

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 81 of 2006

Dated: November 16, 2006

**Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member**

Gajendra Haldea
C-II/69, Bapa Nagar,
New Delhi – 110 003

...Appellant

Versus

1. Grid Corporation of Orissa Ltd.
Vidyut Bhawan, Janpath,
Bhubaneswar

2. Central Electricity Regulatory Commission,
6th Floor, Core 3, Scope Complex,
New Delhi – 110003

3. Orissa Electricity Regulatory Commission
Bidyut Niyamak Bhavan, Unit-VIII
Bhubaneswar – 751 012

...Respondents

1. Uttar Pradesh Power Corporation Limited
2. Maharashtra State Electricity Distribution
Company Limited

...intervenors

For the Appellant:

Mr. Gajendra Haldea

For the Respondents:

Mr. R.K. Mehta with Ms. Suman Kukrety,
Advs. for Gridco of Orissa –Resp.1
Mr. M. G. Ramachandran with
Ms. Taruna Singh Baghel &
Mr. Anand K. Ganesan, Advs. for OERC –
Resp.3
Mr. Shanti Bhushan, Sr. Adv. with
Mr. Sanjeev Kapoor, Mr. Avinash Menon,
Advs CESC Ltd.,
Mr. Amit Kapoor for PTC

For the Intervenors:

Mr. Shyam Divan, Sr. Adv. with
Mr. Kiran Gandhi & Mr. Shaiwal Srivastava
for MSEDCL

Mr. Sunil Gupta, Sr. Adv. with
Mr. Sitesh Mukherjee, Adv. for UPPCL

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson:

This appeal is directed against the order of the Central Electricity Regulatory Commission (for short 'CERC') dated May 1, 2006, whereby the petition of the appellant, being petition no. 15 of 2006 was rejected. In the petition it was, *inter alia*, claimed that the sale of surplus electricity by the Grid Corporation of Orissa (for short 'GRIDCO') to the Power Trading Corporation (for short 'PTC'), an Inter-State Trader was in the nature of Inter-State Trade attracting the application of trading margin fixed by Regulation 2 of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006, notified on January 23, 2006, and therefore, a direction be issued to the GRIDCO not to sell

electricity to the trading licensee contrary to Regulation 2. The relevant facts giving rise to this appeal are as follows:-

2. In the year 1995, the Orissa Electricity Reforms Act, 1995 was enacted by the legislature of the State of Orissa. In accordance with the requirements of the Act, the Orissa State Electricity Board was unbundled in the year 1996. This led to the formation of four generating companies as well as the Grid Corporation of Orissa Ltd., the first respondent for transmission, bulk purchase and distribution of electricity in the State. The generating companies were required to sell power generated by them to the GRIDCO alone.

3. In the year 1999, the work of distribution of electricity was transferred from the GRIDCO to the newly created four distribution companies. Consequently, the area of operation of the GRIDCO was curtailed and as per the license granted to it by the Orissa State Electricity Regulatory Commission, under Section 15 of the Orissa Electricity Reforms Act, 1995, the same was confined to bulk purchase, sale and transmission of electricity.

4. After coming into force of the Electricity Act, 2003, the Govt. of Orissa under Sections 39, 131, 133 and 134 thereof read with Sections 23 and 24 of the Orissa Electricity Reforms Act, 1995 framed a Scheme called Orissa Electricity Reforms (Transfer Of Transmission Related Activities) Scheme 2005. This scheme came into force on April 1, 2005. By operation of Clause 4 of the scheme, the transmission undertaking stood transferred from the GRIDCO to Orissa Power Transmission Company. Consequently, the GRIDCO was left with the residual functions of trading involving bulk purchase and sale of energy and activities incidental and ancillary thereto.

5. On March 10, 2005, the GRIDCO invited offers for sale of its surplus power to State Electricity Boards/Power Utilities through Power Trading entities having valid license from the CERC. It is not in dispute that as per the license granted to it by the Orissa Electricity Regulatory Commission, the GRIDCO is authorized to sell its surplus power to the State Electricity Boards/licensees of other states with the prior approval of the

Commission. It is also not in dispute that the Orissa State Regulatory Commission permitted the GRIDCO to sell the surplus power to Trading entities of other States having valid license from the CERC.

6. Pursuant to the aforesaid invitation, the PTC India Ltd. made an offer to the GRIDCO for purchase of power from it. The offer of the PTC was accepted by the GRIDCO. This resulted in Power Trading Agreement (for short 'PTA') dated March 9, 2006 between the PTC India Ltd. and the GRIDCO, whereby the PTC agreed to purchase electricity from the GRIDCO as per the details specified in clauses 4 & 5 of the agreement. These clauses read as under:

“Clause 4: Quantum of Power

April, 2006 to June, 2006

Round the clock (00.00 to 24.00=24 hrs)	200 MW
Evening Peak power (17.00 to 23.00=6 hrs)(Additional quantity)	100 MW

July, 2006 to September, 2006

Round the clock (00.00 to 24.00=24 hrs)	400 MW
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Clause 5: Rate for Billing

MONTH	ROUND THE CLOCK (00 to 24 Hrs = 24 hrs) Tariff in Paise/Kwh	* Off PEAK (00 to 17 Hrs. & 23 to 24 Hrs.=18 Hrs.) Tariff in Paise/Kwh	EVEN PEAK (17 to 23 Hrs. = 6 HOURS) Tariff in Paise/Kwh
April-06	461.00	456.00	476.00
May-06	466.00	461.00	481.00
June-06	466.00	461.00	481.00
July-06	466.00	461.00	481.00
Aug-06	466.00	461.00	481.00
Sept-06	466.00	461.00	481.00

* The average hourly drawal during morning peak (06 hrs. to 11 hrs.) should not be more than average drawal during balance off peak period of 13 hrs”.

7. It cannot be disputed that pursuant to the agreement, the surplus power was sold by the GRIDCO to the PTC and as a result thereof, it was transmitted outside the State of Orissa.

8. The appellant filed a petition under Section 52 read with Section 79(1)(g) of the Electricity Act, 2003 before the CERC, claiming that though the sale by the GRIDCO to the PTC was in the nature of an interstate trade, the GRIDCO had made a huge profit, much beyond trading margin of 4 paise as permitted by Clause 2 of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 in as much as the average cost of procurement of electricity by

the GRIDCO was approximately 110 paise/Kwh, and price at which it was sold to the PTC ranged between 461 paise/Kwh and 481 paise/Kwh. In the petition the appellant claimed the following reliefs:

- a. *“Direct the GRIDCO to adhere to the maximum trading margin of 4 paise while entering into a contract for sale of power to any trading licensee in case such power is ultimately routed to a licensee outside the state of Orissa through an inter-state transmission system.*
- b. *Direct the GRIDCO to file appropriate returns in the prescribed Form-III of the Central Electricity Regulatory Commission (Procedure, Terms & Conditions for grant of Trading Licence and other related matters) Regulations, 2004 in respect of each transaction of sale, where the electricity sold by it has been ultimately transferred to a license outside the state of Orissa using inter-state transmission system.*
- c. *Direct the GRIDCO not to sell electricity in the course of inter-state trade with a margin exceeding 4 paise per unit and to modify any contract that allows it to retain a higher margin.*
- d. *Direct the GRIDCO not to invite bids with the intent of selling electricity in the course of inter-state trade with a margin exceeding 4 paise per unit.*
- e. *Exempt the Petitioner from the requirement of payment of the prescribed fee”.*

9. The CERC by its order dated April 5, 2006 held that though the GRIDCO was an electricity Trader, the sale, however, by the GRIDCO to the PTC was not in the nature of inter-state trade of electricity as the movement of electricity outside the State of Orissa was caused by the PTC after the property was passed on to it by the GRIDCO within the State. The CERC, therefore, came to the conclusion that clause 2 of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 was not attracted.

10. Aggrieved by the impugned order passed by the CERC, the appellant has filed the instant appeal. The Maharashtra State Electricity Distribution Co. Ltd. (for short 'MSEDCL') and Uttar Pradesh Power Corporation Ltd. (for short 'UPPCL') have filed Interlocutory Applications, being I.A. Nos. 156 of 2006 and 151 of 2006 respectively, for seeking intervention in the matter.

11. We have heard the appellant, who appeared in person, Mr. R.K. Mehta, the learned counsel for the first respondent, the GRIDCO and Mr. M.G. Ramachandran, the learned

counsel for the second respondent, the Orissa Electricity Regulatory Commission. We also heard Mr. Shyam Divan, the learned senior counsel for MSEDCL and Mr. Sunil Gupta, the learned senior counsel and Mr. Sitesh Mukherjee, Advocate for UPPCL. Almost identical pleas have been raised by the appellant and the counsel for applicants in I.A. nos. 156/06 and 151/06. Besides, we called upon the counsel appearing in Petition no. 1/2005 to advance their submissions as we were under the impression that the issues raised in the instant case and petition no. 1/2005 were somewhat similar. Subsequently on August 28, 2006, on hearing the counsel, we observed that it was not so. Mr. Shanti Bhushan, the learned senior counsel for the Calcutta Electricity Supply Corporation (for short 'CESC') a party in Petition No. 1 of 2005 in response to the notice argued for the rejection of the instant appeal.

12. We will first take up the preliminary objection raised by Mr. Mehta, the learned counsel appearing for the first respondent, to the maintainability of the petition filed before the CERC by the appellant and the appeal before us. The

learned counsel for the first respondent submitted that the appellant had no locus standi to file the petition before the CERC under Section 52 read with Section 79(1) (g) of the Electricity Act, 2003 and the instant appeal before us under Section 111 thereof. It was submitted that the appellant has not been able to indicate as to how he has been affected by the price at which the surplus electricity has been sold by the GRIDCO to the PTC. It was pointed out that the appellant in para 11 of the petition filed before the CERC had averred to the effect that he was filing the petition in public interest and for safeguarding the interest of the consumers of electricity in the country. The learned counsel for the first respondent submitted that the appellant has not placed any material on record to show that he was duly authorized by any class of consumers, who may have been primarily affected by the transaction in question. He has also not been able to demonstrate that the consumers whose cause he is seeking to espouse support the litigation. The learned counsel claimed that the consumers of power deficit States purchasing surplus power from the GRIDCO are being benefited as otherwise they

will by paying UI tariff for over-drawl of the electricity at the rate of Rs. 5.70/unit or they will have to purchase Kayamkulam Regulated Power at the rate of Rs. 5.50/ unit or Kawas Regulated Power at Rs. 7.00/ unit or the Dabhol Power at the rate of Rs. 8.50/unit approximately. Shri Mehta contended that when the consumers have not claimed any relief against the sale of surplus power by the GRIDCO to the PTC, the appellant was not entitled to maintain the petition before the CERC seeking direction to the GRIDCO not to sell electricity to any trading licensee at a rate higher than the one envisaged by Clause 2 of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006. The learned counsel in support of his submission relied upon the decisions of the Supreme Court in the case of BALCO Employees' Union vs. Union of India & Ors. (2002) 3 SCC 333 and S.P. Gupta Vs Union of India (1981) Suppl. SCC 87. On the other hand, the appellant, appearing in person submitted that the appellant is affected by the sale by the GRIDCO to the PTC as is clear from the data issued by the concerned RLDC. It was urged by him that the data shows that the electricity

sold by the GRIDCO to the PTC was also supplied in Delhi. Therefore, the appellant claimed that he being a resident of Delhi was directly affected by the rate at which the electricity was sold by the GRIDCO to the PTC. It was also submitted that the appellant is not the only one, who is aggrieved of the violation of the trading margin fixed by the CERC. Even the Uttar Pradesh Power Corporation Ltd. and the Maharashtra State Electricity Distribution Co. Ltd. had filed intervention applications in this appeal, which is proof enough of their being affected by the unregulated price charged by the GRIDCO for electricity traded by it. It was pointed out that both the parties in their intervention application had prayed for issuance of directions for regulating the trading in electricity and for fixing the Trading Margin for such transactions.

13. We have pondered over the submissions of the first respondent as well as those advanced by the appellant. From a perusal of the impugned order passed by the CERC, it appears that the first respondent had not raised any

preliminary objection before the CERC to the maintainability of the petition filed by the appellant. Be that as it may, we find that the preliminary objection raised by the first respondent before us has no substance. A perusal of the data issued by the concerned RLDC shows that the power purchased by the PTC from the GRIDCO was supplied to various locations outside the State of Orissa including Delhi. The fact that sale of some part of the surplus power sold by the GRIDCO was consumed in Delhi has not been controverted by the first respondent. This being so, it cannot be said that the appellant is not directly affected by the transaction of sale of power by the GRIDCO to the PTC as a consumer. The contention advanced on behalf of the first respondent that the persons primarily affected by the price at which power was sold by the GRIDCO to the PTC have not complained of the same, pales into insignificance as not only the appellant but the Maharashtra State Electricity Distribution Co. Ltd. and the Uttar Pradesh Power Corporation Ltd. are objecting to the price at which electricity was sold by the GRIDCO to the PTC. Both the utilities in their applications

for impleadment have submitted that they are facing acute power shortage and are forced to buy power from the traders at a very high cost. According to them, this defeats the basic objectives of the Electricity Act, 2003, which calls for adopting measures conducive to the development of the electricity industry, promoting competition, protecting interest of consumers and supply of electricity to all areas. Some of the affected parties, who are primarily hurt by the transactions between the GRIDCO and PTC, are before us. They are directly affected by the transactions between PTC and the GRIDCO.

14. In BALCO Employees' Union vs. Union of India & Ors. (2002) 3 SCC 333, the Supreme Court referred with approval the following observations of Bhagwati, J in the case of S.P. Gupta versus Union of India (1981) Suppl. SCC 87:

"Before we part with this general discussion in regard to locus standi, there is one point we would like to emphasize and it is, that cases may arise where there is undoubtedly public injury by the act or omission of the State or a public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. In such cases, a member of the public

having sufficient interest can certainly maintain an action challenging the legality of such act or omission, but if the person or specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept such act or omission willingly and without protest, the member of the public who complains of a secondary public injury cannot maintain the action, for the effect of entertaining the action at the instance of such member of the public would be to foist a relief on the persons or specific class or group of persons primarily injured, which they do not want”.

15. As is apparent from the aforesaid observations of the Supreme Court, in case a person or specific class or group of persons, who are primarily injured as a result of an act or omission of the State or a public authority, do not wish to claim any relief and do not challenge such act or omission, a member of the public, who complains of a secondary public injury, cannot maintain the action. As already pointed out the appellant is affected by the sale of power by the GRIDCO to the PTC and he cannot be considered as one who complains of secondary public injury. In the circumstances, therefore, the preliminary objection raised by the first respondent is hereby rejected.

16. The appellant in person, Mr. Sunil Gupta, Senior Counsel and Mr. Mukherjee appearing for the UPCCL and Mr. Shyam Divan, learned senior counsel appearing for MSEDCL submitted that the sale of electricity by the GRIDCO to PTC was a transaction in the nature of inter-state trade and the GRIDCO cannot charge trading margin exceeding 4 paise/Kwh on the electricity traded by it. As a result of the transaction between the GRIDCO and the PTC, the power sold by the GRIDCO was immediately conveyed and consumed outside the State. They contended that the transaction was of sale by export of electricity outside the State involving integrated activities commencing from the agreement of sale between the GRIDCO and the PTC and ending with the consumption of the electricity outside the State. They adverted to the fact that the sale of electricity by the GRIDCO and purchase by the PTC occasioned the export of electricity and the resale of electricity by the PTC to another inter-state trader did not affect already completed transaction of export of electricity outside the State in the course of inter-state trade. They also submitted that GRIDCO was an electricity trader

and a deemed licensee under proviso 5 to Section 14 of the Electricity Act, 2003. On the other hand, Mr. Shanti Bhushan, learned senior counsel, Mr. Ramachandran and Mr. Mehta, learned counsel appearing for the CESC, OERC and the GRIDCO respectively submitted that the transaction of sale and purchase of electricity between the GRIDCO and the PTC was complete before the electricity flowed outside the State of Orissa. According to them, the electricity was delivered by the GRIDCO to the PTC within the State of Orissa and it was the PTC who resold the electricity to another inter-state trader having a license from the CERC, outside the State. The learned counsel also contended that the GRIDCO was not a trader within the meaning of Electricity Act, 2003.

17. We have considered the rival contentions advanced before us.

18. Under Section 79 of the Electricity Act, 2003, the CERC has been assigned various functions. One of the functions as assigned by sub-clause (g) of clause (1) of Section 79 is to fix trading margin for inter-state trading of electricity, in case it is

considered necessary by the CERC. Section 79(1)(j) reads as under:-

*“79(1).....
(j) to fix the trading margin in the inter-state trading of electricity, if considered, necessary”*

19. Pursuant to the aforesaid provision and in exercise of its power under Section 178 of the Electricity Act, 2003, the CERC framed Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006. The regulations were published in the Gazette of India dated January 23, 2006. The Regulations read as follows:

“ Whereas the Central Electricity Regulatory Commission is of the opinion that it is necessary to fix trading margin for inter-state trading of electricity,

Now, therefore, in exercise of powers conferred under Section 178 of the Electricity Act, 2003 (36 of 2003), and all other powers enabling it in this behalf, and after previous publication, the Central Electricity Regulatory Commission hereby makes the following regulations, namely:-

1. Short title and commencement – *(1) These regulations may be called the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006.*

(2) These regulations shall come into force from the date of their publication in the Official Gazette.

2. Trading Margin – *The licensee shall not charge the trading margin exceeding four (4.0) paise/kWh on the electricity traded, including all charges, except the charges for scheduled energy, open access and transmission losses.*

Explanation:- *The charges for the open access include the transmission charge, operating charge and the application fee”.*

20. As is clear from the aforesaid Regulations, the CERC has fixed trading margin under Regulation 2. The trading margin cannot exceed (four) 4.0 paise/ kWh “in respect of inter-state trading of electricity”.

21. The question which falls for our determination is whether the transaction of sale of surplus energy by the GRIDCO to the PTC was in the nature of inter-state trade, attracting the provisions of Regulation 2 of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006.

22. In order to determine the question, the basic facts and surrounding circumstances connected with the transaction in question need to be analysed.

23. The first respondent was granted licence by the Orissa Electricity Regulatory Commission under Section 15 of the Orissa Electricity Reforms Act, 1995, for carrying on the business of bulk purchase and supply of electrical energy within the State. However, under clause 5.1 of the licence granted to the GRIDCO, it could sell surplus power to the needs of the State of Orissa to State Electricity Boards/licensees of other States with the prior approval of the Orissa State Electricity Regulatory Commission and in consonance with the aforesaid conditions of licence. The first respondent, GRIDCO with a view to sell surplus power to State Electricity Boards/Power Utilities located outside the State, invited offers vide communication dated March 10, 2005. The opening para of the letter discloses the clear intention of the first respondent to export electricity outside the State to Electricity Boards etc. The para reads as under:-

“Grid Corporation of Orissa (GRIDCO), a licensee for Transmission and Bulk supply of electricity in the State of Orissa, intends to sell its surplus power to State Electricity Boards/Power Utilities on short term basis through Power Trading entities having valid license from the Central Electricity Regulatory Commission (CERC)”.

24. Thus, it is clear that the whole object of GRIDCO was to sell its surplus power to State Electricity Boards/Power Utilities outside the state through trading entity, licensed by the CERC under Section 79(1) (e) of the Electricity Act, 2003. It is one of the functions of the Central Electricity Regulatory Commission to issue licenses to persons to function as transmission licensees and electricity traders with respect to their inter-State operations. Reference to power trading entity, having valid licence from the CERC, in the aforesaid opening para of the communication inviting offers for sale of surplus power by the GRIDCO, clearly reflects that electricity traders contemplated in the communication are the ones who are licensed to undertake interstate operations by the CERC. It cannot be and has not been disputed by the first respondent that the surplus power was meant to be exported outside the State and was not to be consumed within the State. This position is further pellucid from clause 26 of the Power

Trading Agreement dated March 9, 2006 between the respondent and the PTC Ltd. Clause 26 reads as under-

“This agreement is valid to the extent and for the period Open Access is provided by Nodal RLDC”.

25. Thus, the validity of the agreement was contingent upon being provided with open access facility by the Nodal Regional Load Despatch Centre for the flow of electricity outside the State. In other words, in case permission for open access to export electricity outside the State was not granted by the Regional Load Despatch Centre, the contract would have failed. A conjoint reading of the aforesaid communication dated March 10, 2005 and the Power Trading Agreement shows that the first respondent was accomplishing its object of selling power to State Electricity Boards and State Power Utilities beyond the frontiers of the State of Orissa through the conduit of a licensed power trading entity. Thrust of the circumstances surrounding the transaction, Clause 26 of the agreement, the permission of the Orissa State Electricity Regulatory Authority and Clause 5.1 of the license obligated

the removal of electricity outside the State. As a direct consequence of the agreement the electricity in fact moved outside the State of Orissa.

26. On the basis of the aforesaid analysis, four undisputed facts emerge:

- i. There was clear intention on the part of the respondent to export surplus energy from the state as is reflected by the communication dated March 10, 2005, whereby offers were invited by the GRIDCO for sale of surplus energy to State Electricity Boards/ power utilities located outside the state.
- ii. Under the agreement dated March 9, 2006 between the GRIDCO and the PTC, the surplus energy was required to be transferred outside the state.
- iii. For the purpose of export of power open access was to be acquired by the PTC from the RLDC. The validity of the agreement was contingent upon open access being provided by the RLDC for evacuation of power across the frontiers of the State of Orissa. In case open access was denied, the agreement would have failed, as it was valid to the extent and for the period open access was provided by the RLDC. In other words, under the agreement there could be no voluntary diversion of power within the State.
- iv. The agreement of sale dated March 9, 2006 occasioned the conveyance of electricity outside the state through inter-state transmission system.

27. It would appear from various Judgments of the Supreme Court, to which we would presently refer and on the basis of Regulation 2(g) of the Central Electricity Regulatory Commission (Procedure, Terms & Conditions for Grant of Trading License and Other Related Matters) Regulations, 2004, which defines the words 'inter-state trading', that the aforesaid elements of the transaction constitute sale in the course of inter-state trade.

28. The Supreme Court in the case of State of Bihar & Ors Vs Tata Engineering and Locomotives Co. (1970) 3 SCC 697, held that where under the terms of contract of sale, the buyer is required to move the goods from the state from where he purchased the goods to another state and as a result thereof the goods are so removed, the sale must be considered as a sale in the course of inter-state trade or commerce. The Supreme Court relied upon its earlier decisions in which this well established principle was applied. Some of these decisions also need to be noticed by us to clear the air with regard to the nature of the transaction in question.

29. In *Ben Gorm Nilgiri Plantations Co., Coonoor & Ors. Vs The Sales Tax Officer, Special Circle, Ernakulam & Ors.* (AIR 1964 SC 1752), the questions for determination in the aforesaid case were as to what sales are to be considered sales in the course of export and what sales are for the purpose of export. These questions arose in the context of Article 286(1)(g), which exempts from taxation by a State law all sales and purchases which take place in the course of the import of goods into or export of goods out of the territory of India. In this regard the Supreme Court observed as under:

“A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising, from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be obligation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export. A transaction of sale which is a preliminary to export of the commodity sold may be regarded as a sale for export, but is not

necessarily to be regarded as one of in the course of export, unless the sale occasions export.”

30. As is evident from the aforesaid observations, the following ingredients were held to constitute sale in the course of export:

- a. There must be an intention on the part of the buyer and the seller to export;
- b. There must be an obligation to export;
- c. Sale and export are so integrated that the connection between the two cannot be voluntarily interrupted;
- d. There must be an actual export.

31. In the instant case, all the four ingredients constituting sale in the course of export are satisfied. As already pointed out the letter inviting tenders issued by the GRIDCO clearly shows the intention to export surplus energy. Under the agreement dated March 9, 2006, there was an obligation to export the surplus energy. As a consequence thereof, actual export of electricity did take place. From the nature of the transaction between the GRIDCO and the PTC, sale was inextricably linked to evacuation of power outside the state

and this nexus was not capable of being voluntarily interrupted. Thus, there was a clear connection between the sale of electricity and export outside the state. In fact neither the GRIDCO nor the PTC could voluntarily divert the energy to intra-state Transmission system as the GRIDCO did not have the permission of the State Electricity Regulatory Commission to sell the surplus energy inside the State nor the PTC, being the inter-state Trader, could sell the same inside the State. The whole transaction was based on the understanding that energy was for export, for which purpose open access was to be sought from the RLDC. In case open access was not provided, agreement would have been rendered otiose. Thus, on the touchstone of the principles laid down in the case of Ben Gorm Nilgiri Plantations Co., Coonoor & Ors., the transaction between the parties, on parity of reasoning, clearly falls in the category of 'inter-state trade'.

32. In K.G. Khosla & Co. (P) Ltd. Vs Dy. Commissioner of Commercial Taxes, Madras - AIR 1966 SC 1216, it was held that for a sale to qualify for being considered as responsible for

inter-state trade, the movement of goods must be incidental to the contract of sale and there must be no possibility of the diversion of goods. The Supreme Court in order to judge the nature of the transaction applied the twin test namely (a) the movement of goods must be incidental to the contract of sale and (b) there should be no possibility of goods being diverted for any other purpose.

33. In the case in hand, the electricity moved outside the state as a consequence of the contract between the GRIDCO and the PTC and at the same time, there was no possibility of the electricity being diverted inside the State. In fact no sale would be possible without the goods crossing over to territory outside the State.

34. In the aforementioned case of State of Bihar & Anr. Vs Tata Engineering (1970) 3 SCC 697, the respondent, a public Ltd. Company under the contract with its dealers, required them to remove the vehicles manufactured by it from the state of Bihar. The dealers were forbidden from selling the goods to any purchaser outside their designated territories. The

question for decision was whether sales were for the purpose of inter-state trade or commerce or whether these were sales in the course of intra-state trade. Answering the question the Supreme Court held as under:

“If we apply the principles enunciated by the Court in the decisions referred to above to the facts of this case, it is obvious that the sales with which we are concerned in this case are sales in the course of inter-state trade. The dealers were required to move the trucks, buses chassis and other spare parts purchased by them from the State of Bihar to places outside Bihar. They are so required by the terms of the contract entered into by them with the assessee. They would have committed breach of their contracts and incurred the penalty prescribed in their dealership agreements, if they had failed to abide by the term requiring them to move the goods outside the state of Bihar.

35. The transaction in question is quite similar to the transactions which were the subject matter of the Tata Engineering case. In this case the purchaser under the agreement was obligated to remove electricity from the state, like the dealers in the case of Tata Engineering, who were required to remove the goods outside the state.

36. Applying the principles adumbrated in each one of the above decisions to the facts found in the instant appeal, the

sale of surplus power by GRIDCO to PTC constitutes sale in the course of inter-state trade or in the course of export from the State.

37. There was a clear bond between the contract of sale and the flow of electricity outside the state. The movement of electricity from Orissa to outside the state was result of the single bilateral agreement between the GRIDCO and the PTC. For dispatch of the power outside the State, under clause 12 of the agreement, the PTC was required to submit its day ahead schedule with the State Load Dispatch Centre with a copy to GRIDCO and the scheduling and dispatch of the power was to be done in coordination with GRIDCO and Regional Load Dispatch Centre. The whole exercise was meant to move the electricity across the territory of the State. In case there was no such movement, there would have been no sale of electricity. Therefore, there is a clear irreversible connection between sale and export of power.

38. Clause 2(g) of the Central Electricity Regulatory Commission (Procedure, Terms & Conditions for Grant of Trading License and Other Related Matters) Regulations, 2004 defines 'inter-State trading'. Clause 2(g) reads as under:-

“Inter-state trading means transfer of electricity from the territory of one State to the territory of another State by electricity trader”.

39. Going by the aforesaid definition, the transaction between the GRIDCO and the PTC is clearly in the nature of inter-state trading, as sale by the GRIDCO & purchase by the PTC itself resulted in transfer of electricity from the State of Orissa to the territory outside the State. Rather it was the immediate cause for movement of electricity. This transfer took place not because of series of transactions/agreements but because of one single transaction/agreement between the GRIDCO and the PTC. It must be stressed that there was a contract of sale preceding the movement of goods outside the State. The movement of goods did not take place independently of the contract of sale. It was an incident, cause and affect of the contract of sale. Obviously, once the

electricity generated for sale to the GRIDCO was fed into the system, its movement from the State of Orissa to outside the State was immediate and no voluntary act could have stopped its flow. This was a case of sale by export of electricity from the State of Orissa to the other States caused by agreement between the GRIDCO and the PTC.

40. In the case of State of A.P. vs. National Thermal Power Corporation Ltd. & Ors., (2002) 5 SCC 203, the power generated by Thermal Power Station in the State of Andhra Pradesh was injected into the southern grid and was made available to the Electricity Boards of Karnataka, Kerala, Tamilnadu and State of Goa. Similarly electricity generated by the NTPC in Madhya Pradesh was fed into the northern grid and supplied to various Electricity Boards/Electricity Departments of other States pursuant to the contracts entered into between the sellers and the buyers. The question for determination was whether sale to the buyers was intra-state sales attracting duty under Section 3 of the Andhra Pradesh Electricity Duty Act, 1939/ Section 3 of the Madhya Pradesh

Electricity Duty Act, 1949 and the cess under Section 3(1) of the Madhya Pradesh Upkar Adhiniyam, 1981, as the case may be. The Supreme Court held that the sale was inter-State sale and could not be subjected to levy of duty under the State Acts. In this context, the Supreme Court held as follows:-

“20. Before we deal with the constitutional aspects, let us first state what electricity is, as understood in law, and what are its relevant characteristics. It is settled with the pronouncement of this Court in *CST v. M.P. Electricity Board, Jabalpur (1969) 1 SCC 200* that electricity is goods. The definition of goods as given in Article 366(12) of the Constitution was considered by this Court and it was held that the definition in terms is very wide according to which “goods” means all kinds of movable property. The term “movable property” when considered with reference to “goods” as defined for the purpose of sales tax cannot be taken in a narrow sense and merely because electrical energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book, it cannot cease to be movable property when it has all the attributes of such property. It is capable of abstraction, consumption and use which if done dishonestly, is punishable under Section 39 of the Indian Electricity Act, 1910. If there can be sale and purchase of electrical energy like any other movable object, this Court held that there was no difficulty in holding that electric energy was intended to be covered by the definition of “goods”. However, A.N. Grover, J. speaking for the three-Judge Bench of this Court went on to observe (at SCC p. 205, para 9) that electric energy “can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property”. In this observation we agree with Grover, J. on all other characteristics of electric energy except that it can be “stored” and to the extent that electric energy can be “stored”, the observation must be held to be erroneous or by oversight. Science and technology till this day have not been able to evolve any methodology by which electric energy can be preserved or stored.

21. Another significant characteristic of electric energy is that its generation or production coincides almost instantaneously with its consumption. To quote from *Aiyar’s Law Lexicon* (2nd Edn., 2000)—

“Electricity in physics is ‘the name given to the cause of a series of phenomena exhibited by various substances, and also to the phenomena themselves’. Its true nature is not understood. Imperial Dictionary (quoted in *Spensley v. Lancashire Ins. Co.*, 54

WIS 433, 442 where the court, quoting from the same authority, said, ‘we are totally ignorant of the nature of this cause whether it be a material agent or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the pores of all bodies, and is capable of motion from one body to another’.”

This characteristic quality of electric energy was judicially noticed in *Indian Aluminium Co. v. State of Kerala (1996) 7 SCC 637*. Vide para 25 this Court has noted: (SCC p. 650)

“Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases (i.e. sale, supply and consumption) take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the substation installed at the units of the consumers through electrical high-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place ... as soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously sale also takes place.”

These properties of electricity as goods are of immense relevance as we would state hereafter.

List II, Entries 53 and 54, how to be read

22. We now come to the question on the interpretation of Entry 53 in List II of the Seventh Schedule. It provides for taxes on the consumption or sale of electricity. The word “sale” as occurring in Entry 52 came up for the consideration of this Court in *Burmah Shell Oil Storage & Distributing Co. of India Ltd. v. Belgaum Borough Municipality AIR 1963 SC 906*. It was held that the act of sale is merely the means for putting the goods in the way of use or consumption. It is an earlier stage, the ultimate destination of the goods being “use or consumption”. We feel that the same meaning should be assigned to the word “sale” in Entry 53. This is for a fortiori reason in the context of electricity as there can be no sale of

electricity excepting by its consumption, for it can neither be preserved nor stored. It is this property of electricity which persuaded this Court in *Indian Aluminium Co. case*, to hold that in the context of electricity, the word “supply” should be interpreted to include sale or consumption of electricity. Entry 53 should therefore be read as “taxes on the consumption or sale for consumption of electricity”.

41. Thus, it is clear that in view of the peculiar nature of electricity, its generation, sale, supply and consumption take place without any gap or break. They coincide instantaneously and occur at the same time. In other words, electricity generation, sale and supply end with the consumption and the consumption begins with generation, sale and supply. Therefore, there can be no sale of electricity without consumption. By applying the same principle as laid down by the Supreme Court to the case in hand, it is clear that there was no hiatus between sale and consumption and the movement of electricity was pursuant to the agreement between the GRIDCO and the PTC. Since sale and consumption took place simultaneously the implication is that the transaction was in the nature of sale by consumption outside the State. Therefore, the transaction of sale of electricity in question cannot be considered to have been

completed within the State of Orissa. Transaction of sale was responsible for conveying the electricity outside the State and the sale was completed only on consumption outside the State and in this view of the matter, we hold that the transaction of sale of electricity was in the nature of inter-state trade.

42. We also need to refer para 24 of the Judgment rendered by the Supreme Court in National Thermal Power Corporation Ltd. (supra) as both the sides relied upon the observations made therein. Para-24 of the Judgment is, therefore, set out below:-

“24. It is well settled by a catena of decisions of this Court that a sale in the course of inter-State trade has three essential ingredients: (i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-State movement of goods; (ii) the goods must actually move from one State to another, pursuant to such contract of sale, the sale being the proximate cause of movement; and (iii) such movement of goods must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes place independently of a contract of sale would not fall within the meaning of inter-State sale. In other words, if there is no contract of sale preceding the movement of goods, obviously the movement cannot be attributed to the contract of sale. Similarly, if the transaction of sale stands completed within the State and the movement of goods takes place thereafter, it would obviously be independently of the contract of sale and necessarily by or on behalf of the purchaser alone and, therefore, the transaction would not be having an inter-State element. Precedents are legion; we may briefly refer to some of them. In *English Electric Co. of India Ltd. v. CTO (1976) 4 SCC 460* this Court held that when the

movement of the goods from one State to another is an incident of the contract, it is a sale in the course of inter-State sale and it does not matter which is the State in which the property passes. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. In *Union of India v. K.G. Khosla and Co. Ltd. (supra)*, it was observed that a sale would be an inter-State sale even if the contract of sale does not itself provide for the movement of goods from one State to another provided, however, that such movement was the result of a covenant in the contract of sale or was an incident of the contract. Similar view was expressed in *Sahney Steel and Press Works Ltd. v. CTO (1985) 4 SCC 173*. In *Manganese Ore (India) Ltd. v. Regional Asstt. CST (1976) 4 SCC 124* after referring to *Balabhagas Hulaschand v. State of Orissa (1976) 2 SCC 44* it was observed that so far as Section 3(a) of the CST Act is concerned, there is no distinction between unascertained or future goods and goods which are already in existence, if at the time when the sale takes place these goods have come into actual existence”.

43. The appellant drawing support from the aforesaid observations submitted that all the ingredients of transaction of sale in the course of inter-state trade stand satisfied. On the other hand, Shri Shanti Bhushan, the learned senior counsel for the CESC Ltd., Mr. Ramachandran, the learned counsel for OERC and Shri R.K. Mehta for the GRIDCO submitted that this argument of the appellant overlooks the fact that the export took place after the completion of sale within the State. It was submitted that electricity as per clause 2 of the General Terms & Conditions of the agreement, was delivered by the GRIDCO to the PTC within the State and therefore, the

contract of sale was complete before the electricity left the frontiers of the State. It was submitted by them that the Supreme Court in the NTPC case (supra) has held that where the transaction of sale of goods stands completed within the State and the movement of goods takes place thereafter, it would be independent of the contract of sale and necessarily by or on behalf of the purchaser alone.

44. We have carefully reflected upon the submissions advanced by the party in person and the learned counsel. As already pointed out, the ingredients which constitute sale in the course of interstate trade are all present in the transaction in question. The agreement of sale was executed on the footing that the surplus electricity shall be transferred from the State of Orissa to outside the State. This understanding was the sine qua non of the agreement, the very foundation on which it rested. The agreement of sale was an immediate and proximate cause of the movement. As a result thereof the electricity moved from the State of Orissa to outside the territory of the State, where the sale was concluded by

consumption. We have already pointed out with reference to the tests laid down in the various Judgments of the Supreme Court including the decision rendered in Tata Engineering & Locomotive Co. Ltd. (supra) that the transaction of the sale in the instant case was in the nature of inter-state trade. In all those cases basically it was held that the movement of electricity from one State to another State if it is caused by an agreement of sale, the transaction would be in the nature of inter-state sale. It appears to us that the observations of the Supreme Court in para 24 of its Judgment in the case of National Thermal Power Corporation of India Ltd. (supra) to the effect that if transaction of sale of goods stands completed within the State and the movement of goods takes place thereafter, it would be by and or on behalf of the purchaser alone and therefore, the transaction would not be having an inter-state element, apply to a transaction of sale where movement of goods takes place independently of the contract of sale and the contract of sale is complete before the goods leave the State from where the purchase was made. In case these two conditions co-exist, the transaction will not be inter-

state sale. But in a case where the contract of sale obligates, transfer of goods from one state to another, the sale under the contract is not concluded unless the condition is fulfilled. In this case the whole agreement was to become inoperative in the event of open access was refused for carrying the electricity outside the State. Once the electricity crossed the frontiers of the State of Orissa, only then the sale transaction was concluded. In any event the sale of electricity takes place by consumption. The consumption took place outside the State of Orissa.

45. In the case of State of Travancore-Cochin vs. Bombay Co. Ltd., 1952 SCR 1112, it was held by the Supreme Court that even though the sale was completed and the property in the goods passed to the foreign buyers within the State before the goods commenced their journey from the State, the sale must be regarded as having taken place in the course of export since the sale and the resultant export formed part of a single indivisible transaction and it was not possible to disassociate sale from the export without which the latter could not be

effectuated. This decision was relied by the Supreme Court in Tata Engineering & Locomotive Co. Ltd. case (supra). Again in English Electric Company of India Ltd. Vs CTO, (1976) 4SCC 460, which has been quoted by the Supreme Court in NTPC Case (supra) with approval, it was held that when the movement of goods from one state to another is an incident of the contract, it is a sale in the course of inter-state sale and it does not matter which is the situs of delivery of property. It was further held that what is decisive is whether the sale is one which occasions the movement of goods from one state to another.

46. Having regard to the decisions of the Supreme Court in the Bombay Co. Ltd. and English Electric Co. of India Ltd. (supra), we are of the opinion that when the movement of goods from one state to another is the consequence of an agreement, it is a sale in the course of inter-state trade and it is hardly of any consequence as to in which state the property passes to the purchaser. What is conclusive is whether the

sale is one which occasions the movement of goods from one State to another.

47. It also seems to us that the observations of the Supreme Court in the NTPC case (supra), on which reliance was placed by the learned counsel for the first respondent, the second respondent and the OERC, were not made in the context of electricity as the Supreme Court categorically held, as pointed out earlier, that there can be no sale of electricity except by its consumption. This may not be true for other goods. Electricity has the aforesaid special attribute, which distinguishes it from other goods.

48. The fixation of artificial or notional situs of delivery inside the State does not affect the reality that there can be no sale of electricity without consumption and consumption admittedly took place outside the State. Sale and consumption are interlinked and intertwined. The two cannot be separated. They form part of one integrated activity, which is indivisible.

49. Thus, we reject the contention of Mr. Shanti Bhushan and Mr. Mehta that since the delivery point of electricity to the PTC was within the state, the contract of sale was complete before the electricity flowed out of the state, and the sale was not in the course of inter-state trade. Consequently, we are also of the view that the CERC was not right in holding that the transaction in question was not in the nature of inter state trade.

50. It was submitted by Mr. Shanti Bhushan, the learned senior counsel appearing for the CESC and Mr. Mehta, learned counsel appearing for the GRIDCO, that in the NTPC case, the Supreme Court while interpreting the word “sale” in Entry 53 of List-II of the VII Schedule to the Constitution held that it should be read as ‘sale’ for consumption to avoid any conflict between Entry 53 and Entry 54 of List-II of the VII Schedule. They submitted that the observations of Supreme Court that there could be no sale of electricity excepting by its consumption was made in the aforesaid context. Mr. Mehta submitted that judgment is an authority for what it actually

decides. In support of his submissions, he relied upon the decisions of the Supreme Court in Kalyan Chandra Sarkar Vs Rajesh Ranjan alias Pappu Yadav (2005) 2 SCC 42 and Union of India Vs Amrit Lal Manchanda & anr. (2004) 3 SCC 75.

51. We have examined the submissions of the learned counsel but we find that the core question actually decided by the Supreme Court in the NTPC case is that there could be no sale of electricity without consumption. This view, we reiterate, is based on the peculiar characteristics of the electricity, which were judicially noticed not only in the NTPC case but also in the case of Indian Aluminium Co. Vs State of Kerala (1996) 7 SCC 637, wherein it was held that the sale, supply and consumption take place without any hiatus. As a corollary, therefore, there could be no sale without consumption. Properties and nature of electricity are immutable. The decisions of the Supreme Court in the NTPC case and the Indian Aluminium Co. case are grounded upon the attributes of electricity and are of tremendous value to the case in hand and clinch the issue.

52. It was next contended by Shri Shanti Bhushan, senior counsel for CESC, Mr. M.G. Ramachandran, learned counsel for OERC and Mr. R.K. Mehta, the learned counsel for the GRIDCO that there was no privity of contract between GRIDCO and the purchaser to whom the PTC had resold the power outside the State. We do not see how it will advance the case of the first and the second respondents in view of the fact that the sale by the GRIDCO and purchase by the PTC was exclusively responsible for export of energy outside the State.

53. It was canvassed by Mr. Mehta that the GRIDCO is not a trader and therefore, the sale of electricity by it to the PTC cannot be considered as inter-state sale. He also submitted that the finding of the CERC that it is a trader cannot be countenanced in law. He also contended that the GRIDCO is entitled to raise this plea in the instant appeal preferred by the appellant. He relied upon the decision of the Supreme Court in *Jamshed Hormusji Wadia vs. Board of Trustees, Port of Mumbai & Anr.* (2004) 3 SCC 214.

54. We entirely agree with the submission of Shri Mehta that in the instant appeal, it can be urged by the GRIDCO that it is not a trader. As held in the aforesaid decision of the Supreme Court, a successful party, who has an order in his favour, is entitled to show in an appeal filed by the aggrieved party against whom an adverse order has been passed, that even if the order was liable to be set aside on the grounds decided in his favour, yet the order could be sustained by reversing the finding on some other ground, which was decided against him by the court below. But the question is whether the Commission has wrongly decided that the GRIDCO is a trader. We do not find any reason to hold that the Commission was wrong in holding that GRIDCO was an electricity trader. According to sub-section (26) of Section 2 of the Electricity Act, 'electricity trader' means a person who has been granted a licence to undertake trading in electricity under Section 12. As per sub-section (71) of Section 2 of the Electricity Act, "trading" means purchase of electricity for resale thereof and the expression "trade" is to be construed accordingly. It is not

in dispute that licence was granted to GRIDCO for bulk purchase and supply of electricity. As per para 2(1) (l) of the Orissa Electricity Reforms (Transfer of Transmission and Related Activities) Scheme, 2005, framed by the Government of Orissa under Sections 39, 131, 133 and 134 of the Electricity Act, 2003 read with Sections 23 & 24 of the Orissa Electricity Reforms Act, 1995, 'trading undertaking' "means the undertaking relating to the bulk purchase and bulk sale of energy presently being undertaken by transferor and acts incidental and ancillary thereto". The word 'transferor' as defined in para 2(1) (m) of the aforesaid scheme means the Grid Corporation of Orissa, a wholly owned undertaking of the State Government. Since the GRIDCO undertakes bulk purchase and bulk sale of energy, it is clearly a trading undertaking as envisaged by para 2(1)(l) of the Scheme. Moreover, activities of GRIDCO are trading activities within the meaning of Section 2(71) of the Electricity Act, 2003 since GRIDCO purchases electricity in bulk and resells the same. It is an electricity trader within the meaning of Section 12 of the Electricity Act, 2003. As per Section 12 of the Electricity Act,

2003, no person can transmit, distribute or undertake trading of electricity unless he is authorized to do so by a licence issued under Section 14, or is exempt under Section 13. As per the fifth proviso to Section 14 of the Electricity Act, “the Government company or the company referred to in subsection (2) of section 131 of this Act and the company or companies created in pursuance of the Acts specified in the Schedule shall be deemed to be a licensee” under the Act. There is no dispute that GRIDCO is covered by the said proviso and is deemed to be a licensee for undertaking trading in electricity under the Electricity Act, 2003. It also needs to be noted that the agreement executed between the GRIDCO and the PTC is captioned as power trading agreement. The parties clearly knew about the nature of the transaction.

55. Mr. Mehta, learned counsel for the GRIDCO canvassed that according to Section 12 of the Electricity Act, 2003, only those persons who are authorized by a licence issued under Section 14 thereof can trade in electricity and could be called traders. It was further urged that since no licence has been

issued under Section 14 to the GRIDCO, it cannot be considered as an 'Electricity Trader' within the meaning of Section 2(26) of the Electricity Act, 2003. As a sequitur, it was pleaded that a deemed licensee under Section 14 is not covered by Section 2(26) and therefore, it is not to be considered as one to whom a licence has been granted for undertaking trading in electricity. We do not agree with the contention of Mr. Mehta that a deemed licensee under Section 14 of the Electricity Act, 2003 cannot be treated as an 'Electricity Trader'. The fifth proviso to Section 14 clearly postulates that a Government company or a company created under the Act specified in the schedule-II of the Electricity Act, 2003 shall be deemed to be a licensee. The GRIDCO is both a Government company and also a company created under the Orissa Electricity Reforms Act, 1995, therefore, it is a deemed licensee and is not required to take a licence for undertaking trading in electricity as for all purposes in law it is to be treated as one to whom licence has been issued. This result is attained by a deeming fiction.

55. Therefore, we do not find any reason to differ with the finding of the Commission that the GRIDCO is a trader.

Upshot of the discussion

56. Thus, in the light of the bargain between the GRIDCO, a deemed trader, and the PTC, it is clear that the sale and purchase under the agreement occasioned the export of goods from the State. In other words, the movement of electricity across the border of the State of Orissa was caused by the Power Trading Agreement. The agreement itself was the reason for such movement. The electricity was conveyed outside the State of Orissa through inter-state transmission system (defined under Section 2(36) of the Electricity Act, 2003.

57. In fact sale was not capable of being disassociated from the export of electricity. The sale under the agreement bears the insignia of sale in the course of inter-state trade. The features of the transaction point to one and only one

conclusion that the sale in question was in the nature of Inter-state trade.

58. Even the sale of electricity by the GRIDCO to the PTC is covered by the definition of inter-state trading contained in clause 2(g) of the Central Electricity Regulatory Commission (Procedure, Terms & Conditions for Grant of Trading License and Other Related Matters) Regulations, 2004 as undoubtedly the transaction has directly led to the transfer of electricity from the territory of the State of Orissa to outside the State.

59. Before parting with the Judgment, we would like to add an epilogue thereto to bring out the spirit pervading the Electricity Act and the relevant requirements of our Constitution. The Electricity Act of 2003 was formulated to encourage private sector participation in generation, transmission and distribution. The Preamble to the Act gives cue to its objectives. It is an Act to consolidate the laws relating to generation, transmission, distribution, trading & use of electricity and generally for taking measures conducive

to the development of electrical industry. It also envisages supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign strategies etc. One of the very important objectives of the Act is to protect the interests of the consumers while promoting competition. In this background, the question arises whether the exorbitant unregulated rates at which the electricity is sold by a trader of electricity will promote competition and protect the interests of the consumers. The obvious answer is that such activity will lead to negation of the spirit of the Electricity Act, 2003. The tendency of making unregulated profits at the cost of consumers is required to be curbed. In this context, we also need to look at the National Tariff Policy, 2006. The National Tariff Policy 2006 emphasizes the need to promote trading in electricity for making the market competitive, but at the same time the appropriate commissions are required to monitor the trading transactions continuously and ensure that electricity traders do not indulge in profiteering in situations of power shortages. The mechanism of fixing trading margins as

envisaged by Sections 78(1) (j) and Section 86 (1) (j) of the Electricity Act, 2003 must be utilized by the Central Commission and the State Commissions respectively to ensure protection of the interests of the consumers and at the same time they must strive to promote trading in electricity. A balance needs to be maintained.

60. It was argued by Mr. Shanti Bhushan, Mr. Ramachandran and Mr. Mehta, the learned counsel appearing for the CESC, the OERC and the GRIDCO respectively, that the Orissa State Regulatory Commission is required to ensure the protection of the interests of the consumers of the state only and is not empowered or authorized to have extra territorial jurisdiction to look after the interests of the consumers of other states while allowing the sale of electricity to an electricity trader for exporting it outside the state. This is a narrow view of the matter. Electricity traders cannot be allowed to exploit the shortage of electricity in the country. In case they are allowed to indulge in such activities, it will have an adverse effect on the economy of the country. The

consumers in the state of Orissa are no different than the consumers in any other state. We are disturbed to find that the Orissa Electricity Regulatory Commission far from curbing the tendency of the electricity trader to charge exorbitant price for sale of surplus electricity to the inter-state trader, is encouraging it to continue with such activities. This is evident from the following observations of the Commission recorded in tariff order for the year 2005-06:-

“The commission is aware of the fact about export of power outside the state and earning of additional revenue on account of unscheduled interchanges consequent upon implementation of ABT. The Commission, therefore, directs that the revenue earned out of such transactions should be utilized to wipe out the past losses without burdening the general consumers of the state.”

61. The Constitution of India, which is to be given primacy over all laws, ensures social and economic justice to every citizen, wherever he may be. No institution in the country, by its policy and decision, can be allowed to cause harm to the economic interests of the citizens residing in a State other than the one in which the institution is located. The

Constitution strives to minimize inequalities amongst the people. The system cannot be worked so that one State or its people gain at the cost of another State and its people. It is one country and one people.

62. The objects and reasons of the Electricity Act, 2003 clearly states that “trading is a distinct activity with the safeguard of the Regulatory Commissions being authorized to fix ceilings on trading margins, if necessary”. The regulatory authorities have a very important role to play. They are to act as catalysts to achieve the goals recited in the Preamble of the Act. While giving fillip to competition, they have to protect the interests of the consumers. Therefore, where electricity trading is being utilized to garner undeserved profits by selling electricity at exorbitant prices, the Commission as a sentinel on the quivive is required to fix ceilings on the trading margins to nip the evil in the bud. Real competition lowers the prices of goods rather than pushing them up. This has happened in the Telecom Sector. But, unfortunately trading in electricity is being monopolized by a few entities and it is high time that the

Regulatory Commissions should consider fixing ceilings on the trading margins.

63. The Regulatory Commissions, under Section 52(2) of the Electricity Act, 2003, should also specify the duties of electricity traders in relation to supply and trading of electricity, so that the interest of the consumers could be safeguarded and competition in this field is generated. Real competition will trigger downward trend in the prices of the electricity.

64. The defence offered by Mr. Mehta for the high price charged by the GRIDCO is this: the states purchasing power from inter-state traders are getting the benefit of surplus power at a lesser rate, as compared to the cost of UI tariff of Rs. 5.70/unit, Kayamkulam regulated power at Rs. 5.50/unit; Kawas regulated power at Rs. 7/unit and Dabhol power at Rs. 8.50/unit approximately.

65. Thus, it is obvious that the GRIDCO is justifying its action on the ground that electricity available from certain sources is more expensive than the price at which GRIDCO has sold to PTC. This is merely an excuse. GRIDCO buys power from generators at an average cost of 110 paise/Kwh and sells the surplus power to the PTC within the range of 461 paise/Kwh and 481 paise/Kwh. In case, this tendency is encouraged, it will defeat the spirit of competition and the power will never be available to the consumers at reasonable rates.

66. Allowing electricity traders to sell electricity at unregulated price without fixing trading margins will have baneful effect on the development of the power sector. In order to make extra money, a licensee will resort to selling power to inter-state trader at unregulated price and acquire a vested interest in stifling any move to provide electricity to every household in the State, particularly in the rural areas. It was submitted by Mr. Mehta, the learned counsel for GRIDCO that only surplus power in the state of Orissa was sold. We fail to

appreciate how the power could be surplus, when 80% of the households in the villages of the State of Orissa are not electrified. Even on the basis of the facts and figures furnished by the GRIDCO in its affidavit of August, 2006, it is clear that only 22.83% of house-holds have been electrified in the State of Orissa. This presents a dismal picture.

67. In case all the households are electrified in the State of Orissa, there will be no surplus power for export across its border. But in case electrification of the households is not undertaken, it will leave the GRIDCO and the like to sell electricity to inter state trader at exorbitant price. This will act as a disincentive to electrify the households. In reality, selling electricity at high rates outside the State is neither in the interests of the residents of the State nor in the interests of the consumers of the rest of the country. Mr. Mehta submitted that GRIDCO has sustained huge losses and therefore, no fault can be found with sale of surplus power to inter-state traders at a price of 460 paise/ Kwh. In case this argument is allowed to prevail, consumers of other states would be

subsidizing the alleged losses of GRIDCO. This ought not to be permitted as it adversely affects the consumers of other states.

68. In view of the above discussion, we hold that the transaction of sale of surplus energy to the PTC was in the nature of 'inter-state trade'/'trading', attracting the application of Regulation 2 of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006. Accordingly, we allow the appeal and set aside the impugned order dated April 05, 2006, passed by the CERC in Petition No. 15/2006. We hold that the GRIDCO was entitled to charge only the trading margin over the average cost of procurement of electricity for the surplus power sold to PTC. Therefore, we remit the matter to the CERC for the purpose of computing the amount which the GRIDCO had charged over and above the trading margin allowed under Regulation 2 of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006. It will be for the Central Electricity Regulatory Commission to also work out a methodology by

which the refund of the excess amount charged by the GRIDCO could be given back to the consumers. For the aforesaid purpose the parties shall appear before the CERC on 12th December, 2006.

69. The principle laid down by us shall apply to all transactions which are identical to the aforesaid transaction between the GRIDCO and the PTC.

**(Justice Anil Dev Singh)
Chairperson**

**(Mr. A.A. Khan)
Technical Member**

Dated: the November 16 , 2006