

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 160 of 2007

Dated this 07th day of May, 2008

Coram : Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

1. **M/s. Tata Steel Ltd.**
Bombay House, 24, Homi Modi Street, Fort,
Mumbai – 400 001

 2. **M/s. Tata Power Com. Ltd.**
Bombay House, 24, Homi Modi Street,
Mumbai – 400 001
- ... Appellants

Versus

Jharkhand State Electricity Regulatory Commission
2nd Floor, Rajendra Jawan Bhawan,
Cum-Sainik Bazar,
Main Road,
Ranchi – 834 001

... Respondent

For the Appellant : Mr. M. G. Ramachandran,
Mr. Anand K. Ganesan and
Ms. Swapna Seshadri

For the Respondents : Mr. Sudarshan Srivastava
Mr. A. K. Mehta, Secretary, JSERC

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The present appeal is filed by two appellants namely Tata Steel Ltd. (TSL for short) and Tata Power Company Ltd. (TPCL for short) to challenge the order of the Jharkhand State Electricity Regulatory Commission (the Commission for short) dated 02.11.07 in Case No. 13 of 2007 & 2008. The prayer in Petition No. 13 of 2007 was to treat the two power generating units described as units 2 & 3 at Jojobera, Jamshedpur owned by appellant No.2, TPCL as captive power plants of the appellant No.1, TSL, exclusively for the purpose of steel works TSL. This prayer was turned down by the impugned order.

2) TSL earlier known as Tata Iron & Steel Ltd. (TISCO for short) has been engaged in production of iron and steel and related activities. It was established at Jamshedpur in 1907. It set up a power plant inside its steel works with the capacity of 147.5 MW. In 1923, TISCO, now TSL, was granted sanction under section 28(1) of the Indian Electricity Act 1910 (hereinafter referred to as Act of 1910) for distribution of electricity in the Jamshedpur township area. On 24.01.1991 TSL obtained permission under section 44 to establish one generating unit of 67.5 at Jojobera which was subsequently transferred to TPCL. The Government of Bihar issued

a notification dated 05.02.93 accepting the proposal of TISCO to establish three more power plants of the capacity of 202.05 MW (3 x 67.5 MW) in Jamshedpur Power Company Ltd. and granted sanction under section 15(A), 43(A)(1)(c) and 44(1) of the Electricity (Supply) Act, 1948 (herein after referred to as the Act of 1948).

3) Section 15(A) laid down the objectives, jurisdiction etc. of a generating company and it, *inter alia*, said that the objective of generating company should include establishment, operation and maintenance of generating stations. Section 43(A) dealt with conditions for sale of electricity by a generating company. Section 43(A)(1)(c) provided, *inter alia*, that a generating company will be entitled to sell electricity to the State Electricity Board/Boards but in case it wanted to sell electricity to any other person it would need the consent of the competent authority Government/Governments. Section 44 is captioned "Restriction on establishment of new generating stations or major additions or replacement of plant in generating stations". As per this section, it was not lawful for a licensee or any other person, not being the Central Government or any Corporation created by Central Act or any generating company, except with the previous consent in writing of the Board, to establish or acquire a new generating station or to extend or replace any major unit of plant or works pertaining to the generation of electricity in a generating station. Thus as per this section, TISCO

required consent of the Board to establish a new generating station. The conditions on which the permission was to be granted are also laid down in the same section and it says

“Provided that such consent shall not, except in relation to a controlled station, be withheld unless within three months from the date of receipt of an application-

(a) for consent to the establishment or acquisition of a new generating station, the Board-

(i) gives to the applicant being a licensee an undertaking that it is competent to, and will, within twenty-four months from the said date, afford to him a supply of electricity sufficient for his requirements pursuant to his application; or

(ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source;

(b) ...

(c) ...”

4) “Licensee” in the Act of 1948 was the person who had obtained sanction under section 28 of the Act of 1910. Thus the appellant No.1 became a licensee under the Act of 1948. The permission of 05.02.93 was given for establishing the Jamshedpur Power Generating Co. Ltd. which was proposed by TISCO. Paragraph 3 of this notification said that the power generated by Jamshedpur Power Generation Co. would be supplied to TISCO which is a distribution licensee at Jamshedpur and any surplus left after consumption by TISCO would be sold to the State Electricity Board on the terms determined by it. This notification was subsequently amended in 1996, vide Resolution No. 698 dated 23.02.96 and the capacity of the units based on the recommendations of CEA, were altered from 3 x 67.5 MW to 2 x 120 MW. However, the condition applicable regarding the sale of power from the units of Jamshedpur Power Company Ltd. continued to be the same. On 22.03.97, the State Government vide Resolution No. 358 dated 22.03.97 granted permission under section 18(A) of the Act of 1948 to establish, maintain and operate power generating stations as may be required to be established by the State Governments.

5) How the Jamshedpur Power Co. Ltd. was eventually formed is not available on record. Nonetheless it is on record that the Jamshedpur Power Co. Ltd. merged with the Tata Power Co. Ltd. the appellant No.2 as evidenced by the company petition No.320 of

2001 in the matter of “TPCL... and in the matter of Scheme of amalgamation of Jamshedpur Power Co. Ltd. with the Tata Power Co. Ltd. The order of the High Court is dated 26.04.2001. The scheme presented before the High Court, as shown by the order, was to take effect from 01st day of April, 2000. This order of the High Court also discloses that the transferer company namely Jamshedpur Power Co. Ltd. was a wholly owned subsidiary of the petitioner company namely the Tata Power Co. Ltd. By the time the two units actually came into existence i.e. in 2001 the Jamshedpur Power Co. Ltd. had ceased to exist and the two units in question emerged as the property of Tata Power Co. Ltd.

6) In 2003, the Electricity Act 2003 (herein after referred to as the Act of 2003) was brought into force. The Commission acting under the Act passed an order on 30.03.06 to decide on the annual revenue requirement and tariff of TSL for distribution of electricity in the licensed area of Jamshedpur city. Keeping in view the peculiarity of functioning of TISCO which was simultaneously running a steel plant and was also generating and distributing electricity the Commission gave certain directions to separate the accounts of power business from the other business activities of TISCO. The paragraph in the tariff order of 30.03.06 relating to such directions given to TISCO/TSL is as under:

“However, the Commission directs the petitioner to separate the accounts of its Power Business Division from any other Business including Steel Works within six months from the date of issue of this order. This shall take note of the energy supplied to Steel works as well. Also, the petitioner shall undertake proper assessment of the Steel works’ resources being utilized for supplying power to the township, especially the distribution network for determination of appropriate wheeling charges. The petitioner shall also make appropriate arrangements to treat Steel Works as consumer and propose a corresponding tariff for the same within six months of the issue of this order. All the above-mentioned information shall be submitted to the Commission for its consideration”

7) This direction led to the filing of a Case No. 13 of 2007 & 2008.

The joint petition:

8) The substance of the petition filed by the appellants can be stated briefly as under:

The units 2 & 3 at Jojobera, Jamshedpur with a total installed capacity of 240 MW were conceived to meet the needs

of steel works and are essentially captive power plants for steel works and related and associated activities of TSL i.e. steel works. The permission to establish the units 2 & 3 were granted to Jamshedpur Power Generating Co. Ltd. (JAPCOL for short) vide a notification issued by the Government of Bihar dated 05.02.93, subsequently amended on 22.03.96 under section 15-A, 43(A)(1)(C) and 44(1) of the Act of 1948. JAPCOL was later amalgamated into TPC in April 2000. The electricity generated from units 2 & 3 were from the very beginning primarily and essentially used for activities associated with manufacture of steel at TSL and for activities incidental and related thereto such as for supply to residential colonies of steel works. TSL became a sanction holder under section 28(1) of Act of 1910 and the area contiguous to the steel works forming part of the Jamshedpur city was taken over by TSL for electricity distribution. TSL is now distribution licensee in the area of Jamshedpur as an ancilliary unit in principal business of production of steel. The electricity distribution and retail supply to consumers was done from the energy available after own consumption for TSL's principal business activity. TSL also purchases electricity from TPCL's unit 1 at Jojobera for consumers of steel works. It also purchases electricity from the Damodar Valley Corporation (DVC for short) to supplement the

electricity generated at TPCL's generating units. The total consumption of energy at the steel works of TSL exceeds total distribution by TSL as distribution licensee. The units 2 & 3 have always been treated as captive power plants of TSL and not as generating units supplying electricity to third parties. Hence, the use of electricity by TSL's steel works and associated activities from units 2 & 3 be not regarded as supply of electricity to consumers by distribution licensee. The supply of electricity to steel works from units 2 & 3 be not considered as supply of electricity by TSL as distribution licensee and therefore be not made part of annual revenue requirement and tariff proposal of TSL's activity as distribution licensee.

9) The two appellants submitted before the Commission that the use of electricity to steel works and connected activities needed to be differentiated from the supply of electricity to consumers. However, the main aim of the petition was to consider the generating units 2 & 3 as captive plants of TSL dedicated to the steel works of TSL.

The Impugned Order:

10) The Commission heard the appellants who also made a power point presentation of the facts. The Commission passed the impugned order after such hearing.

The impugned order is brief and is quoted in its entirety as under.

“ORDER
(02.11.2007)

The Commission has gone through all the papers, documents placed before the Commission by the petitioners. The Commission also considered the presentation given on their behalf by their consultant. Keeping in view Section 9 of the Electricity Act 2003 and Rule 3 of the Electricity Rules 2005 and considering the papers, documents and presentation on their behalf, the Commission finds that the units in question are not captive power plants as they do not fulfill the requirements of the Act and Rules.

(S. Sinha)
Member (Legal)

(P.C. Verma)
Member (Tech)

(S.K.F.Kujur)
Chairman”

The Appeal :

11) In the appeal the appellants reiterate the facts to allege that from the very beginning the units 2 & 3 were conceived as captive power plants of TSL and the supply from TSL was used primarily for the manufacturing activities of the integrated steel plant of TSL. It is further submitted that the permission under section 44 was required only for the purpose of captive generation and permission under section 44 of the Act of 1948 itself made the two units as

captive units of TSL particularly for its steel works. According to the appellants applying for the approval under section 44 of the Act of 1948 by a person necessarily meant that he was seeking approval for establishing the generating station for his own use i.e. for captive use and that this would also include permission for generation of power through special purpose vehicle also. The appellants claim that the Government of India had also been treating the two power plants as captive power plants of TSL. It is contended by them that at the relevant time no person other than a generating company, established with the business objective of generation and sale of electricity, was permitted to undertake generation except for captive use and for such purpose they were required to take approval of the State Electricity Board. Further a formal approval under section 43(A)(1)(c) of the Act of 1948 had to be given if the legal entity using power was different from the legal entity producing power. The appellants claim that the permission under section 43(A)(1)(c) itself showed that generation by the two units would be consumed entirely by the steel works of TSL. The appellants then seek shelter under section 185(2)(a) of the Act of 2003 which saves all actions taken under the Act of 1948 and 1910 although both the Acts stood repealed by section 185(1) of the Act of 2003. The relevant provision of 185(2)(a) is extracted below:

185. **Repeal and saving.**- (1)...

(2) *Notwithstanding such repeal,-*

(a) *anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provision of this Act, be deemed to have been done or taken under the corresponding provisions of the Act;*

(b) ...

(c) ...

(d) ...

(e) ...

12) The appellant contend that the units 2 & 3 were captive units by virtue of permission under section 44 of the Act of 1948 and

therefore should now be treated as captive generating units under section 9 read with section 2(8) of the Act of 2003.

13) In the grounds of appeal the appellant extensively quote the judgment of Supreme Court in the case of *State of UP Vs. Renusagar Power Company (1988) 4 SCC 459* in which Renusagar Power Company, a 100% subsidiary of Hindustan Aluminium Company or Hindalco were treated as one person by application of the principle of “lifting of corporate veil” and the power generated by Renusagar Power Company was treated to be “own source of generation of Hindalco”. The appellants submit that the judgment squarely applies to the facts of this case and although the two units are owned by the appellant No.2 they should be treated as captive units for TSL.

The response of the Commission:

14) The Commission has filed response to the memo of appeal. The Commission’s reply in brief is as follows:

- a) As per the provisions of section 43(A)(1)(c) of the Act of 1948, the generating company could supply electricity to any person other than the electricity Board only with the consent of the Government for such supply and that the sanction that was given to JAPCOL was for supply of

electricity by a generating company to TISCO (now TSL) sanction holder to undertake distribution and supply of electricity at Jamshedpur under section 28(c) of the Act of 1910. These facts are evident from the notification of the State Government Resolution No. 296 dated 05.02.93. It is not disputed that JAPCOL was established with the efforts of TISCO (now TSL) as the steel works were not able to meet its growing power demand from its captive units of 147 MW installed inside the steel works. This sale, however, did not indicate anything like captive use as because of the typical characteristic of electricity that it cannot be stored, the generating plants are planned and developed with the understanding or agreement for purchase of generated power by a prospective buyer or consumer.

- b) The notification of the Resolution No. 296 dated 05.02.93 was partially modified vide Resolution No. 698 dated 23.02.96 where it was reiterated that JAPCOL will supply surplus electricity after consumption of TISCO for distribution to the grid of the State Electricity Board on terms and conditions prescribed by the Board. JAPCOL was merged with Tata Power Company Ltd. w.e.f. 01.04.2000 and since then the generation units have

become the property of TPCL. TISCO/TSL entered into a long term power purchase agreement of 30 years as sanction holder for distribution and generation of electricity at Jamshedpur with appellant No.2, TPCL, for purchase of power generated from the units 2 & 3 in question on tariff and terms and conditions set forth in the agreement. As such the supply of power by appellant No.2, TPCL, to appellant No.1, TSL, is sale of power by a generating company under a PPA on usual commercial terms.

- c) TSL a sanction holder for distribution and generation of electricity in Jamshedpur under section 28(1) of the Indian Electricity Act 1910 has been granted distribution license in terms of section 14 of the Electricity Act 2003. At present there is no need for permission or approval for establishing a generating plant or generating company. Whether the units 2 & 3 at Jojobera can be considered or treated as captive power plant has to be decided strictly as per the provisions of the Act of 2003. These provisions have to be read with Rule 3 of Electricity Rules 2005 notified by Government of India under the provisions of the Act of 2003. As per clause (8) of section 2 read with section 9 of the Electricity Act 2003 captive

generating plant means the power plant set up by any person to generate electricity primarily for his own use. A generating plant qualifies for being treated as captive generating plant only when the company owns that generating plant and the same company is primary user of the power generated by such generating plant. The units 2 & 3 at Jojobera are owned by TPCL and the power generated by these units are being used by another Company TSL and therefore they cannot be a captive generating plant of TSL. Further Rule 3 of the Electricity Rules 2005 says that no power plant shall qualify as a captive generating plant unless not less than 26% of the ownership is held by the captive user and not less than 50% of the aggregate electricity generated in such plant, determined on an annual basis first consumed for captive use. In case the generating station is owned by a company formed as special purpose vehicle, a unit or units of such generating station identified for captive use and not the generating station need to satisfy the conditions mentioned above. TSL does not hold 26% of the equity share capital with voting rights in TPCL and therefore units 2 & 3 do not qualify as captive generating plants. Nor are the units 2 & 3 owned by a company formed as a special purpose vehicle for

such generating station as required by clause 3(1)(b) of Electricity Rules 2005 for being qualified as a captive generating plant and therefore the generating plant in question is not qualified as and cannot be treated as captive generating plant as per the provisions of Electricity Rules 2005.

- d) The power generated by units 2 & 3 in question of TPCL are meant to be consumed by another company namely TISCO/TSL which does not mean that the generating plant in question becomes a captive generating plant of TSL which is a distributing company and a sanction holder under section 28 of the Electricity Act 1910. Section 44 of the Act of 1948, deals with restriction on establishment of new power generating station and does not deal with captive generation.

15) Coming to the law laid down by Supreme Court in *State of UP Vs. Renusagar Power Company*, the Commission contends that ruling is not applicable to the facts of the present case. The Commission contends that TSL may be the end user but it cannot be termed as a captive user. The Commission denies the allegation that no person other than a generating company established with the business objective of generation and sale of electricity were

permitted except for captive use. It contends that the permission under section 43(A)(1)(c) was given in cases where there was nexus between the generating company and the purchaser other than the Electricity Board or distribution licensee. However, this sanction, the Commission contends, cannot make the two units as captive generating station. JAPCOL sought permission to install the two units in question. The Commission however, contends that the power generated by TPCL being supplied to TSL, a distribution licensee, will not attract any cross subsidy under section 42(2) of the Electricity Act 2003. The Commission contends that the impugned order does not call for any interference.

Decision with reasons:

16) We have heard the counsel for the parties who have supplemented their oral arguments by written submissions and citations of authorities. We have carefully examined the facts and have given our anxious thoughts to the subject.

17) The first task before the Tribunal is to get a clear picture of the facts. The facts have to be scanned in order to determine whether the two units were established as captive units of TSL primarily for its use in TSL's steel works. The steel work was the principal business of TISCO/TSL. The TISCO/TSL were also a distribution licensee. The effort of TSL/TISCO is to establish: (a) the two units

namely units 2 & 3 at Jojobera were meant primarily for the use of TSL and (b) such use was primarily for the steel works of TSL. On 05.02.1993 the Government of Bihar issued notification No. 296 regarding the establishment of Jamshedpur Power Generating Company. By this notification, the State of Bihar, in view of the shortage of electricity, and the policy of the Central Government to encourage production in private sector, granted permission to TISCO to establish 3 x 67.5 MW Jamshedpur Power Company Ltd. under section 15(A), 43(A)(1)(c) and 44(1) of the Electricity (Supply) Act 1948. The notification, however, does not stop there. It goes on to say that the power produced by Jamshedpur Power Company, after the consumption of TISCO, which is authorised to distribute electricity in Jamshedpur, will be sold to the State Electricity Board. Therefore, TISCO, in this notification, is not steel works but a distribution licensee or a sanction holder for distribution of electricity. This is reiterated in the subsequent notification dated 23.02.1996. The translation of the relevant notification of 23.02.96 as submitted by the appellants, is as under:

“ANNEXURE-B : Permission to establish 3 x 67.5 MW Unit to Jamshedpur Power Generating Company Ltd.

*Government of Bihar
Energy Department*

RESOLUTION

No. P3/Y.V.Estt-12/95-978

Dated: 23/2/1996

Sub: Regarding sanction to amend the proposed capacity from 3 x 67.5 Megawatt (202.5) Megawatt to 2 x 120 Megawatt (240 MW) for Jamshedpur Power Generating Company

As a partial amendment to earlier issued Resolution issued vide Memorandum No. 296 dated 5.2.93, after technical inspection of Central Electricity Authority, in view of the proposal for amendment in the configuration, now the State Government, after consultation with Electricity Board, has granted its permission under section 15A, 43(A), (C) and 44(1) of Electricity Supply Act, 1948 for establishment of unit of 2 x 120 MW in place of proposed construction of 3 x 67.5 Megawatt capacity's Power Plant.

2. The other terms and conditions for the construction of proposed generating Company, will be decided in future, as per requirement.

3. Out of the electricity, generated by M/s. Jamshedpur Power Company, after the consumption of TISCO, which has been authorized for distribution of electricity in Jamshedpur, the remaining produced electricity will be given by this Company to the State Electricity Board at the Grid, on specified terms & conditions, for its distribution.

Order – It is ordered that the copy of Resolution be got published in the Extraordinary Edition of Gazette of Bihar and its copies be sent to government departments and Bihar State Electricity Board/M/s. Tata Iron & Steel Company Ltd., Jamshedpur.

By order of Governor of Bihar

*Sd/-
(A. K. Upadhyaya)
Secretary to Government
Energy Department*

// true translation //”

18) Subsequently, on 22.03.1997, permission under section 18(A) of the Act of 1948 was also granted to JAPCOL. JAPCOL subsequently merged with the Tata Power Company Ltd. in the year 2000.

19) As stated earlier, before any of the two units was commissioned i.e. even before any supply from any of the two units were given to TSL/TISCO, the two units exclusively belonged to appellant No.2, TPCL which was a company in its own right and in no way subsidiary to TSL.

20) The notification extracted above conspicuously talks of consumption of TISCO which is a distribution licensee. There is no mention in the two notifications that the power produced by units 2 & 3 would have to go to the steel works of TSL. The power was to go to the distribution licensee and any excess left over was to go to the Bihar State Electricity Board. As a distribution licensee TISCO is a bulk consumer and distribute in retail to consumers including TISCO steel works.

21) The appellants produced before the Commission certain documents which included a feasibility report. The Tata Consulting Engineers (TCE) prepared a feasibility report dated February 1995 for installation of 2 x 120 MW thermal power plant at Jojobera at the outskirts of Jamshedpur for the Jamshedpur Power Co. Ltd. The TCE assessed the demand which the two units would be required to meet. In the introductory part of the report it is sufficiently mentioned that the power requirement which was to be made by setting up the two units was not only the TISCO's steel plant but also the distribution business of TISCO apart from that of TELCO and plants of other associated companies. Paragraph 5 of the Chapter 2 of the report makes a special mention of the expected utilization of the power produced.

Paragraph 5: The proposed power plant would be set up by TISCO associated companies and other promoters in Jamshedpur by forming a power generating company – Jamshedpur Power Company Ltd (JPCL). The bulk of power generated will be utilised by TISCO's integrated steel plant and surplus power would be supplied to Jamshedpur city and associated Tata companies in Jamshedpur and Jamshedpur Township.

22) It is interesting to note that when the feasibility report was prepared (in 1995), the notification of 1993 had already been issued in which the main use of power from the proposed units was prescribed for the distribution licensee. The feasibility was only relevant for examining the change in the capacity of the unit.

23) This feasibility report is an internal document for the use of Jamshedpur Power Company Ltd. & TISCO. The appellants have withheld the actual application made to the Bihar Electricity Board/the Government for permission under section 44, 43(A)(1)(c) and 15 of the Act of 1948. Be that as it may eventually when the permission came it did not say that the power will be consumed primarily in the steel works. The permission was granted for use of power by the distribution company. The appellant No.2, who established the two units pursuant to the permission granted vide

the two notifications mentioned above, cannot say that the purpose for establishment of the two units was primarily for supplying to steel works of TSL although the Distribution licensee could distribute such power to steel works. Neither TPCL nor TSL ever asked for any amendment in the two notifications seeking to alter the use of power and claiming that the power produced in the two units would be primarily consumed in the steel works directly and not by the distribution licensee for the purpose of distribution to consumers. The feasibility report is only an examination by TCE as to whether the two proposed units at Jojobera were feasible. They cannot be taken as evidence of what took place subsequent to the preparation of feasibility report. In case the appellant had sought permission to set up these two units for captive use in the steel works, the permission granted by the two notifications of 1993 and 1996 would have reflected the same. Further, even if the two appellants had proposed the two units for the primary consumption of steel works, the sanction eventually did not come for the same. The appellants who took advantage of the sanction and establishment of two units now cannot say that despite such user, mentioned in the two notifications, the two units be deemed to be the units dedicated to the consumption of steel works of TCL/TISCO.

24) It is not unknown in the electricity sector for entire power of a generating company to be purchased by one single purchaser. This does not make the generating unit a captive generating unit for the purchaser. This is exactly what has happened in this case. TPCL has entered into an agreement for sale of power. We find on record copy of the power purchase agreement dated 12.12.1997 between TISCO and three power companies namely: (1) Tata Hydro Electric Power Supply Co. Ltd., (2) Andhra Valley Power Supply Co. Ltd. and (3) Tata Power Co. Ltd. all of whom have their office at 23, Homi Modi Street, Mumbai and were collectively referred to as Tata Electric. The purchaser TISCO has described itself in the agreement as a “Sanction Holder for generation and distribution of electricity at Jamshedpur”.

25) It is also clear from this narration of facts that the JAPCOL was in fact intended to be established as a generating company rather than a captive generation unit. Permission was granted not only under section 44 but also under section 43(A)(1)(c) of the Act of 1948. This permission was required when the generating company intended to sell electricity to any person other than the Electricity Board of the State in which the generating station was operated or to any Board of any other State carrying on activities in pursuance of section 3 of sub-section 15(A) of the said Act. The JAPCOL was also subsequently recognized as a generating company vide a

notification under section 18(A). All this suggests that JAPCOL was an independent generating company but had permission to sell to TISCO/TSL, a distribution licensee/sanction holder as well as to the Bihar State Electricity Board.

26) The appellants have relied upon the judgment of Supreme Court in the case of *State of UP Vs. Renusagar Power Company 1998 4 SCC (supra)* and has taken pain to quote extensively from the report. Since the appellants are so strongly relying upon the judgment, it will be appropriate to reproduce the portion of the judgment on which much stress is laid by the appellant. The facts of the case, as reproduced in the memo of appeal, have been taken from the head note and the same is reproduced below:

“Renusagar Power Co. (respondent 1) was brought into existence by Hindalco (respondent 2) in order to fulfill the condition of industrial licence of Hindalco through production of aluminium. The model of setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in cases of take-over of the power station by the State or the Electricity Board. As all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar can be said to be wholly owned subsidiary of Hindalco and completely

controlled by Hindalco. Even the day-to-day affairs of Renusagar are controlled by hindalco. Renusagar has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the generation in Renusagar as the own source of generation of Hindalco. The profits of Renusagar have been treated as the profits of Hindalco. There was no question of evasion of taxes but the manner of treatment of the power plant of Renusagar as the power plant of Hindalco and the Government taking full advantage of the same in the case of power cuts and denial of supply of 100 per cent power to Hindalco, underline the facts and, as such, imply acceptance and waiver of the position that Renusagar was a power plant owned by Hindalco. Hindalco and Renusagar are inextricably linked up together. Renusagar has in reality no separate existence apart from and independent of Hindalco. Thus persons generating and consuming energy are the same. Therefore, by lifting the corporate veil Hindalco and Renusagar should be treated as once concern and Renusagar's power plant must be treated as the own source of generation of Hindalco. Renusagar should therefore, be liable to duty on that

basis. In the premises the consumption of such energy by Hindalco will fall under Section 3(1)(c) of the Act. Accordingly, the rates of duty applicable to own source of generation have to be applied to such consumption, that is, 1 paisa per unit for the first two generating sets and nil rate in respect of third and fourth generating sets.”

The decision of the Supreme Court, as given in Paragraph 66 & 67 of the reported judgment, is as under:

66. It is high modern jurisprudence, lifting of corporate veil is permissible. time to reiterate that in the expanding of horizon of Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. Here, indubitably, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfill the condition of industrial licence of Hindalco through production of aluminium. It is also manifest from the facts that the model of the setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take over of the power station

by the State or the Electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar is wholly-owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day-to-day affairs of Renusagar are controlled by Hindalco. Renusagar has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the generation in Renusagar as the own source of generation of Hindalco. In the impugned order of the profits of Renusagar have been treated as the profits of Hindalco.

67. *In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco and should be liable to duty on that basis. In the premises the consumption of such energy by Hindalco will fall under section 3(1)(c) of the Act. The learned Additional Advocate-General for*

the State relied on several decisions, some of which have been noted.”

27) We have carefully gone through the entire judgment of the Supreme Court in the case of *State of UP Vs. Renusagar Power Co.* This judgment has no application to the facts of this case. The Supreme Court in that case raised the corporate veil to say that Renusagar Power Co. which was a wholly owned subsidiary of Hindalco and generated power entirely for Hindalco had no existence distinct from Hindalco and therefore, the electricity generated by Renusagar Power Co. and consumed by Hindalco could be taxed as electricity consumed from “own source of generation”. In the present case there is no question of raising any corporate veil in as much as the appellant No.1 is not claiming to be the same as the appellant No.2. Nor is the appellant No.2 which owns the two units is wholly owned subsidiary of appellant No.1. The power in units 2 & 3 is generated by the appellant No.2 TPCL and is sold to appellant No.1 and such consumption cannot be said to be consumption from “own source of generation”.

28) The appellants have placed reliance on another judgment of the Supreme Court in the case of *Andhra Pradesh Gas Power Corporation Ltd. Vs. Andhra Pradesh State Electricity Regulatory Commission and another (2004) 10 SCC 511* to claim that the

Supreme Court has recognized that section 44 of the Act of 1948 was only dealing with captive power plant though the term ‘captive’ has not been used in the Act. There can be no doubt that a captive power plant could be established, during the time when the Act of 1948 was enforced only with section under section 44 of the Act of 1948. This is because no person other than a generating company could generate electricity except with permission under section 44. The question before the Supreme Court in Andhra Pradesh Gas Power Co. Ltd. was only whether a license was necessarily for sale to third parties by a company which had been set up by a group of persons to generate electricity for their group consumption. The Supreme Court held that though the persons who formed a company could take power from the company according to their share in it, those outside the group namely sister concerns could not be supplied any electricity without permission under section 43(A)(1)(c).

29) The Act of 2003 recognizes a captive power plant established by a group of persons for the use of the members of that group. The captive generating plant is described in section 2(8) of the Act of 2003 as under:

*2(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 co-operative society or association.”

30) In common parlance such plants set up by a cooperative society or association of persons for generating electricity primarily for the use of members of such associated or association is called a ‘special purpose vehicle’. Mr. M. G. Ramachandran, learned counsel for the appellant attempted to project the two units as a special purpose vehicle. However, there is not an iota of fact on the basis of which it could be said that the units 2 & 3 were constituted as special purpose vehicle as understood in section 2(8) of the Act of 2003. The appellants in fact never set up such a case before the Commission. We have read the joint petition made before the Commission. We have also gone through the presentation of which the print outs have been placed on the record. No claim was ever made during the hearing before the Commission that JAPCOL was set up by a group of intending purchasers of power. No evidence at all have been placed on record from which it could be concluded that the power from the two units were shared by those constituting the society or association or for that purpose any group of any nature or that the power generated in these two units were shared by members of such group.

31) The permission under section 44 was issued to JAPCOL. It could perhaps be claimed by JAPCOL that units 2 & 3 were its captive plants. If JAPCOL had been set up by an association of persons those persons, including juristic persons, could claim that JAPCOL was a special purpose vehicle. What has turned out is that JAPCOL was a 100% subsidiary of TPCL. We are unable to persuade ourselves that the two units for which permission has been obtained by JAPCOL and which were eventually established, owned and maintained by TPCL were captive generating plants of TSL/TISCO. In our opinion, no such inference is possible even with the aid of the judgment of Supreme Court in the case of Andhra Pradesh Gas Corporation (Supra).

32) The judgment of the Madhya Pradesh High Court in the case of *Madhya Pradesh Cements Manufacturers Association Vs. State of Madhya Pradesh AIR 2002 Madhya Pradesh 62* cited by the appellant also does not take the case of the appellant any further. This case is not a ruling on section 44 of the Act of 1948. The section 44 of the Act of 1948 has come to be mentioned in this judgment only because in the facts of that case there was mention that a captive power plant has been set up with sanction under section 44 and 45 of the Act of 1948.

33) Mr. M. G. Ramachandran has repeatedly referred to section 185 of the Act of 2003 to argue that the plants which were captive plants under the old Act could not cease to be the captive plants under the new Act and that Regulations framed under the Act of 2003 cannot stand in the way of operation of section 185. We do not think that there is any necessity for us to go into the applicability of 185 of the Act of 2003 in view of what has already been stated above. Rule 3 of Electricity Rules 2005 states that no power plant could qualify as captive generating plant under section 9, read with clause (8) of section 2 of the Act unless – in case of a power plant not less than 26% of the ownership is held by the captive user and not less than 50% of aggregate electricity generated by such plant is consumed for captive use. The appellants claim that the entire generations of the two units are consumed by them in their steel plant. But the appellant No.1 do not hold 26% of the share in JAPCOL or TPCL or in the two units in question. As stated earlier JAPCOL was a wholly owned subsidiary of Tata Power. Therefore, in JAPCOL, TSL did not have any share whatsoever. TSL may hold some shares in TPCL. However, admittedly it is less than 26%. But even if it is more than 26% that would not have fulfilled Rule 3 because share holder of a company is an entity distinct from the company and a share holder cannot claim that he is the owner of a particular property of a company to the extent of his share. Even if TSL has any share holding in TPCL

it would not mean that it is the owner of the two units to any extent. It appears that the Commission in its impugned order found it sufficient to reject the claim of the appellants only on the score of Rule 3. We have already found that the two units were not captive units even when the Act of 2003 came into force and hence section 185(2) of the Act of 2003 cannot convert the units into captive units.

34) We are constrained to disapprove the manner in which the Commission has summarily rejected the prayer of the appellants without giving any analysis of the facts and the law. We, however, do not intend to remand the matter to Commission for writing a speaking order as all the facts and law have already been discussed during the arguments in this appeal and we think it appropriate that having heard the matter in detail we should state our own view and dispose of the appeal. We have found that on facts the appellants have failed to establish that the units 1 & 2 were captive generating units of TSL nor can it be said that the two units are captive units for steel works of the TSL. The situation cannot improve for the TSL on account of coming into force of Act of 2003 or of the saving clause therein namely section 185. The prayer for treating units 2 & 3 as captive units for TSL, particularly for the steel works, cannot therefore be allowed. Therefore, while we deprecate the manner in which the petition of the appellants was

disposed of by the Commission, we find no force in the appeal and dismiss the same.

Pronounced in open court on this **07th day of May, 2008.**

(Justice Manju Goel)
Judicial Member

(A. A. Khan)
Technical Member

The End