steel is not a Special Purpose Vehicle.
- l) The rule of proportionality cannot be applied because the captive generating plant has not been set up by association of persons or the Special Purpose Vehicle. Reference has been made to the two decisions of this Tribunal namely *Chhattisgarh State Power Distribution Limited vs. Hira Ferro Alloys Limited (2010 ELR(APTEL)759)* and *Kadodora Power Private Limited vs. Gujarat Electricity Regulatory Commission, 2009 ELR (APTEL) 1037*.
- m) Rule 3 does not mandate anything to be done in regard to 74% ownership or 49% consumption.
- n) There is flexibility for the shareholders to project percentage out of their shareholding towards calculation of the minimum 26% and

again such respective consumption by them towards 51% consumption.

- o) For the purpose of satisfying the conditions what is to be counted is the minimum consumption. It is possible that the entire 49% consumption can be made by the person holding a shareholding of 3% or 15%.
- p) Both JSW Steel and its four shareholders hold a common or joint ownership in the captive power plant of 1 x 100 MW and 1 x 130 MW. Thus, the requirement of proportional consumption by the shareholders does not arise.
- q) JPOCL and BOC are job workers, although there is relationship of seller and buyer between them on the one hand and JSW Steel on the other. These two companies supply oxygen upon conversion which is necessary for the purpose of manufacture of steel and they operate within the premises of the JSW Steel.
- r) As regards the status of the transmission line, all the electric lines used for supply of electricity by JSW Steel are within the premises of the JSW Steel and no part of the lines falls outside the premises of the JSW Steel.
- s) The State Commission has jurisdiction to determine the status of generating plant.

10. **The submission of the Appellant in Appeal No.162 of 2011:-**

The learned advocate for the Chief Electrical Inspector who is

Respondent no.2 in the Appeal No. 136 of 2011 and the Appellant in Appeal No. 162 of 2011 makes the following submissions:-

- a) The State Commission has no jurisdiction to adjudicate any dispute between the Chief Electrical Inspector of the Government and the generator with regard to the levy of electricity duty because the Karnataka Electricity Reforms Act, 1999 provides that Appeal against the decision of the Electrical Inspector would lie with the Government.
- b) The averments of JSW Steel itself show that JSW Steel and the other four companies are participating companies.
- c) It is an association of persons. That it is an association of persons has been claimed before the Commission in their petition.
- d) The Kadodara case clearly lays down that the rule of proportionality will apply in case of association of persons.
- e) The JSW Steel uses its distribution system without any license. Generating units of different owners are getting connected and their generation is mixed up with the generation plant.
- f) JPOCL and BOC are not job workers.
- g) All the installations of participating and non-participating companies are being supplied with power after availing open access because the arrangements made for supplying power to the participating and non-participating industries amounts to distribution system.

11. **Submission of the Appellant in Appeal No. 167 of 2011:-**The learned advocate for the Appellant in Appeal No. 167 of 2011 makes the following submissions:-

- a) Both JSW Power Ltd. and JSW Steel Ltd. have been supplying electricity for several years for a multiple number of companies, eight in number, in the distribution area of Gulbarga Electricity Supply Co. Ltd. without license and without paying cross-subsidy surcharge and additional surcharge.
- b) Rule 3 of the Electricity Rules, 2005 has not been complied with.
- c) The generating company of the JSW steel is not a captive generating plant.
- d) Non-compliance with minimum consumption as contained in Rule 3 even by one of the five companies would fail the entire generating plant to be a captive generating plant because the five companies constitute the generating company.
- e) The JSW Steel Ltd. and other equity holders are really the association of persons, as such the second proviso in Rule 3 (1)(a) of the Electricity Rules, 2005 makes it obligatory on the part of all such owners to comply with the said provisions. Therefore, M/s JSW Steel Ltd. is also not entitled to the status of captive user.
- f) Unit-wise ownership is available only to SPV and JSW Steel Ltd. is not an SPV.

12. **Analysis of the above three Appeals** :- Issue nos. a) to d) demand an integrated approach as they are co-related to each other. Before we proceed with the deliberations upon the question whether the Commission was justified in passing the impugned order, it would be

proper to reproduce paragraphs 21, 22, 25 and 26 of the impugned order for the sake of convenience of treatment.

*“21. If we look into the facts of the present case in the light of the above interpretation of Rule, it is clear that in view of JSW Steel holding more than 25 per cent of the equity interest in the two generating units in question and also consuming more than 51 per cent of the aggregate power generated during the five year period mentioned above, the two units are to be treated as captive generating units of M/s JSW Steel. As far as the other four shareholding companies, they can also be treated as captive consumers in any year in which their consumption is in proportion to their respective share of equity in the unit out of 51 per cent of the aggregate power generated. In case any of these companies do not consume power in proportion to their equity holding with variation of 10 per cent in any year, they will not be captive consumers for the year in question. As a consequence, they will then be liable to pay the charges that are payable to any open access consumers.*

*22. In our view, merely because some of the shareholders are not consuming electricity generated in proportion to their shareholding in any year, it cannot take away the benefit available under the Act to the other shareholders who are consuming electricity in proportion to their equity holding when the total captive consumption is more than 51 per cent of the electricity generated. Section 9 and 10 of the Electricity Act, 2003 and Rule 3 (2) of the Electricity Rules, 2005 have to be read harmoniously and shall be interpreted keeping in view the avowed broad objective of the Act. As held by the Hon’ble ATE in Malwa Industries Ltd. [2007] ELR (APTEL)1631] the proviso to Rule 3(a)(ii) is in the nature of a qualification or exception and it does not nullify, subsume or swallow the general Rule of captive consumption which shall be a minimum of 51 per cent of aggregate power generated on an annual basis. Rule 3(2) on which heavy reliance is placed by the Respondent does not lay down that if any of the captive consumers does not consume power in proportion to the shareholding, all other stakeholders shall forfeit their benefit which is otherwise available to individual captive consumers even when the consumption by captive users exceeds 51 per cent. If it is held otherwise, it may defeat the very object of the Act in respect of*

*facilitating captive generation and may discourage combined investments which may held only large industries.*

*25. We have examined the above question with reference to the nature of the relationship between JPOCL and BOC India Ltd., on the one hand, and the JSW Steel on the other. From the copies of the agreements between JSW Steel and these companies, it is observed that the said companies are treated as sellers of certain gases and JSW Steel is treated as the buyer of their produce. Further, as evidenced by clauses 8.9 to 8.11 of the Pipeline Supply Agreement dated 8.12.1995 between JPOCL and Jindal Vijaynagar Steel Ltd. (now JSW Steel) and clause H of the Gas Supply Agreement dated 31.5.2006 between JSW Steel and BOC India Ltd., produced by the petitioner as Annexures A and B to its written submissions in this case, in respect of the supply of power, the seller companies have power purchase agreements with Jindal Tractabel Power Company Limited, the predecessor of Jindal Power Company, which set up the two generating units in this case. According to the said Power Purchase Agreement, the seller companies are responsible to pay for the power consumed by them directly to the power generating company which makes them independent consumers of power. Further, in case of default by the seller companies in making payments for the power consumed, JSW Steel will be competent to deduct corresponding amounts from payments due to these companies and then indemnify the power generation company. This arrangement clearly shows that the nature of relationship between Jindal Steel and these companies is one of buyer and seller and not one of principal and job workers. At any rate, the two companies are receiving power and are paying for it as consumers in their own right. Therefore, the power consumed by these companies cannot be treated as consumption of power by JSW Steel. Further, since M/s JPOCL and BOC India Ltd. are not shareholders of the power plant in question, they cannot be treated as captive consumers in this case under Rule(3) of Electricity Rules, 2005.*

*26. In view of above finding, we declare that –*

- (i) the consumption of power by M/s JSW Steel from the 1 X 100 MW and 1 X 130 MW units in question amounts to captive consumption in terms of the Electricity Act, 2003 for those years in which its consumption is more than 51 per cent.*

- (ii) *the electricity consumed by M/s Bellary Oxygen Company Private Limited, M/s Bhuwalka Pipes Private Limited, M/s Padmavathi Ferro Alloys Limited has to be treated as captive only in the years in which out of 51 per cent of aggregate power generated they have consumed electricity in proportion to their equity participation with a variation of ten per cent, and when the total captive consumption exceeds 51 per cent.*
- (iii) *the consumption of power from the units in question by the companies who are stated to be doing job work of M/s JSW Steel cannot be considered as captive consumption of JSW Steel Ltd; and*
- (iv) *the above declaration would imply that the captive consumption of the petitioner and other companies is subject to verification each year by competent authorities and the concerned distribution licensee and for this purpose the petitioner shall make available necessary information on a quarterly basis as may be required."*

13. Now, since the bone of contention centres round the concepts of 'company', 'captive generating plant', 'person', together with interpretation of Rule 3 of the Electricity Rules, 2005, it will be easier for our discussion to reproduce the definitions of the above three expressions and the Rule in question.

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

(13) "*company*" means a company formed and registered under the Companies Act, 1956 and includes anybody corporate under a Central, State or Provincial Act;

(49) “person” shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person;

### RULE 3

#### **“3. Requirements of Captive Generating Plant.-**

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

*(a) in case of a power plant -*

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

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

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

*Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;*

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

*Explanation :-*

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

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

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

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

*Explanation.- (1) For the purpose of this rule.-*

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

14. **Question of Jurisdiction** :- A lot of time has been spent by the learned counsel for the Chief Electrical Inspector on the question whether the State Commission has jurisdiction to decide the points involved in the dispute between the Chief Electrical Inspector and JSW. By correspondences dated 18.5.2010, 26.6.2010 and 20.7.2010, the Chief Electrical Inspector demanded of the JSW, the payment of electricity tax on the ground that the JSW having not fulfilled the essential criteria of the Rules, 2005, it lost the status of being designated as captive generating plant; consequently it is argued by the learned counsel for the Chief Electrical Inspector that Appeal against the decision of the CEI will lie with the Government under the Karnataka Electricity Reforms Act, 1999. We fail to be impressed at all by the argument. The provisions of the Karnataka Reforms Act, 1999 which finds its berth in the Schedule to the Electricity Act, 2003 shall continue to be operative only to the extent when any such provision of the Act, 1999 does not become repugnant to the provisions of the Electricity Act, 2003. Section 185(3) of the Electricity Act, 2003 is a clear and specific provision thereto. It is of no dispute that section 40 of the Karnataka Reforms Act, 1999 has changed appellate forum against the decision of the CEIG to the State Commission. No general or special order conferring jurisdiction to the Commission is at all needed. Secondly, the question as to whether a certain generating plant can be termed as

captive generating plant or not does not fall for determination by the Govt.. It is the Appropriate Commission that has the exclusive jurisdiction to decide the issue. The learned Commission has aptly referred to a decision of this Tribunal in "*Chhatisgarh State Power Distribution Company Limited Vs. Hira Ferro Alloys (Appeal No.116/2009)*" which we also quote as follows:-

*"A generating Company which fulfils the special conditions prescribed in Section 2(8) read with Rule 3 above is categorized as captive power plant. Therefore, the captive generating plant will also be subject to the regulatory control of the State Commission inasmuch as a generating company. The proviso of Section 42(2) exempts a captive consumer from payment of cross subsidy surcharge. It is the State Commission which has the jurisdiction to determine whether the exemption provided under Section 42(2) can be accorded or not in the same manner as it is entrusted with the responsibility of determination of tariff and charges payable by the consumers in the State".*

Therefore, when the question has arisen as to whether the JSW Steel has or has not lost the status of a captive generating plant, it is the State Commission that has the only jurisdiction to decide the same.

15. Issue Nos. a), b), c) & d) are taken up together as they are interlinked with each other. It has been the argument of the JSW Steel that it is of no use to go into the company law to ascertain as to whether a shareholder can be treated as an owner of the captive power plant set

up by a company because explanation to Rule 3 of the Rules, 2005 is sufficient and any reference to the Companies Act, 1956, will render the relevant rules redundant and meaningless. Whenever the word '*company*' has been used in Rule 3 of the Rules, 2005, it has to be understood as defined in the Act because Rule 2 (b) clearly provides that the words and expressions used and not defined in the Rules but defined in the Act shall have the meaning assigned to them in the Act and in terms of Section 2(13), company means a company referable to the Companies Act, 1956 and includes anybody corporate under a Central or a State Act. Again, when we refer to the definition of '*person*' in terms of section 2(49) of the Act, the definition of Company automatically comes in because a '*person*' as per inclusive definition is a company or a body corporate or association or body of individuals or artificial juridical person. Under the Company Law, a company is a voluntary association of persons formed for the purpose of doing business having a distinct name and limited liability. It is a juristic person having a separate legal entity distinct from the members who constitute it, capable of rights and duties of its own and endowed with the potential of perpetual succession. Thus, a company is a legal entity allowed by legislation, which permits a group of people, as shareholders, to apply to the Government for an independent organization to be created, which can then focus on pursuing a set of objectives. Company

is an artificial juridical entity, while the owners are equity shareholders thereof and this is exactly conveyed in the Act and more explicitly explained in the Explanation (1)(c ) of the Rules, 2005. But a company cannot be conceived of under the law being divorced from shareholding and Mr. Ramachandran also clearly submitted that the explanation as mentioned above recognises the fact that the ownership in a generating station or power plant set up by a company means equity share capital with voting rights. It is noticeable that Rule 3(1) (a) & (b) of the Rules, 2005 recognises four distinct clear entities who are legally entitled to be categorised as a captive generating plant subject to fulfilment of the requirement of percentage of ownership and the percentage of consumption of electricity. What is called captive generation is to be found from section 9 which we reproduce below:-

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

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

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

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

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

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

This section has to be read with section 2(8). The concept of captive generating plant as defined in section 2(8) exactly corresponds to Rule 3 of the Rules, 2005. Thus the four legal entities who were eligible under the law to set up a captive generating plant includes an individual which can be called a person, a registered co-operative society, a company and a company formed as special purpose vehicle. Thus, a person may include an individual in which case proprietary interest would come in, a body of individuals or persons, and a company. Association of persons as referred to in the second proviso to Rule 3(1)(a)(ii) may also include a company under the Companies Act, 1956 because basically and fundamentally company is a voluntary association of persons formed for the purpose of carrying a business. Ownership is associated with company so far as Explanation (1)(c ) to sub-rule (2) of Rule 3 of the Rules, 2005 is concerned.

16. Now, before we proceed further the undisputed fact that emerges is that shareholding of JSW Steel, four other companies and others is on the date of amalgamation of Jindal Power with JSW Steel with effect from 1.4.2005 as follows:-

|    |                                     |        |
|----|-------------------------------------|--------|
| 1) | JSW Steel                           | 61.63% |
| 2) | Bellary Oxygen Company Private Ltd. | 6.90%  |
| 3) | Jemshedpur Power Injection Limited  | 0.17%  |
| 4) | Bhuwalka Pipes Private Ltd.         | 0.35%  |
| 5) | Padmavathi Ferro Alloys Limited     | 3.47%  |
| 6) | Others                              | 27.48% |

The learned advocate for the JSW Steels Ltd. ascribes 100 % ownership in respect of two generating units of 100 MW and 130 MW to the JSW Steels Ltd. by saying that the other four companies are shareholders of the said company. During argument, learned advocate for the Appellant JSW Steels Ltd. places three alternatives namely, a) together with the four other companies, JSW Steels owns 100% proprietary interest, b) if considered from the stand point of original

equity share holding, which JSW Steel and the four other shareholding companies had in JSW Power Ltd., then JSW Steels Ltd. alone get 61.63% shareholding, c) from the standpoint of ownership of JSW Steel after providing for the equity share holding of the four other share holding companies then, JSW Steels Ltd. has 89.11 % ownership. We do not find any necessity to conceive of three alternatives. It is needless to go into question of ownership and the concept of company as a matter of academic discourse because the undisputed fact is that JSW itself has more than 26% of the equity share in the two generating units in question. So far as M/s JSW Steel is concerned, it satisfies the ownership criteria because more than 26% of the ownership admittedly it has. Even though in Explanation 1(c ) to sub-rule (2) of Rule 3 ownership has been identified with equity shareholding, the fact remains that a company is a distinct legal entity separable from the shareholders. The use of the word '(s)' after the words captive users cannot be detached from 26% ownership. The spirit of the rule does not demand that in a company where there are a good number of shareholders each and every shareholder has to be 26% ownership in order to claim captive status particularly when company itself is a distinct legal entity and a company is comprised within the inclusive definition of a person. To hold otherwise is to defeat the purpose of law. That is to say the captive users can claim to the captive status when they conjointly hold

minimum requirement of ownership of 26%. Again, in case of association of persons, ownership of 26% is required in the aggregate.

17. The second conclusion of the Commission is that the rule of proportionality is applicable and it is so in respect of not only JSW Steels Ltd. but also in respect of the other shareholding companies. Any approach to this question must be based on the proposition that the power plant is a plant that generates electricity for mostly captive use of its members of the persons for their own use. It has been the argument of the learned advocate for the JSW Steels that the rule of proportionality is not applicable and if JSW Steels alone consumes 51% of generation then the other condition is also satisfied no matter whether the each of the other shareholding companies individually consume 51% of electricity generated according to the respective shares for the purpose of carrying on their respective business/manufacturing. The argument proceeds to the conclusion that even if the other shareholding companies do not consume 51% of generation to the extent of their share, then also for all the years and at all the times the JSW Steel satisfies both the requirements. Mr. Ramachandran refers to certain decisions of this Tribunal to buttress his point that the principle of proportional consumption should not be applied even if the shareholding

sister concerns were considered as captive users. He refers to *Chhatisgarh State Power Distribution Ltd. Vs. Hira Ferro Alloys Ltd. & CSERC 2010 ELR (APTEL) 0759, Kadodara Power Pvt. Ltd., Gujarat & Ors. Vs. Gujarat Electricity Regulatory Commission & Ors. 2009 ELR (APTEL) 1037, Chhatisgarh State Power Distribution Ltd. Vs. Aryan Coal Benefications Pvt. Ltd. & Ors, Nalwa Steel and Power Ltd. Vs. Chhatisgarh State Power Distribution Ltd. 2009 ELR (APTEL) 0609 and Malwa Industries Ltd. Vs. Punjab State Electricity Regulatory Commission and Ors. 2007 ELR (APTEL) 1631*. It must not be forgotten that each case has been decided on the facts of that case alone and the *ratio decidendi* is fact oriented. The Hira Ferro Alloys Ltd. follows Malwa Industries Ltd. and according to the decision in Ferro Alloys, the principle of proportional consumption should not be applied even if the shareholding sister concerns were considered as captive users. With respect to the question of proportionality, the learned Commission held that “*the electricity consumed by M/s Bellary Oxygen Company Private Limited, M/s Bhuwalka Pipes Private Limited, M/s Jamshedpur Injection Powder Limited and M/s Padmavathi Ferro Alloys Limited has to be treated as captive only in the years in which out of 51 per cent of aggregate power generated they have consumed electricity in proportion to their equity participation with a variation of ten per cent, and when the total captive consumption exceeds 51 per cent.*” This conclusion is

objected to by the Appellant on the ground 51% consumption which is another requirement must cover the consumption of JSW Steels and other shareholding companies collectively and if collective consumption becomes 51% then it is immaterial whether a particular shareholding company does not itself consume 51% alone according to its share. We think that the argument is correct because the words 'aggregate' 'captive user(s)' lose all meaning if it is argued that even if 51% or more is consumed by one company then also other shareholding companies have to consume equally 51% according to their respective shares. 26% ownership is co-related to 51% consumption. If ownership has to be 26% in the aggregate by the captive users then consumption has to be also 51% in the aggregate. If is such a situation where JSW Steels Ltd. admittedly consumes more than 51% of the aggregate power generated then non-consumption of 51% of the other shareholding companies according to their shares is of no significance. Holding otherwise would defeat the very object of the Act. Therefore, the second conclusion reached by the Commission in para 26 of the judgment can hardly be conceded to. This is more so when we read *Malwa Industries Ltd. Vs. Punjab State Electricity Regulatory Commission and Another*. We quote in this connection relevant paragraphs of the said decision.

*"9. Thus, a captive generating plant is one which is set up by any person for generating electricity primarily for his own use. This*

*includes a power plant which is set up by any cooperative society or association of persons for generating electricity primarily for use of their members. The word 'primarily' has not been defined in the Electricity Act but the accepted meaning of the term is 'mainly' or 'mostly'. Therefore, any person claiming to have set up a captive generating plant must use the power generated by it mainly for its own use. That means while most of the power is to be used by it, the surplus or remaining power may not be used by it but it still would come within the definition of 'captive generating plant'. In order to lend clarity to the provision, the word 'person' occurring in clause 2(8) of the Act of 2003 needs to be explained. For this purpose, we need to refer to the definition of 'person' in Section 2(49) thereof. This provision gives inclusive definition to the word 'person'. According to it 'person' includes any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person. Therefore, a company or body corporate or association or body of individuals or artificial juridical person falls within the definition of 'person'. Undoubtedly, the Appellant is a person, since it is a company incorporated under the Companies Act".*

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

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

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

(a) *in case of a power plant –*

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

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

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

*Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one per cent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten per cent;*

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

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

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

#### *Illustration*

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

(2) *It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in*

*sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.*

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

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

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

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

*The two provisos to Rule 3(1)(a) are in the nature of exceptions to it. In Shah Bhojraj Kuverji Oil Mills and Ginning Factory vs. Subhash Chandra Yograj Sinha, AIR 1961 SC 1596, it was held that “as a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule”. Again in S. Sundaram Pillai and Ors.vs. V.R. Pattabiraman&Ors.*

(1985) 1 SCC 591, it was held that “while interpreting a proviso, care must be taken that it is used to remove special cases from the general enactment and provide for them separately”.

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

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

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

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

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

16. It was submitted that while Rule 3(1)(a) determines status of power plant as captive, based on ownership, Rule 3(1)(b) deals with status of captive power plant set up by a company formed as special purpose vehicle. It was further submitted that the word ‘ownership’ in Explanation 1(c) to Rule 3 of the Rules of 2005 applies to CPP set up by a company formed as special purpose vehicle only and not to the CPP owned by association of persons. The term ‘ownership’ is defined by Explanation 1(c) to Rule 3 of the Rules of 2005. The explanation reads as under:-  
“ownership” in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity

share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant”.

17. First part of the Explanation 1( c) applies to a company or any other body corporate which has set up a generating station. Since the Appellant is a company incorporated under the Companies Act, therefore, the first part of Explanation- 1(c) shall apply and ownership shall mean equity share capital with voting rights. First part will apply to all captive power plants in the ownership of a company notwithstanding the fact that the company has not been constituted by a special purpose vehicle. No limitation can be read into the first part of explanation 1(c). It cannot be held that the first part only applies to companies formed by a special purpose vehicle and not to any other company or body corporate. Reading a limitation will do violence to the language of Explanation 1(c). First part of Explanation 1(c), therefore, is applicable to the case of the Appellant. Rule 3(1) (a) (i) read with Explanation 1(c) requires that not less than twenty six per cent of the ownership shall be held by the captive user(s). Letter ‘s’ in brackets has been suffixed with the word ‘user’ indicating that the captive users collectively or singly must have not less than twenty six per cent of the ownership in the power plant. In case there is one captive user, it should be minimum twenty six per cent and in case there are two or more than two captive users, still it should be twenty six per cent. Minimum twenty six per cent of the ownership in the power plant is to be held collectively by the captive user(s) and not individually. Otherwise the provision [Rule 3(1)(a)(i) of the Rules] would have been to the following effect:

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

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

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

**(omitted by us)**

19. *It is well settled that a company is a legal entity, separate and independent of its shareholders. It owns hundred percent ownership of its assets. This being so, CPP in question is owned by the Appellant. Besides the Appellant is also a captive user of the generating plant. Though the ownership of the CPP is that of the company but for the purpose of Rule 3(1)(a) read with explanation (1)(c) ownership in relation to the CPP will mean the equity share capital with voting rights of captive users. As seen from above, the total shareholding of the main promoters is 93.55%. Therefore, their ownership/voting rights for the purposes of the Rule are to the extent of 93.55%, which is obviously much more than 26% of the ownership in the power plant. The other criteria laid down in Rule 3(1)(a)(ii) which requires not less than fifty one per cent of the aggregate electricity generated in such plant, determined on an annual basis must be consumed for the captive use is also being fulfilled as per the averments made in the amended petition. It is categorically stated therein that the consumption of power is 100% by the Appellant herein and its sister concern and 100% of the CPP ownership is held by the captive users.(underlining ours)*

18. The *Malwa* decision is a Full Bench decision which has been followed in *Chhatisgarh State Power Distribution Ltd. Vs. Hira Ferro Alloys Ltd. & CSERC 2010 ELR (APTEL) 0759*, which is a Division Bench decision. In this decision, it has been held that the principle of proportion consumption should not be applied even if the shareholding sister concerns were captive users. It has been held as follows:-

“36. *In conclusion we decide as under:*

*i) The State Commission has the jurisdiction to declare the captive generating plant and captive consumer status of the first*

*Respondent and also the captive consumer status of its three sister concerns.*

*(ii) We agree with the decision of the State Commission holding that the first Respondent is a captive generator and its three sister concerns are also the captive users. This is in line with this Tribunal's judgment in Malwa Industries case (Supra);*

*(iii) We uphold the decision of the State Commission that principle of proportional consumption will not apply in the present case as the Respondents are covered by the Rule 3(1)(a)".*

19. The Kadodara decision is not of too much help because as we find from this decision, it relates to a case where power plant was a Special Purpose Vehicle. Thus, JSW Steel having itself consumed more than 51% of generation, the company qualifies to be a captive user and non-consumption of 51% according to the respective shares by the other shareholding companies does not matter. Thus, so far as ownership is concerned, JSW Steels Ltd. fulfils 26% ownership in the company. The Appellant, JSW Steel Ltd. has legally captive status. The Appellant, JSW Steel Ltd. has also 51% consumption. Non-consumption of 51% according to their proportionate share by the other four shareholding companies does not deprive them of the captive status in terms of the Full Bench decision in *Malwa Industries*. Thus *Malwa Industries and Hira Ferro Alloys* are the valuable precedents which cannot be departed from.

20. The issue no. d) is whether the consumption of electricity by JPOCL and BOC Private Limited, the two oxygen converting units is that of a job workers or Seller and Buyer of electricity. It is the lengthy submission of Mr. Ramachandran that the consumption by JPOCL and BOC India Ltd. is the consumption by JSW Steel because they supply oxygen, nitrogen etc. at the place of steel manufacturing and make available the same and tally to JSW. These two companies are companies set up for oxygen plant and 98 /99% of oxygen are consumed by JSW Steel. The agreement entered into by JSW Steel with these two companies dated 8.12.1995 and 31.5.2006 clearly make out that these two companies will operate within the premises of JSW Steel and the gas conversion plants are primarily for supply of oxygen to JSW Steel. On the part of JSW Steel, it provides various inputs and facilities to such companies besides electricity, including water, waste and water disposal, nitrogen connections, intercom facility, pipe work for gas delivery, fire fighting facilities, space for unloading and storage of equipment and site fabrication and assembly of piping, providing heavy craneage for construction etc.. The installed capacity of such gas conversion plant is aligned to the requirements of JSW Steel and not for these companies to manufacture and sell gas to others. All the facilities and inputs provided by JSW Steel to the companies are netted off on actual basis and the price effectively paid by JSW Steel to the

companies for the oxygen and other gases supplied is the conversion charges. The price of electricity provided gets adjusted with JSW Steel not making any revenue or profit whatsoever in the power supply. The oxygen is an essential requirement in the manufacture of steel, the main business of JSW Steel. The oxygen and other gas supply are integrated to steel manufacturing. In this connection and in support of this argument the learned advocate for the Appellant refers to the decisions in *Prestige Engineering (India ) Ltd vs Collector of Central Excise , Meerut, 1974 (73) ELT 497, Commissioner of Sales Tax, MP Vs. Madhya Pradesh Electricity Board 1969 1 SCC 200, Hindustan Aeronautics Ltd. Vs. State of Karnataka, 1984 (1) SCC 706, Haldia Petrochemical Ltd. Vs. Commissioner of Central Excise, Haldia, 2006 (197) ELT 97, State of Tamil Nadu Vs. Anandam Vishwanathan 1989 (1) SCC 613, Rainbow Colour Lab and Anr. Vs. State of MP and Ors. 2000 (2) SCC 385 and Commissioner of Customs Vs. Yashpharma Chemicals Pvt. Ltd. 2005 (188) ELT 185.* All these decisions are fact oriented and in the decisions themselves, it has been held that the question whether there is in a particular situation, relationship of buyer and seller or of job work depends upon the facts and circumstances of each particular case and there cannot be straight jacket formula. In *Prestige Engineering*, it has been held that the job work means goods produced out of materials supplied by customer and where the job workers contribute mainly their

labour and skill though done with the help of their own tools, gadgets or machinery, but when the job worker contribute his own raw material to the article supplied by the customers and manufactures different goods, it does not amount to job work. Example has been given that when a tailor stitches a shirt out of the cloth supplied by his customer is a job work. Here, in our case what is manufactured by the JPOCL and BOC is the oxygen by conversion of air. It is noticeable that in this decision, the question was whether when steel pipes are supplied by customer, and rings, adopters and sleeves purchased and fitted by the worker and the worker uses his own material not of very small value, the product would be a job work within the meaning of the notification issued under Central Excise Rules, 1944 and the answer was no. In *Commissioner of Sales Tax, M.P.*, the arrangement was for supplying steam on actual cost basis and in that sense it was more akin to a labour contract than sale. In this decision, the question really was electric energy was intended to be covered by the definition of goods. In *Hindustan Aeronautics Ltd.*, it has been very explicitly held that in a contract of sale, the main object is the transfer of property in, and the delivery of possession of the property to the buyer, the thing produced as a whole has individual existence when produced, while in the contract of service no property in the thing is produced. It was further held that it cannot be said as a general proposition that in every case of contract, there is

necessarily implied the sale of the component parts which go to make up the repair and the whole question would depend upon the facts and circumstances of each case. In *Haldia Petrochemical Ltd.*, the Appellant did not pay anything to power plant for electricity and steam besides conversion charges and all the raw materials are supplied to the power plant free of charge. In *State of Tamil Nadu*, it was held in paragraph 13 and onwards that in each case the nature of contract and the transaction must be found out. And this is possible only when the intention of the parties is found out. The fact that in the execution of a contract for work some materials are used and the property/goods so used, passes to the other party, the contractor undertaking to do the work will not necessarily be deemed, on that account, to sell the materials. In *Rainbow Colour Lab*, the facts were very simple where work was done by a photographer in taking photographs and developing and printing films was only in the nature of service contract not involving any sale of goods. It was a case under sales tax. It was held that unless there is sale and purchase of goods, either in fact or deemed, there cannot be any sales tax. In *Commissioner of Customs*, the question was whether the first Respondent was only doing job work on behalf of the Respondents no.3 & 5 and/or whether there were transactions of sale between the parties.

21. Having found the legal position in the above decisions, we find the following circumstances in the present Appeal:-

- a) There is production of good, namely oxygen by the process of manufacturing.
- b) The JPOCL and BOC are not shareholders of JSW Steel and vice-versa.
- c) The mere fact that these two companies are situated in the premises of JSW Steel is not at all decisive.
- d) The percentage of oxygen supplied by the two companies is not alone decisive.
- e) It also comes out that whatever be the percentage, the surplus oxygen is sold by these two companies to outside.
- f) These two companies are companies independent of JSW Steel.
- g) JPOCL and BOC have the respective agreements of sale and purchase with JSW Steel.
- h) As per the agreements, the JPOCL and BOC are liable to pay for the power consumed by them directly to the power generating company and in case of default, the JSW Steel will be deducting corresponding amounts from payment due to these companies and indemnify the power generating company. These two companies are receiving power and are paying for it. The decision in *State of Uttar Pradesh vs. Renusagar Power Co. (1988) 4 SCC 59* is again in a different fact situation but what is of fundamental importance is that in that case the Hon'ble Supreme Court has said that corporate veil has to be lifted.
- i) In our fact situation, nothing is found to have been done on actual cost basis or free of charge.

- j) It is not a case of a contract of work to be done only for remuneration.
- k) It is not a case where a party concerned has to pay service tax.
- l) In the agreement JPOCL is referred to as Seller of Gas and JVS(now JSW Steel) is referred as a Buyer of Gas respectively.
- m) The pipeline agreement clearly says that JPOCL will sell and deliver the gas produced to the JVSL(now JSW Steel). [Article 2 of pipeline supply agreement]
- n) Nowhere in the pipeline agreement it is mentioned that the entire gas produced by JPOCL should be made available to the JVSL (now JSW Steel).
- o) The claim of the Appellant that land has to be provided by it for JPOCL for constructing the units is factually incorrect. The pipeline supply agreement specifically mentions that JPOCL (referred to as Seller) intends to construct, own and operate a facility for the production of gas on its own property at Torangallu, District Bellary. [ under the heading “witnesseth” at page 34 or pipeline agreement ].
- p) It should be also noted that JPOCL owns the “production facility.”

22. Accordingly, we are to hold that JPOCL and BOC are not job workers.

23. The issue no. e) is whether the transmission line used by the Appellant is dedicated transmission line or not. The learned advocate for the Chief Electrical Inspector very forcefully argued that consumption

is used with a non-captive users and that through distribution system. In support of this argument, there is no evidence. The Commission also does not hold that the status of the transmission line from the captive power plant to the place of consuming entities is not dedicated transmission line. It goes undisputed that all the electric lines used for supply of electricity by JSW Steel to the place of use are within the premises of JSW Steel and not outside thereof. Where the conveyance of electricity by JSW Steel to the point of consumption is the own lines of JSW Steel it cannot be said that the lines of the distribution company namely Gulbarga Electricity Supply Company Ltd. has been used. The issue is decided in favour of the JSW Steel Ltd.

24. We concur with the learned Commission in their finding in sub-paragraph (i), (iii) & (iv) of paragraph No.26 of the impugned order in connection with Appeal Nos. 136 of 201, 162 of 2011 and 167 of 2011. Non-consumption of 51% according to the respective shares of the other four shareholding companies do not make them non-captive users and in this respect we following the Full Bench decision in Malwa Industries Ltd. are in disagreement with the Commission's finding contained in sub-paragraph (ii) of Paragraph no.26. We hold and concur with the Commission that JPOCL and BOC are not job-workers and that no part of the transmission or distribution network is used.

25. Accordingly, the Appeal no 136 of 2011 is allowed in part to the extent indicated in paragraph no.24. The Appeal nos. 162 of 2011 and 167 of 2011 are dismissed.

### **Appeal No. 137 of 2011**

26. In Appeal no 137 of 2011 the facts are slightly different. The company in the name and style of JSW Energy (Vijaynagar )Ltd was formed as a Special Purpose Vehicle by the Appellant no 1 JSW Energy Limited, the Appellant no 2 JSW Steel Ltd. and JSW Cement Ltd. JSW Cement Ltd is not a party in this Appeal. However, later with effect from 1.4.2008 the JSW Energy (Vijaynagar ) Ltd. by an order of Bombay High Court dated 15.10.2008 merged with the Appellant no1, namely JSW Energy Ltd and all assets including the power plant vested in the Appellant no1. JSW Steel Ltd. owned 29.24% of the total issued and paid up share capital of the erstwhile JSW Energy (Vijaynagar) Ltd. on the effective date of amalgamation of JSW Energy (Vijaynagar)Limited with the JSW Energy Ltd. The Appellant no 2 JSW Steel Limited continues to hold all the shares in the Appellant no 1 allotted pursuant to the amalgamation. The power plant owned by the Appellant no 1 is situated within the premises of the Appellant no 2 and the electricity

generated by the power plant is partly consumed by the Appellant no2 JSW Steels Ltd. for its operation, namely manufacture of steel the electricity is transmitted to the JSW Steels from the generating units through dedicated transmission lines laid down by the Appellant no 1JSWEnergy Ltd . Besides, the power generated through the power plant is also provided for use by Jindal Praxir Oxygen Company Limited (JPOCL) for getting oxygen converted for use in the steel manufacturing of the JSW Steels, and as such the consumption of the JPOCL is the consumption on behalf of the JSW and is the consumption of job worker. Therefore, the consumption by the JPOCL is captive consumption on behalf of the JSW Steels Aggrieved by the communications dated 26.6.2010, 7.7.2010, 27.7.2010 and 9.8.2010 passed by the Chief Electrical Inspector to the Government of Karnataka and the Respondent no 3 Deputy Chief Electrical Inspector to the Government of Karnataka to the effect that the consumption by the JSW Steels Ltd fails to satisfy the criteria laid down by the Rule 3 of the Electricity Rules,2005 ( for short, the Rules 2005) and as such its consumption cannot be the consumption of captive user. The Appellants filed a petition, being petition no 34 of 2010 for declaration of the captive status of JSW Steels and that of the JPOCL, but the Commission by a majority decision of 2:1 held by the order dated 7.7.2011 that that the consumption of electricity by the JSW Steels , the

Appellant no 2, cannot be declared as captive consumption. The said order also refers to the other order of the even date passed in the case no 33 of 2010 which we have elaborately discussed and dealt with in the earlier batch of three Appeals and they do not demand any repetition. The Appellants refers to almost the same grounds as were advanced in the earlier batch of three Appeals and adds one more question not raised earlier, whether the auxiliary consumption used by the company, namely JSW Energy Ltd for generation and supply of electricity has to be construed towards consumption by the Appellant no 2 or in the alternative by the Appellant no 1 namely JSW Energy Ltd itself for the purpose of determining 51%consumption as is required under the Rule 3 of the Rules,2005., or in the alternative whether such auxiliary consumption is to be proportionately apportioned between captive consumption and non- captive consumption. According to the Commission, auxiliary consumption from JSW Energy's 2x300 MW power plant should not be considered towards captive consumption of the JSW Steels Ltd. which is an erroneous view. The Commission failed to appreciate that in the event of the auxiliary consumption being a consumption by the power plant for generation of electricity the same should be considered as captive consumption of the JSW Energy Ltd. The Commission ought to have determined that the Appellant no 1 being the owner of the power plant any consumption by the Appellant no 1,

namely JSW Energy Ltd is a captive consumption. According to the Appellant, the Commission erroneously held that auxiliary consumption should be assigned in proportion to the power consumed by the relevant consumer out of total power generated. According to the Appellant, auxiliary consumption must be treated as consumption by the JSW Energy Ltd., being the owner of the power plant, and when aggregated with the consumption by the JSW Steels Ltd, the total consumption exceeds 51% and therefore, the Commission erred in not upholding the claim of the Appellants' captive consumption. It is the further case of the Appellants that the Commission has failed to appreciate that the two units of 300 MW generating units at the power plant are independent units and in any event the Commission ought to have considered the consumption by the JSW Steels Ltd. qua one unit if it had come to the conclusion that the consumption on both units is less than 51%. The consumption of the JSW Steels Ltd. ought to have been considered unit wise, even assuming for the sake of argument that the Appellant did not satisfy 51% consumption requirement based on the entire power plant.

27. **Counter affidavit of Respondent No.2 & 3** :- The Respondents nos. 2 &3 filed a joint counter affidavit contending as follows:-

- a) Equity participation of JSW Energy Ltd, JSW Steels Ltd and JSW Cement Ltd was 70.18%, 29.24%, and 0.58% respectively. .
- b) It is not all a fact that JSW Energy Ltd which is a mere shareholder is itself a captive consumer , and when this is not so, the primary object of the Act as well as the object of the Government in extending the associated incentives and concessions for establishing , operating a and maintaining such generator will be defeated.
- c) The Appellants are silent as to the share of JSW Cement Ltd. If 2x 300 MW generating units are owned by JSW Energy as stated , in that case electricity generated from the two units will have to be utilized for trading /sale from JSW Energy Ltd , since JSW Energy is an engineering company , and not for the captive use of JSW Steels Ltd and JSW Cement Ltd. who have participated in the setting up of 2x300 MW power plant initially.
- d) If it is presumed that 2x300 MW power plant is now solely owned by JSW Energy Ltd, then JSW Steel and JSW Cement Ltd cannot claim that they have shares only in that particular power plant and hence cannot become captive users.
- e) Merely by being share holder in the company a person cannot claim captive consumer status.
- f) If a person having 70.18% share is not having manufacturing activity apart from generation of electricity then that generating plant cannot become a captive generating plant since primary intention of the person who is not having any manufacturing activity would become business which is against the primary

objective of forming captive generating plant with the associated incentives and concessions to its users..

- g) “ 220 kV Bus of JSW Energy Ltd can be energized by 2x130 MW power plant, 2x300 MW power plant of JSW Energy Ltd & others , and 1x130 MW power plant and 2x300 MW power plant of JSW Steel Ltd & others , 220 kV and 400 kV line of KPTCL. To this 220 kV Bus 10 numbers of different capacities transformers owned, operated and maintained by JSW Energy Limited is connected and electricity is stepped down and supplied at 33 kV and 11 kV main step down sub-station (MNDS), owned, operated and maintained by JSW Steel Ltd. Further, two numbers of transformers (TR3 & TR4) feeds exclusively JPOCL loads and other eight transformers feeds to JSW Steel Ltd and other different companies.”
- h) JSW Steel Ltd has consumed only 43.33% and if consumption of JPOCL is deducted then actual consumption of JSW Steel Ltd is only 26.52%. Auxiliary consumption of power plant which cannot be considered as captive consumption is 7.84%, and consumption of other constituents i.e. JSW Cement LTD & JSW Energy Ltd is nil.
- i) The contention of JSW Energy Ltd that it is supplying electricity to its captive users from its power plant through dedicated transmission line no part of the line falls outside the premises and it is only their internal wiring is totally misconceived.

- j) The power plant is not the captive power plant and the consumption is not also in proportion to the share holding and also not within the variation of 10% as stipulated in the Electricity Rules, 2005.

28. **The contention of the Appellants in Appeal no 163 of 2011**

The Chief Electrical Inspector to the Government of Karnataka who is one of the Respondents in the Appeal no 137 of 2011 is the Appellant in the Appeal no 163 of 2011, and in fact this is an Appeal counter to the Appeal no 137 of 2011 and the contention of the Appellant in the Appeal no 163 of 2011 which is being considered with the Appeal no 137 of 2011 is the same as the counter affidavit of this Appellant in Appeal no 137 of 2011. Therefore to avoid repetition, we, in brief, state the contention of the Appellant in the Appeal no 163 as follows:-

- a) JSW Energy which is identified as a generating company cannot now be called as a Special Purpose Vehicle because power is also supplied to the other companies who have not participated in the setting up of the generating plant.
- b) All the members of the SPV as an association of persons have consumed proportion to their share holdings.
- c) The companies said to be doing the job work for JSW Steel and their consumption for doing such work cannot be treated as self-consumption of JSW Steel.

- d) All installations of participating and non-participating companies are not connected to the power plants through dedicated transmission lines.
- e) All the installations of participating and non- participating companies are being supplied after availing open access.

29. **Counter affidavit of the Respondent in Appeal No.163 of**

**2011** :-The counter affidavit of the Respondents of the Appeal no 163 of 2011 are the replica of the memorandum of Appeal no 137 of 2011 , as such we feel it useless in reproducing the same contentions once again.

30. **Issues** :- The following issues emerge for consideration in this batch of two Appeals:-

- a) Whether JSW Steel and JSW Cement who are shareholders of the JSW Energy Ltd have at least 26% of equity share as is required to satisfy the requirements of Rule 3(1) of the Rules 2005 which we have extensively discussed in the earlier batch of three Appeals?
- b) Whether and to what extent auxiliary consumption of JSW Steels Ltd. can be taken as consumption of JSW Steel Ltd?
- c) Whether JSW Steel Ltd satisfied 51% consumption to comply with the Rules, 2005?
- d) Whether there is any amount of consumption of JSW Cement ?

- e) Whether consumption of JPOCL can be considered to be the consumption of job worker and captive consumption on behalf of the JSW Steels Ltd.?
- f) Whether JSW Steels and the associated companies use their own dedicated transmission lines or they avail open access?

31. **Commission's finding** :-The majority of 2:1 decision of the Commission can be culled out as follows:-

- a) JSW Steels Ltd and JSW Cement Ltd together own more than 26% of equity shares in the 2x300 MW power plants of JSW Energy Ltd.
- b) Auxiliary consumption cannot be totally counted as captive consumption of the JSW Steels Ltd.
- c) There is no consumption of JSW Cement Ltd at all.
- d) The JSW Steels Ltd fails to satisfy the 51% Consumption as is required for recognition of captive status.
- e) The consumption of JPOCL cannot be considered as consumption on behalf of the JSW Steels Ltd as captive consumption.
- f) No transmission or distribution network has been used.

32. **Our analysis of the two Appeals**:-The point nos. a) to e) are taken up together as they are co-related and cannot disjunctively considered. The undisputed facts are that JSW Energy (Vijaynagar ) Ltd was formed as a Special Purpose Vehicle by the JSW Energy Ltd,(Appellant no 1 in the Appeal no 137 of 2011), JSW Steels Ltd. (Appellant no 2), and JSW Cement Ltd( not made a party to the Appeal

in the Appeal no 137 of 2011). Later, by the order of the Hon'ble Bombay High Court dated 10.10.2008 JSW Energy (Vijaynagar) Ltd merged with JSW Energy Ltd and all the assets came to be vested in the JSW Energy Ltd. with effect from 1.4.2008. It is also not in dispute that the JSW Steels Ltd owned 29.24% of the total issued and paid up capital as on the date of amalgamation. That JSW Cement Ltd has share in the power plant is averred , but it has not been disclosed in the memorandum of the Appeal no 137 of 2011 as to what amount of equity share is held by the JSW Cement Ltd. JSW Cement is also, as said above, not made a party to the Appeal no 137 of 2011. Be that as it may, the whole tenor of the Appeal no 137 of 2011 that relates to 2x300 MW power plant centres round the JSW Steel to the total exclusion of the JSW Energy and JSW Cement although all the three are said to have constituted the said power plant. Now, so far as the JSW Steels Ltd is concerned, it is not disputed that it has more than 26% equity shares in the power plant consisting of two units. To this extent the finding of the learned Commission cannot be assailed, and the Respondents of this Appeal one of whom is the Appellants in the Appellants in the Appeal no 163 of 2011 were not in a position to assail this finding. What appears is that the Respondent of this Appeal and the Appellant of the Appeal no. 163 of 2011 have drafted their pleadings in such a fashion as if the other power plant which is the

subject matter of the earlier batch of three Appeals which we have discussed above are also relatable to the power plant which is the subject matter of the Appeal no 137 of 2011. The shareholders of the power plant of the earlier batch of three Appeals are not exactly the same as the shareholders of the batch of the present two Appeals. However, without adding anything more which will not also be necessary for disposal of this batch of two Appeals, it can be said that since the central focus of the Appeal no 137 of 2011 is the JSW Steel and its consumption of electricity for the purpose of manufacture of steel by the said steel company which is situated admittedly in the same premises where the power plant is also situated the equity share of the JSW Steels Ltd is more than 26% of the total issued and paid up shares of the company. Records do not suggest any amount of consumption by M/s JSW Energy Ltd. and JSW Cement Ltd in the relevant year. Before the Commission it was not disputed that in the relevant year 2009-10, the gross generation of 2 X 300 MW Station which is the subject matter of Appeal in Appeal no.137 of 2011 was 3625.28 MUs and out of this 1571 MUs has been shown as consumption of JSW Steels, while 284.35 MUs were the auxiliary power consumption of the generating plant. The remaining 1769.93 MUs was exported to the grid. These are the data incorporated in returns filed by the Appellant in Appeal no. 137 of 2011. The

Commission found that the power supply to JSW Steel comes to 43.3% of the aggregate electricity generated and this falls short of the 51% of the minimum power as required under the Rules and particularly when in the said relevant year there was no consumption shown by JSW Cement. In order to obviate this difficulty, the JSW Steel claims the total auxiliary consumption as the consumption of JSW Steel so that 51% requirement is fulfilled. The Commission gave the opinion that it was not permissible because firstly auxiliary consumption is both an output and an input in the process of power generation and as such it needs to be accounted towards the generating units only. The Commission, of course, did not totally exclude consumption of auxiliary power from JSW Steel. The Commission was of the opinion that if, at all, any part of auxiliary consumption is to be assigned as consumption of any other consumer then it can only be assigned in proportion to the power consumed by the relevant consumer out of the total power generated. This finding cannot be overruled by any amount of reasoning. For, the amount of auxiliary consumption has to relate to the JSW Steel as also to the amount of power exported to the Grid. No amount of auxiliary consumption can be excluded from the amount exported to the Grid and if this proportionality is maintained, then the total consumption including the auxiliary consumption by JSW Steel amounts to 47.3%. An interesting feature that has also undisputedly

emerged is that the total amount of consumption as has been claimed and shown by JSW Steel in the relevant year includes also the consumption of JPOCL and the Appellant in Appeal no.163 of 2011 and the Respondent in the Appeal of 137 of 2011 hotly contested the claim of the JSW Steels Ltd. because according to them consumption of JPOCL cannot be claimed by JSW Steel as its own consumption. In paragraph no.21 & 22, we have found that the consumption of JPOCL and BOC cannot be said to be the consumption as job worker as clearly there is contract of sale, not a contract of service, in letter and spirit between the JSW Steels Ltd. on the one hand and JPOCL and BOC on the other. In this batch of two Appeals, we reach the same finding and it requires no separate analysis. It is not the case of the Appellant in Appeal no.137 of 2011 that total consumption claimed by JSW Steels Ltd. is exclusive of the consumption of JPOCL. In such circumstances, the consumption of JSW Steel falls short of required consumption. It is only when the total auxiliary consumption and the total amount of consumption by JPOCL put together is added to the actual consumption of JSW Steels Ltd. then, only the minimum requirement is reached but that is not legally possible.

33. With regard to issue no. f), we confirm the finding of the Commission that so long as the power generated by the captive power

plant is supplied to captive consumers through the own lines of the captive power plant and without using the network of transmission and distribution licensee it satisfies the requirement of dedicated transmission line as per section 9 of the Act.

34. In the result, the Appeal no.137 of 2011 fails and Appeal no.163 of 2011 succeeds and is allowed only to the extent as indicated in the body of the judgment. No cost.

**35. Summary of our conclusions :**

- i) **Appeal no. 136 of 2011 is partly allowed to the extent of consumption of M/s Bellary Oxygen Company Pvt. Ltd., M/s Bhuvalka Pipes Pvt. Ltd., M/s Jamshedpur Injection Power Ltd. and M/s Padmavathi Ferro Alloys Ltd. and their non-consumption of 51% to the extent of their shares is of no consequence at all because consumption of JSW Steels exceeds 51% of the total power generated and this being the position in the peculiar facts and circumstances of this Appeal, the rule of proportionality is not applicable and we follow the Full Bench decision in *Malwa Industries Ltd.* and *Hira Ferro Alloys Ltd.*. So far as ownership is concerned , M/S**

**JSW Steel Ltd satisfies the requirement of 26% as per the Rule 3 of the Rules, 2005.**

- ii) The Appeal no.162 of 2011 is allowed only in part to the extent that the consumption of JPOCL and BOC is not the captive consumption on behalf of JSW Steels.**
- iii) The Appeal no.167 of 2011 is dismissed. This is to note that in this Appeal the issue of JPOCL and BOC has not been raised.**
- iv) The Appeal no.137 of 2011 is dismissed.**
- v) The Appeal no. 163 of 2011 is allowed only in part to the extent of our finding that consumption by JPOCL and BOC are not the captive consumption of JSW Steels Ltd..**
- vi) We award no costs in any of the Appeals.**

**(V.J. TALWAR)  
TECHNICAL MEMBER**

**(JUSTICE P.S.DATTA)  
JUDICIAL MEMBER**

Reportable/Not-reportable

Pr