Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal No. 28 of 2005

Dated this 29th day of March 2006

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

Kalyani Steels Limited
Ginigera, District Koppal, Karnataka
represented by its Director, Mr. Shivkumar Kheny ……Appellant

Versus

1.Karnataka Power Transmission Corporation Limited (KPTLC)
Cauvery Bhavan, K.G.Road, Bangalore
2.Gulbarga Electricity Supply Company Limited (GESCOM)
Gulbarga
3.Karnataka Electricity Regulatory Commission,
Bangalore - 560001 ……Respondents

Counsel for the Appellant(s) Mr.L. Viswanathan, Mr. Manu Nair and
Mr. Mark D'souza for Amarchand Mangaldas, Advocate
Counsel for the Respondent(s) Mr. M. G. Ramachandran, Advocate
Ms. Saumya Sharma, Advocates for Respondents No. 1 & 2.

JUDGMENT

1. This appeal has been preferred by the appellant herein, challenging the order dated 9th day of June 2005 made in Case No. OP 04/2005 on the file of the Karnataka Electricity Regulatory Commission (in the matter of grant of permission for purchase of power from Power Trading Corporation of India and other sources on Open Access basis), in so far as it is against the appellant.

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2. Heard Mr. L. Viswanathan, learned counsel appearing for the Appellant and Mr. M.G. Ramachandran, Advocate appearing for the Respondents 1 and 2. None appeared for the third Respondent.

3. The appellant herein moved the third Respondent Karnataka Electricity Regulatory Commission seeking for the following reliefs:-

> "a) To allow the present petition and accord approval to the Petitioner's proposal to purchase power from Power Trading Corporation (PTC)/other sources on Open Access basis using the existing transmission network of PGCIL and existing distribution link between PGCIL's Munirabad Sub-station and the Petitioner's steel plant;
> b) To direct the Respondent No.1 / Respondent No.2, as the case may be, to accommodate minor variations in power procurements of the Petitioner at any instant and also supply power to the Petitioner in case of any contingency condition in the power networks because of which PTC/other sources is unable to deliver power to the Petitioner;
> c) To fix the relevant wheeling charges and the applicable surcharge, if any, in the event this Hon'ble Commission deems it appropriate to impose such charges in the facts and circumstances of the case;
> d) To pass an Order not to levy any Intra-State (Karnataka) transmission charges losses and additional surcharge for the proposed purchase of power;
> e) To direct the respondent to reduce the contract demand in consonance with the total power consumed by the Petitioner less the power supplied by PTC to the Petitioner."

4. According to the appellant, it has set up an integrated steel manufacturing plant at Ginigera, District Koppal. The first Respondent is the Transmission Corporation while the second Respondent is the distribution licensee within whose area of supply, the appellant has located its steel manufacturing plant. The appellant is a H.T. consumer under category H.T.(2)(a) having a sanctioned load of 22100 KVA with a monthly consumption exceeding Eleven million units. The appellant's plant is fed from the Power Grid Corporation of India 400 KV Munirabad Sub-station via 220 KV terminal bay extension and through a 7.25 km long 220 KV own transmission line.

5. The appellant has financed the entire 220 KV terminal bay extension and the 7.25 km long 220 KV transmission line to its plant and the said line is exclusively dedicated to supply power to the appellant's plant.

6. With respect to the reliefs prayed for, the Respondents filed their written objections. Before the Commission both parties filed additional affidavits or objections or responses during

the hearing. The Regulatory Commission heard the counsel for both parties and considered the materials submitted by both sides.

7. With respect to the appellant's request to allow and approve the proposal to purchase power from PTC / other sources on an Open Access basis, the Regulatory Commission directed the appellant to file an application for transmission access with the Nodal Regional Load Despatch Centre in terms of "Open Access in Inter-State Transmission Regulations" notified by CERC. With respect to the appellant's request to direct the Respondents to accommodate minor variations in power requirements and to supply power in case of any contingency when PTC / other sources is not able to maintain supply of power, the third Respondent Regulatory Commission directed the appellant to negotiate with the Respondents 1 & 2 regarding back-up supply arrangements for availing Open Access and if the negotiations fail, the appellant may approach the Regulatory Commission for appropriate decision. With respect to the issue of fixation of wheeling charges, the Regulatory Commission ordered that the appellant has to pay the same as may be specified by the Regulatory Commission in terms of Section 39 (2)(d)(ii) of the Act and the KERC Regulations on Open Access. With respect to the request of the appellant for a direction not to levy any Intra-State transmission charges, losses and additional surcharge for the proposed purchase of power, the Regulatory Commission held that wheeling charges and surcharges thereon as determined by the Commission would become payable. With respect to additional surcharge, if any on the charges of wheeling, the Respondents were directed to approach the Commission for determination of such charges.

8. With respect to direction to the Respondents 1 & 2 to reduce the contract demand, the Commission directed the Respondents to consider reduction in contract demand to the extent sought for, subject to back-up charges to be mutually agreed to in terms of "KERC Regulations on Open Access". The Commission finally observed that there is adequate capacity in the line for providing Open Access to the extent of appellant's proposal which is within the sanctioned contract demand of 22100 KVA. Thus, the Commission allowed Open Access on the 7.25 km long 220 KV transmission line from 400 KV PGCIL Sub-station exclusively to feed the appellant's steel plant.

9. As against the said order of the Regulatory Commission, the appellant has come forward with the present appeal in so far as it had negatived the request of the appellant, while seeking for the following reliefs:

i. To hold and direct that the appellant is not liable to pay transmission charges and the surcharge thereon;

ii. To hold and direct that the appellant is not liable to pay wheeling charges and additional surcharge thereon.

iii. In the alternative to direct even if the appellant is liable to pay cross-subsidy surcharge, the same should be determined as pleaded by the appellant.

10. The learned counsel for the appellant Mr.L. Viswanathan as well as Mr. M G Ramachandran learned counsel appearing for the Respondents 1 and 2 made detailed submissions during the hearing of the appeals, apart from submitting written arguments. The counsel on either side also relied upon various reported judgments in support of their respective contentions.

11. It is the contention of the learned counsel for the appellant that the appellant is not liable to pay transmission charges and the surcharge thereon with respect to the power purchased from Power Trading Corporation or other sources by way of Open Access. The transmission losses determined by the Regulatory Commission despite a specific representation that the appellant will bear transmission loss as an exclusive line, is a misdirection. It is also contended that the appellant is not liable to pay wheeling charges with respect to the Open Access granted to the appellant for the purchase of power from PTC. It is the further contention that the appellant is not liable to pay cross-subsidy surcharge as well as additional surcharge under Section 42 (4) of The Electricity Act 2003. In any event, the methodology adopted for determination of cross-subsidy surcharge by the Regulatory Commission is erroneous and liable to be interfered. The learned counsel for the appellant referred to the statutory provisions of The Electricity Act 2003 as well as other relevant statutory Regulations in support of his various contentions. It is the contention of the learned counsel for the appellant that in so far as the Regulatory Commission has negatived the reliefs, the order is vitiated by irregularities, misdirections and errors apparent on the face of the record, besides it is contrary to the statutory provisions and liable to interfered. It is contended that appellant is entitled to the reliefs prayed for in this appeal.

12. Per contra Mr. M G Ramachandran, the learned counsel for the Respondents 1& 2 while pointing out that the entire 7.25 km long 220 KV line from Munirabad Sub station to the appellant's factory premises is owned, controlled, operated and maintained by the first respondent, a State Transmission Utility which undertakes transmission of electricity through intra-State transmission system, therefore, the contention that no charges are payable by the appellant for the user of the line is devoid of merits. The appellant is liable to pay the transmission, wheeling and other charges that may be determined by the State Regulatory Commission from time to time. It is also pointed out by Mr. Ramachandran, learned counsel appearing for the Respondents 1 & 2 that the appellant is liable to pay cross-subsidy surcharge as provided in Sub section (2) of Section 42 in addition to the transmission charges. Since the appellant desires to have Open Access to its factory in the area of supply of second Respondent discom, the appellant is bound to pay the cross-subsidy surcharge. According to the Respondents, the appellant is liable to pay the following charges:

a) Transmission charges to Power Grid Corporation of India for transmission on the inter-State line as determined by the Central Electricity Regulatory Commission;
b) Transmission charges to first Respondent for use of 7.25 km overhead 220 KV line as may be determined by the third Respondent Karnataka Electricity Regulatory Commission;
c) Cross-subsidy surcharge to the account of the second respondent as determined by the Karnataka Electricity Regulatory Commission under Section 42 (2) of the Act; and
d) Additional surcharge under Section 42 (4) of the Act as determined by the Karnataka Electricity Regulatory Commission.

13. In addition to the above charges, it is pointed out on behalf of the Respondents, that the appellant is required to comply with the conditions of supply as determined by the Regulatory Commission in regard to the committed load, minimum charges, minimum demand, contract demand, etc., as in the case of similar HT consumers. The contention of the appellant that no charges are payable for use of the line as the appellant had contributed towards the capital cost of the line is a misconception of law. That apart network involving the lines cannot also be isolated and being an integrated intra-State transmission system, all the consequences and liabilities

follow. The appellant had contributed the entire capital cost of the 7.25 km line without any reservation as to the utilization by the Respondents. The contention advanced by the appellant in this respect is a misconception. It is also not open to the appellant to re-open the issue without raising any dispute as to the ownership of the line or liability of the appellant to pay the required charges notwithstanding that the appellant had contributed towards capital cost. The appellant having failed to challenge the tariff order already in force, it is not open to the appellant to resile and contend to the contra. With respect to the contention that the tariff policy recently announced by the Central Government should have been followed or adopted by the Commission with a further request that the matter be remitted back to the Regulatory Commission, it is contended by Mr. Ramachandran learned counsel for the Respondents that the appellant may move the State Regulator by way of review, have the right to take part in the proceedings and make their submissions with respect to the recent tariff policy announced by the Central Government.

14. On a consideration of the order passed by the Regulatory Commission, pleading in the appeals, written submissions and the arguments advanced, the following points arise for consideration in this appeal:-

i. Whether the appellant is liable to pay transmission charges even in respect of 7.25 km dedicated transmission line put up at its cost under the Deposit Contribution Scheme with respect to the power purchased from PTC and other sources on being granted Open Access?
ii. Whether the appellant is liable to pay surcharge on transmission charges as claimed by the Respondents?
iii. When the appellant is ready to accept transmission at the point of injection and ready to suffer transmission losses after the point? Whether the appellant could be fastened with liability to bear transmission losses as held by the Regulatory Commission?
iv. Whether the appellant is liable to pay wheeling charges with respect to Open Access already granted for the purchase of power from PTC and other sources?
v. Whether the appellant is liable to pay cross subsidy surcharge? If so, what is the methodology for determination of cross subsidy surcharge and what is the rate at which the appellant is liable to pay cross subsidy if at all?

vi. Whether the appellant is liable to pay additional surcharge under Section 42 (4) of The Electricity Act 2003?

vii. To what relief, if any, the appellant is entitled to?

15. Before taking up the points for consideration certain facts, which are admitted by either side and not in dispute are required to be set out. The first Respondent is Karnataka Power Transmission Corporation, which is also a State Transmission Utility engaged in intra-State transmission of electricity in the State of Karnataka. The second Respondent is a distribution licensee, in whose area of supply the appellant's steel plant is located. The appellant is a HT consumer having a sanctioned load of 22100 KVA with a monthly consumption exceeding eleven million units. The appellant's plant is fed from Power Grid Corporation of India 400 KV Munirabad Sub-station via 220 KV Terminal Bay Extension and a 7.25 km long KV transmission line.

16. Concedingly, the appellant had met the entire cost of 220 KV Terminal Bay Extension and 7.25 km long 220 KV transmission line to the plant. The said 220 KV transmission line is an exclusively dedicated line to supply power to the appellant's plant. There is no dispute that the dedicated transmission line was fully financed by the appellant and it is being maintained by the second Respondent.

17. There is no dispute that the point of injection of power into the system of the first Respondent is 400 KV Munirabad sub-station as it is at that point the power is injected from Power Grid Corporation of India (PGCIL) CTU line / system into the KPTCL line / system. The appellant moved the third Respondent, seeking approval for grant of Open Access from the very same 400 KV Munirabad Sub-station where the power is injected from PGCIL to KPTCL system by grant of Open Access for purchase of power from sources other than the Respondents 1 & 2.

18. The Respondents, as recorded by the third Respondent Regulatory Commission, have not commented or raised objections and the capacity of 7.25 km long dedicated overhead 220 KV line from the PGCIL (CTU) 400 KV Munirabad Sub-station to the appellant's plant. Concedingly, the entire cost of 7.25 km long dedicated overhead line and the connected infrastructure for the transmission was totally financed by the appellant under "Deposit Contribution Scheme". It is through this 7.25 km long dedicated overhead 220 KV line, is the only part of the entire system for which Open Access is sought for by the third Respondent.

19. The third Respondent Regulatory Commission has also recorded a finding that the appellant proposed to avail Open Access by using the existing transmission network of PGCIL and the existing distribution link between PGCIL's Munirabad Sub-station and the appellant's steel plant, from a source outside the State involving Inter-State transmission of electricity. It is also admitted that hitherto the said 7.25 km long 220 KV line is exclusively used for transmission of power by the Respondents 1 & 2 to the appellant's plant and the appellant was remitting consumption charges at the tariff rate fixed by the Commission.

20. It is also not in dispute that while fixing the tariff, cost of 7.25 km long dedicated line was excluded from consideration, as no part of the capital cost has been borne by either of the Respondents or its predecessor. Of course, while fixing the tariff, the Regulatory Commission had taken into consideration of the transmission cost for the entire transmission network system of the discom / distribution licensee.

21. The appellant also seeks for continuance of its contract with the second Respondent as a standby source of supply even though it has moved for Open Access, for the power proposed to secure from other sources such as PTC, etc. Here we are not concerned with the fixation of standby charges or other incidental charges as the appellant has not demurred to pay the same as may be determined which may include the minimum guarantee as well. So also the maintenance charges for the 7.25 km line.

22. Taking up the first point for consideration, at the risk of repetition we record that the entire 7.25 km long dedicated transmission line 220 KV and necessary infrastructure from Munirabad Sub-station to the appellant's steel plant has been solely and exclusively financed by the appellant for providing electricity supply. There is no controversy in this respect. The appellant could trace and place copy of the proceedings of the Government of Karnataka in this respect in **Government Order No. CI 12 SPC 95, Bangalore, Dated 25.1.1995**. By the said Government order, the State Government among other infrastructure assistance, incentives and concessions, sanctioned supply of power. The material portion of the Government Order reads thus:

> "POWER : The project is sanctioned 70 MVA of power for both I & II Phases of the project subject to the condition that 2/3 of the requirement i.e., 46 MVA will be met by the KEB in two stages and the balance unit by way of continuous captive generation. The sanctioned KEB power for the project will be provided by December, 1995. The unit has to avail power on 220 KV from Lingapura Sub-Station and the cost of line

extension from the Sub-Station to the plant site has to be borne by the unit. No concession / reduction in power tariff will be available to the company.

For this purpose, the company has to establish the 220 KVA Station on their own premises at their own cost for receiving the power from Lingapura Sub-Station. The lines from Lingapura Sub-Station have also to be drawn at the cost of the company."

23. It is not in dispute that the appellant deposited Rs.281 lakhs in all as estimated by the then Karnataka Electricity Board and the entire cost of the lines and infrastructure has been met by appellant. No other condition has been imposed or to suggest that the line has become the exclusively owned line of the then Karnataka Electricity Board or the successor discom or there is anything to show that the appellant relinquished its interest in the said line in favour of Respondent. In other words, it is a dedicated transmission line laid at the cost of appellant and exclusively meant for transmission of power to connect the appellant's plant to the Sub-station. The inference sought to be drawn by Respondents 1 & 2 that they are the exclusive owners of the said 7.25 km transmission line and the appellant has no right or interest whatsoever over the said line is not supported by any material much less reliable material, such as dedication or relinquishment or a contract between the parties. Up till now the line is exclusively used for the transmission of power and there is no dispute.

24. The Deposit Contribution Scheme relied upon by the Respondents or the details thereof have not been placed either before the Regulatory Commission or before this Appellate Tribunal to substantiate their claim that the Respondents 1 & 2 have become the owners of the said transmission line. Factually the appellant has borne the entire cost of the transmission line with necessary infrastructure connecting its plant to the Sub-station. Hence, it is too purile for the Respondents to contend that they have become the exclusive owners or that the appellant has no right or whatsoever. It is true that the said line is being operated and maintained by the second Respondent. By that, it does not follow that the second Respondent has become the legal or exclusive owner of the said transmission line or acquired exclusive ownership in a manner known to law. Had there been a contract between the parties, the Respondents would have placed the same to establish legally that the second Respondent has become the exclusive owner of the said 7.25 km long transmission line.

25. Mr. M.G. Ramachandran learned counsel appearing for the Respondents, incidentally referred to Regulation 8.13 of the KERC (Electricity Supply & Distribution Code) 2000-01 and

contended that the transmission line vests with the licensee. Prima facie the said Regulation has no application to "transmission" line, though it may apply to service lines. Section 2(72) defines transmission and Section 2(61) defines service line and the two are distinct. The said Regulation has been framed long after the laying of transmission line in terms of sanction letter of State Government. The Regulation has no application to the case on hand as it is not ex post facto. It is not known as to how, the Regulator could provide for vesting, when there is no statutory provision conferring such power or power to frame such Regulation.

26. It is further pointed out that the transmission line is being operated and maintained, which involves O & M expenses and therefore, this implies transfer of ownership. This contention cannot be sustained as ownership is distinct and different from operation and maintenance and such arrangement by no stretch could transfer title or transfer ownership. The ownership is a sum total of various subordinate rights as held in Mohamed Noor V/s Mohamed Ibrahim AIR 1995 SC 398. The right to transfer the subordinate right like O & M does not make it a transfer of ownership. The right of ownership, or own, mainly arises either by operation of law or by reason of some event or act as has been held in John Vallamattom V/s U.I reported in AIR 2003 SC 2902. In fine in law no owner could be asked to pay fee or hire charges for the user of his own infrastructure, which he erected or created by his exclusive funds. The failure to place a copy of the scheme by Respondents is fatal to their claim. The reimbursement of O & M expenses by appellant is a must as without operation and maintenance the interest of appellant will suffer and it is in its interest to maintain or reimburse the expenses to Respondents.

27. Further, it is not the case of the Respondents nor they have placed material to oust the equitable rights which the appellant could claim over the dedicated line, which it has exclusively financed. While fixing the tariff, admittedly the cost of the said line had not been taken into consideration and therefore, it follows in equity also, the second Respondent cannot claim ownership, though it is entitled to operate and maintain the said line and get reimbursement of the charges. Equitable consideration weighs in favour of the appellant. Equity looks upon a thing as done which ought to have been done. Equity lends assistance to the cause of justice and avoids inequities. Ethics and good conduct always subserve the need of justice which equitable maxims denote. It is not as if, the application of equitable principle on the facts of the case will operate to annul any statutory provision. A Court of Law has to do equity and while doing so it

has to consider the factual situation of the matter in issue The appellant has not abandoned its rights nor it has neglected to insist on its rights over the transmission line laid at its cost.

28. To put differently, the second Respondent or for that matter the first Respondent, if at all could claim control over the line as they are obligated to maintain the transmission and supply, since the line in question is dedicated for the supply of power exclusively to the appellant's plant. It may be in course of time, the exclusive transmission line could have been connected to other source of supply as the distribution licensee has to maintain supply to the plant from one or more sources of supply or transmission lines. Yet it cannot be held that the appellant cannot claim an equitable right over the line as it has borne the entire cost. The line was under the supervision, control and maintenance of the second Respondent as the distribution licensee, in trust for the exclusive benefit of the appellant. Therefore, the Respondents cannot legally claim or by fiction that they are the exclusive owners and that they are entitled to transmission charges for the user of the said 7.25 km long dedicated line. No law requires the owner to pay charges or rent or hire for the user of its infrastructure put up at its cost for its exclusive user, like the appellant.

29. The learned counsel for the contesting Respondents 1 & 2 relied upon the four pronouncements in support of their plea that the transmission line is owned by them or it has become the asset of the Respondents 1 & 2 and they are consequentially entitled to transmission / wheeling charges for the use of the line. The four pronouncements relied by the Respondents are:

i. Calcutta Electric Supply Corporation v the Commissioner of Wealth Tax, West Bengal. AIR 1971 S.C.2447 at Page 2449 Para 8;

ii. The Upper Ganges Valley Electricity Supply Company Limited v The U.P. Electricity Board. AIR 1973 S.C. 683 at Page 687.

iii. Hoshiarpur Electric Supply Company v Commissioner of Income Tax, Simla.

iv. The Caxton Press Private Limited v Municipal Corporation of Delhi. AIR 1876 Delhi 30 at Page 31.

30. In our considered view, none of these pronouncements would lend support to the Respondents' plea. The pronouncement reported in AIR 1971 S.C. 2447 arose under The Wealth Tax Act, where their Lordship of the Supreme Court had the occasion to decide with respect to

the value of assets shown by an electric supply undertaking in its balance sheet with reference to Section 7(2) of The Wealth Tax Act. Their Lordships were concerned with the question whether the Wealth Tax Officer could accept the value of the assets of the business as shown in the balance sheet or not and as to how the net value of the assets of the business has to be determined, even though the undertaking of the company, including portions of the main service connections were put up at the expense of consumers. The pronouncement is not a precedent which would support the Respondents' claim, as nowhere it has been held that the line put up by the consumer would automatically become the asset of the electric supply undertaking.

31. AIR 1973 S.C. 683 arose out of arbitration proceedings, where the arbitrators were appointed to fix the compensation on purchase of undertaking by the Electricity Board under The Electricity Act 1910. In the said case, a notification has been placed to show the introduction of a license condition, which condition was framed under Section 21(2) of The Electricity Act 1910. The said condition reads thus:

> "The whole of the service line, irrespective of the payment made by the consumer, shall be and remain the property of the company of whom and at whose cost it shall be maintained and the Company reserves the rights to extend, alter, remodel or replace the said service line or cable to afford a supply to other consumers, should this be necessary."

32. In the present case, the Respondents are unable to place such a condition or notification. In the said case, no compensation was awarded by the Arbitral Tribunal in respect of the said service line, the cost of which was borne by the consumers. The Hon'ble Supreme Court interfered with the said conclusion while holding that the Umpire was in the wrong end of the matter. In that context, the Supreme Court observed that the line though laid at the cost of the consumers, it had some market value and while holding that the Umpire has misconducted itself, interfered with the award. Here again, it is to be pointed as in the earlier case, no notification has been placed by the Respondents in the case on hand nor it is the pronouncement of their Lordships that the line remains the property of the undertaking though the consumer have borne the cost. Such a wide proposition has not been laid by their Lordships as sought to be contended by Mr. M G Ramachandran.

33. The third pronouncement reported in AIR 1961 S.C. 892, would apply to the limited proposition as to whether it is a capital or trading receipt. In this respect, the Supreme Court held thus:

"(11) The receipts though related to the business of the assessee as distributors of electricity were not incidental to nor in the course of the carrying on of the assessee's business; they were receipts for bringing into existence capital of lasting value. Contributions were not made merely for services rendered and to be rendered, but for installation of capital equipment under an agreement for a joint venture. The total receipts being capital receipts, the fact that in the installation of capital, only a certain amount was immediately expended, the balance remaining in hand, could not be regarded as profit in the nature of a trading receipt. On that view of the case, in our judgment, the High Court was in error in holding that the excess of the receipt over the amount expended for installation of service lines by the assessee was a trading receipt." (Emphasis supplied)

34. The pronouncement in AIR 1976 Delhi 30 at Page 31 is far from supporting the Respondents supports the appellant. In that learned Judge of the Delhi High Court has sustained the claim of consumer and it would show that a time switch which was removed by the distribution licensee was decreed to be returned to the consumer or the value of it. Here again a condition was relied upon by the undertaking with respect to service line. But in the case on hand no such condition has been pleaded nor established.

35. In the three pronouncements of the Supreme Court, it has not been laid down that such lines executed at the cost of consumer vest with the licensee. In our view, those pronouncements may not be relied upon as a ratio decidendi. In Dalbir Singh v State of Punjab reported in 1979(3) SCC 745, the Supreme Court held that it is not everything said by a judge that constitutes a precedent. In this respect, it has been held thus:

"*Per Sen. J.*
A decision on a question of sentence depending upon the facts and circumstances of a particular case, can never be regarded as binding precedent, much less 'law declared' within the meaning of Art.141 of the Constitution so as to bind all courts within the territory of India.
It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents every decision contains three basic ingredients –

(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the judge draws from the direct, or perceptible, facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of (*i)* and (*ii)* above.

However, for the purposes of the doctrine of precedents, ingredient *(ii)* is the vital element in the decision. This indeed is the ratio decidendi. The ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents."

36. No such arrangement as relied in the said pronouncements has been pleaded or placed by the Respondents to show that it is a joint venture and that the Respondents have become the exclusive owners. To the contra, the Respondents have placed the Karnataka Government Notification, the portions of which are already extracted above would go to show that the Respondents are not the owners of the transmission line but it could, if at all invoke the rule in respect of service line. So long as the second Respondent or for that matter the first Respondent, is not the owner nor it had invested its funds in the said line nor there is a vesting by operation of statutory provision, it would be inequitable on the part of the Respondents to claim transmission charges when no part of the capital expenditure had been incurred by it. It would be inequitable on the part of the Respondents to claim transmission charges for the 7.25 km long dedicated 220 KV transmission line as the appellant has not relinquished its interest and the Respondents have not acquired title to the said line in a manner known to law. That apart when the Respondents could not in law include the value of line in its capital, and claim return according to the above pronouncements, it is legally not permissible for them to claim transmission charges. Of course, the Respondent who is operating and maintaining the line will be entitled to collect or reimbursement of the expenses incurred in that behalf and nothing more. Therefore, it follows the appellant is not liable to pay transmission charges for the said 7.25 km long dedicated line put up at its cost for exclusive transmission of power to its plant. However, the appellant shall be liable for O & M charges and it shall reimburse the same to the Respondent who maintains, besides bearing the cost when replacement of line is required by contingencies.

37. As regards the second point, as to liability of pay surcharge on transmission charges claimed by the Respondents, it is seen that Section 39 prescribes functions of State Transmission Utility and one of them being to provide non-discriminatory Open Access. Section 42(2) provides that a State Commission shall introduce Open Access. Proviso to Sub-section (2) of Section 42 enables the State Commission to allow Open Access even before elimination of cross

subsidies on payment of surcharge in addition to the charges for wheeling as may be determined by the State Commission. Sub-section (4) of Section 42 provides for additional surcharge on the charges of wheeling as may be specified by the Commission. Sub-section (4) of Section 42 reads thus:

> "(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply."

A plain reading of this Sub-section would show that a consumer is liable to pay additional surcharge, only if he is liable to pay charges of wheeling and not otherwise.

38. Per contra proviso to Sub-section (2) of Section 42 provides for payment of surcharge in addition to charges for wheeling as may be determined by the State Commission. Sub-section (2) of Section 42 reads thus:

> "(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operations constraints:
>
> PROVIDED that such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:
>
> PROVIDED FURTHER that such surcharge shall be utilized to meet the requirements of current level of cross subsidy within the areas of supply of the distribution licensee:
>
> PROVIDED also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State commission:
>
> PROVIDED also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use."

As seen from the first proviso of Sub-section (2) of Section 42 for open access, surcharge is to be imposed in addition to the charges for wheeling. Therefore, even if wheeling charges are not payable, the open access consumer has to pay surcharge.

39. Wheeling is defined in Section 2(76) and it reads thus:

> "(76) "wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62"

On careful analysis, it is clear that liability to pay wheeling charges arises only when distribution system and associated facilities of a transmission licensee or distribution licensee are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62 and not when the consumer uses its dedicated lines of its own.

40. In the present case and on the admitted facts, no part of the distribution system and associated facilities of the first Respondent transmission licensee or the second Respondent distribution licensee is sought to be used by the appellant for the transmission of power from Grid Corporation, from injecting point (sub-station) to appellant's plant. Therefore, the definition as it stands, the appellant is not liable to pay wheeling charges and additional surcharge for the Open Access in respect of which it has applied for. In terms of Sub-section (4) of Section 42, the payment of additional surcharge on the charges of wheeling may not arise at all. Yet the appellant is liable to pay surcharge, whether he is liable to charges for wheeling or not and on the second point we hold that the appellant is liable to pay surcharge and not additional surcharge which may be fixed by the third Respondent, State Regulatory Commission.

41. As regards the third point, the appellant's specific case that it is ready to accept transmission at the point of injection of power and suffer transmission loss throughout the 7.25 km transmission line. Therefore, with respect to the power that may be transmitted by way of Open Access purchase, the question of payment of transmission loss does not arise at all as factually the appellant bears the transmission loss. The appellant still seeks to retain standby supply and it is through the same transmission line. Unless the appellant also accepts the supply by the second Respondent from the same point of injection where the appellant undertakes to fix

the necessary meter for measuring the consumption, the appellant cannot escape the transmission loss. If the appellant accepts the measurement on the spot of injection of power either from Open Access or when standby power is drawn from the second Respondent, then the liability for transmission loss also will not arise. Therefore, the contrary conclusion of the Commission and its conclusion deserves to be interfered while making the point clear. If the point of injection is at a different point where standby power is drawn, then it automatically follows, the appellant will be liable for transmission loss and all incidental charges such as surcharge, etc. follows..

42. As regards fourth point, namely, payment of wheeling charges with respect to Open Access already granted for the purchase of power from PTC and other sources, as has already been held in point number two, the appellant is not liable to pay wheeling charges as it accepts the injection of power at the point in the sub-station where the PTC or other sources through the grid line of the Central Utility is accepted. Since the appellant has not applied for Open Access beyond the 7.25 km long line, we need not discuss any further in this respect.

43. As regards fifth point, liability to pay cross subsidy, which cross subsidy is part of the tariff as notified by the Commission to all consumers within the area of distribution of second Respondent distribution licensee so long as the appellant seeking for stand by supply of power, it is liable to pay cross subsidy surcharge and there is no escape. The cross subsidy surcharge, which is an element which has gone in the fixation of tariff, would be compulsory in terms of statutory provision. It is not as if the contractual relationship with the second Respondent is severed. The appellant wants to retain its service connection as a consumer and to draw power depending upon the exigency and for the quantum of power drawn as a standby source, the liability to pay the all consequential charges are automatic. We do not find any illegality in the methodology adopted by the Commission with respect to determination of cross subsidy surcharge.

44 The sixth point has already been answered in favour of the appellant holding that it is not liable to pay additional surcharge.

45. As regards seventh point, accepting the above points though we have not framed other points specifically, the learned counsel for the appellant requested for a remand to the third Respondent as the third Respondent did not have the benefit of Tariff Policy and Electricity

Policy when it decided the matter. We find force in this. The learned counsel for the Respondents 1 & 2 added that the appellant may move the Regulator by way of review, in this respect. Therefore, in respect of all other aspects including fixing of rate of various charges and all other incidental matters, the matter is remitted back to the third Respondent for being considered in the light of our conclusions and in the light of Tariff Policy as well as Electricity Policy which has been notified.

46. In the result, we allow the appeal in part while remitting the same to the third Respondent for its consideration in the light of the recent Electricity Policy and Tariff Policy notified under Section 3 of The Electricity Act 2003 with respect to various aspects, while holding that the appellant is not liable to pay (i) transmission or wheeling charges or (ii) additional surcharge nor it is liable to meet the transmission loss for the Open Access applied for, but liable to pay surcharge, cross subsidy surcharge, reimburse all maintenance expenses including cost of replacement and also all charges prescribed for standby supply that may be drawn by it so long as the contract is kept live.

Pronounced in open court on this 29th day of March 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

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No. of corrections