

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
APPELLATE JURISDICTION, NEW DELHI**

Appeal No. 29/06 & IA No. 35/06
Appeal No. 30/06 & IA No. 36/06 and
Appeal No. 31/06 & IA No. 37/06

Dated this 13th of December, 2006

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

Appeal No. 29, 30 & 31 of 2006

Western Electricity Co. of Orissa Ltd.
123-A, Mancheshwar Industrial Estate,
Bhubaneswar ... Appellant in A. No. 29 of 2006
(IA No. 167 of 2006)

Southern Electricity Co. of Orissa Ltd.
123-A, Mancheshwar Industrial Estate,
Bhubaneswar ... Appellant in A.No. 30 of 2006

North Eastern Electricity Supply Co. of Orissa Ltd.
123-A, Mancheshwar Industrial Estate,
Bhubaneswar ... Appellant in A.No. 31 of 2006

Versus

1. Shri Sarat Chandra Mohanty,
General Secretary,
Nikhil Orissa Bidyut Sramik Mahasangha,
At: Dhia Sahi, Sankarpur, Cuttak 753012

2. Grid Corporation of Orissa Limited,
Through its Chairman & Managing Director,
Janpath, Bhubaneswar-22.
 3. Government of Orissa,
Through its Principal Secretary,
Dept. of Energy, Secretariat, Bhubaneswar.
 4. Orissa Electricity Regulatory Commission,
Bidyut Niyamak Bhawan, Unit VIII,
Bhubaneswar 751 012.
 5. Reliance Energy Ltd. (BSES Limited),
Reliance Energy Centre,
Santa Cruz (East),
Mumbai 400 055.
- ... Respondents 1 to 7
In all Appeals

[WESCO, NESCO & SESCO impleaded as formal respondents in the appeals are deleted from their being arrayed as respondents]

Counsel for the appellants : Mr. S. Ganesh, Sr. Advocate
Mr. Sayed Naqvi, Advocate

Counsel for the respondents : Mr. M.G. Ramachandran &
Mr. Anand K. Ganeshan,
Advocate for OERC
Mr. R.K. Mehta, Advocate &
Ms. Suman Kukrety, advocate
for Grid Corporation of Orissa.
Mr. S.S. Misra & Mr.N.K. Niraj,
Advocate for Respondent No. 1
Mr. R.M. Patnaik, Advocate for
Respondent Nos. 12, 14 & 15

Mr. Sanjay Sen for Govt. of Orissa.

J U D G M E N T

1. Appeal No. 29 of 2006 has been preferred by M/s. Western Electricity Supply Company of Orissa Ltd. (WESCO for brevity) challenging the legality and validity of the order dated 27.1.2006 passed by the sixth respondent Orissa Electricity Regulatory Commission (OERC for brevity) in case No. 35 of 2005, whereby the said Commission initiated proceeding for suspension of the appellant's distribution license and appointed Special Officer to oversee the operation of the appellant Discom and to file status report on the activity and management of the Discoms. The order impugned is dated 27.1.2006 and it came to be passed on the petition filed by Mr.Sarat Chandra Mohanty the first respondent herein, where he sought for an action under Section 19 or 24 of The Electricity Act 2003 against the Discom.

In Appeal No. 29, the appellant has sought for the following reliefs:

- (i) To set aside the impugned order dated 27.1.2006 passed by the OERC in case No. 35 of 2005.
 - (ii) To set aside order dated 27.1.2006 issued by the OERC calling upon the appellant to show cause as to why its license should not be suspended under section 24 of The Electricity Act 2003.
2. Appeal No. 30 of 2006 has been preferred by Southern Electricity Supply Company of Orissa (SESCO for brevity) challenging the same order of OERC and praying for identical reliefs as prayed for in Appeal No. 29 of 2006.
3. Appeal No. 31 of 2006 has been preferred by North Eastern Electricity Supply Company Ltd. Of Orissa (NESCO for brevity) challenging the same order of OERC and seeking for identical reliefs as prayed for in Appeal No. 29 of 2006.

4. In these three appeals the order of the Regulatory Commission which is being challenged is one and the same and therefore the appeals were taken up together and common arguments were advanced on behalf of the appellant as well as respondents by their respective counsel.

5. Heard Mr. S. Ganesh, Sr. advocate appearing along with Mr.S.Naqvi advocate for the appellant in the three appeals, Mr.R.K.Mehta, advocate for the 2nd respondent Grid Corporation of Orissa Ltd., since taken over by Orissa Power Transmission Corporation Ltd., Mr. M.G. Ramachandran, advocate for the fourth respondent OERC, Mr. Sanjay Sen, advocate for 3rd respondent Government of Orissa, Mr.S.S.Misra, advocate for first respondent, Mr. Sandeep Mahapatra, advocate for Dutt & Mennon Advocates appearing for other respondents.

6. Excepting the fact that independent appeal has been preferred by the three Discoms, there is no other appreciable difference and therefore, it would be sufficient if facts leading to one of

the appeals are summarized. The contentions being identical, we also frame common points for consideration in all the three appeals.

7. Mr. Sarat Chandra Mohanty the first respondent herein moved the OERC praying for an action under section 19 or 24 of The Electricity Act 2003 against the three Discoms, namely WESCO, SESCO and NESCO. The said move of Mr. Sarat Chandra Mohanty was apparently supported by second respondent GRIDCO and the State of Orissa, as they had financial apprehensions and they thought that they would be better protected in the hands of an Administrator or subsequent purchaser of the three Discoms.

8. The three Discoms, are privatized in terms of The Orissa Electricity Reforms Act 1998 and the bids submitted by M/s.Reliance Energy Limited (formerly known as BSES Limited) became the three distribution licensees for three different areas to distribute power in retail. The Grid Corporation of Orissa as per the privatization scheme,

transferred 51% of the equity shares with management control in the three Discoms. The disinvestment of shares in the three Discoms was through a competitive bidding. Pursuant to the disinvestment, the GRIDCO and the Discoms executed separate instruments such as Shareholders-Agreement, Bulk Supply-Agreement, Escrow Agreement, Hypothecation Agreement etc. It is not necessary to set out the details of the above said agreements or the stipulations contained therein or particulars and terms of privatization. The Discoms are required to manage the business of distribution in terms of license in the manner that they duly discharge the obligations and liabilities arising in the business of distribution including payment of salaries, wages to the employees, Bulk Supply Tariff (BST), loan repayment to GRIDCO, payment to other creditors besides meeting the O&M expenses etc.

9. The gravamen of the allegations against the three Discoms being they failed to pay the entire cost of supply of power due to GRIDCO and they obtained accommodation from GRIDCO for deferment of payments besides sought for relaxation of

Escrow agreement. The commission also ordered relaxation of Escrow Agreement based on the recommendations made by the Kanungo Committee, which the State of Orissa also approved partly. As a result of such financial accommodation shown, a sum of Rs.1814 Crore, it is alleged, has fallen due and outstanding from three Discoms to GRIDCO. The said figure has been set out in the written submission made on behalf of Government of Orissa before the Regulatory Commission, but it is controverted by the appellant Discoms.

10. According to the respondents, the three Discoms are expected to discharge their obligations arising in the course of their business in terms of the agreement and the investors; the Reliance Energy Ltd. holds the key to the regulatory commitments of the Discoms. It is alleged that Reliance Energy Ltd. has resiled from its responsibility leading to the three Discoms' failure to discharge its functions or perform its duties imposed on them by or under the provisions of The Electricity Act 2003. It is further alleged that the three Discoms under the management and control of Reliance

Energy failed to adhere to the terms and conditions of the agreement and substantial sum fell due to GRIDCO since 1.4.1999. It is further alleged that as a result of the above, it has not been possible for GRIDCO to discharge its dues to NTPC which supplies power in bulk to GRIDCO, who in turn supply power to the three Discoms. To tide over the situation, the three Discoms issued bonds in the year 2000 rescheduling the payment of principal to October, 2005, October, 2006 and October, 2007 with interest at 12.5% P.A. payable once in every six months. GRIDCO in its turn had assigned the bonds in favour of NTPC. The Discoms failed to service the said bonds leading to NTPC enforcing its claim against GRIDCO. At that juncture, the OERC initiated proceedings to evolve a scheme. A business plan was received from the Discoms through the Government of Orissa to resolve the issues. The said business plan has not been agreed to by the Reliance Energy, who also took the stand that it should not even be a party for finalization of business plan and that it cannot be subjected to any order by the Commission in relation to the affairs of the Discoms and business plan. As a result, it could

not be proceeded further and the amounts payable to the GRIDCO, it is alleged, is mounting.

11. It is further alleged that since Reliance Energy had taken an extra ordinary stand, the distribution arrangements are about to collapse and the Discoms cannot maintain an efficient, coordinated and economical distribution system as comfortable or as required by Section 42(1) of The Electricity Act 2003 and that action has to be taken to maintain the standard of performance and quality of power supply specified in Section 57 of The Electricity Act 2003. It is stated that the Commission issued certain directions and yet nothing has been achieved due to callousness on the part of the holding company. There is a failure on the part of Reliance Energy Ltd. to obtain further finances to meet the financial requirements of the Discoms. By non-assigning of the share holders' agreement, the REL has failed to undertake the obligations to bring additional finances to support the Discoms. Identical allegations were made or suggested against REL and the performance of three Discoms, while pointing out

the magnitude and various dimensions, as each one of them sought to allege against the Discoms. General public also made certain allegations against Discoms. As against the Discoms, it is alleged that their affairs are not being carried on in the best interest of the Discoms and also in the interest of the consumers. In all, ten defaults/ misfeasance/malfeasance are summarized by the Regulatory Commission in its order. The Discoms controverted all the allegations and disputed the figures in entirety.

12. The Regulatory Commission issued notice under Section 24 (1) proviso after recording adverse findings even before affording opportunity and called upon the Discoms to state their objections/ representations by 1.3.2006 against the proposed suspension of license. The Commission also directed the copy of its order to be served on the Discoms.

13. The Regulatory Commission, while taking note of the stand taken by the Discoms and the REL, took the view that it is necessary and imminent to pass interim orders to protect the

interest of the consumers at large. The Commission pending further hearing, appointed Special Officers and few others to assist them to oversee the operation of the three Discoms and to file a status report on the activity and management of the three Discoms. The Regulatory Commission appointed officers from GRIDCO/OERC, as special officer and held that those officers shall have the same powers as Directors of the Company under The Companies Act 1956 may exercise. Certain other directions were issued to the Discoms by the Regulatory Commission by the impugned order.

14. The three Discoms rushed to this Appellate Tribunal challenging the said impugned order of the OERC and prayed for interim orders as well. Pending the appeal, after hearing the counsel appearing on either side, this Appellate Tribunal on 8.2.2006, passed the following interim order:

“It is noticed that proceedings were initiated at the instance of the first respondent. After submission of petition, after submissions of objections from

time to time with respect of business which were carried on by DISCOMs, OERC issued certain directions. It is also true that there are some interim orders and directions from time to time by the OERC. It is also admitted that two or three orders of the Regulatory Commission are the subject matter of the appeal which are pending. As seen from para 28 & 29 of the order the Regulatory Commission has initiated action under Section 24 to suspend the license and had called upon the appellant in each of the appeal to submit their objections. In respect of para 28 & 29 the independent contentions are advanced by the appellant. With respect to this we are not expressing ourselves at this stage.

9. On a perusal of paras 30 & 31 we are of the view that it is not sustainable to contend on the part of counsel for respondent No. 4 as well as respondent No. 6, that it is just collection of information and collection of material with respect to the management of three DISCOMS. On the other hand the directions setout in para 30 and 31 substantially interfere with management of the three DISCOM Companies. Under Section 24 of the Act notice has been issued calling upon the

appellant to show cause as to why license should not be suspended. Had an order of suspension been passed by Commission, it will be well within its powers in appointing Administrator or Special Officers or any name they call, to take charge of the administration of the licensees. That is not so.

10. Prima-facie, we are of the view that the appointment of Special Officers as ordered in paras 30 and 31 definitely interfere with the day to day administration of the three DISCOMS as well as their licensed business, which they are entitled to carry. As sought to be pointed out by Mr.Ramachandran and Mr.Mehta appearing for OERC and GRIDCO, we are not satisfied with their contentions. At the same time, we will not be justified in giving a blanket stay as prayed for.

11. A prima-facie case has been made out. Our attention is drawn to few of the provisions of the Act and there is time enough to consider the scope of those provisions of the Act.

12. Pending appeal as a prima-facie case has been made out the order of the OERC appealed against in these three appeals is stayed pending

further orders but it will not prevent the Special Officers appointed by the OERC from collecting information. At the same time it is made clear neither the Special Officers nor their assistants could interfere with the functions of the three DISCOMs or its day to day business carried by them.

13. Pending further proceedings the Regulatory Commission shall not also proceed further with regard to Show Cause Notice issued to the three DISCOMs, which are also under challenge with respect to interim order. Call on 28.2.2006.”

15. Pending the appeal, further orders were passed as an interim measure to safeguard the interest of both parties on 2.6.2005 and the consumer public as under :

“8. With a view to give quietus to the difference and mutual doubts, with the object of providing un-interrupted supply of electricity to the consumers in the State of Orissa, with the view to get full particulars and facts through an independent agency and at the same time not to

drive away the appellants who have already invested substantial funds in the three Discoms, we have been persuading the parties to join together and earn together as joint sector companies in the same spirit with which they joined for and with that background and after hearing the parties as an interim measure we issue the following directions which will serve the interest of both sides.

9. The orders are being passed pending the appeal as a measure to see that the Discoms are placed back on track, so also the Orissa GRIDCO and the entire distribution system which requires further reduction in T&D loss are managed better and effectively exercise control over the officers and employees of the Discoms. The trial measure of privatization, it is represented has to be secured and that is the objective of both sides. Having considered the contentions advanced and the suggestions made on either side during the hearing and conciliation in the interest of justice, to maintain the balance of convenience and equity, interest of consumers in the State of Orissa, to sustain and regulate the privatization of distribution of power in the State of Orissa, to

avoid breach and break down, allied contingency, to avoid unpleasant situation and to offer a fair opportunity in the hearing of appeals, we deem it fit and proper to make an arrangement in respect of three Discoms pending disposal of appeals. We are also taking into consideration of the problem 20,000 workers who may have to face grave situation and innumerable consumers will have to face a worst situation if there is going to be a break down by Reliance departing from the joint venture business of Distribution in the State of Orissa. In the light of the above we have considered the entire matter and issue the directions to render substantial justice:

10. For the first time in India, in the State of Orissa steps were taken for privatization of distribution of electricity. So far, attempts have been made to sustain privatization but due to perceptible differences problems have arisen between the two joint venture partners.

11. Again a thrust requires to be given not only to sustain but also to advance and forward the power sector reforms in the State of Orissa. With the said objective in mind, we have been

persuading the parties in the above appeals for an amicable resolution. During number of hearings, we have expressed ourselves that every effort should be made for the success of privatization and also advance the interest of the consumers in the State in hands of such entrepreneurs. The interest of the consumers is what State authorities and every one are concerned.

12. We have persuaded not only ourselves but also the counsel appearing on either side to certain of our suggestions. The parties and their counsel after much persuasion and deliberations understood the spirit with which we made our suggestions. However, they expressed helplessness. We had taken into consideration of the Commissions view but we approach the problem and issue from different angle and prospect. However, if it is any other venture our approach would have been different. It is the electrical energy, which is required by the entire Public on a minute to minute basis and without break down. It is the back bone of every act of us and particularly for economic and industrial growth.

13. *It is not only in the interest of three Discoms but also in the interest of general public in the State of Orissa, who are customers within the area of three Discoms, and to sustain un-interrupted supply of electrical energy the present arrangement is being made as an interim measure and directions are issued. There is no doubt in the object which is sought to be achieved by these directions. With that avowed object our suggestions have been responded. That apart is is represented that if the three Discoms are placed in CUSTODIA LEGIS under the control of this appellate forum there will be a phenomenal change in their functions and they may turn around the corner and the parties will come forward with additional funds and proposals to solve financial problems besides the state authorities may come forward to assist enforcement of The Electricity Act 2003.*

14. *Taking an overall view and in the best interest of all concerned being the better course available as of today, we issue the following directions in the above three appeals. These directions shall be without prejudice to final orders or outcome in the pending appeals, before this*

Appellate Tribunal. These directions shall be in force until further orders that may be passed after watching the functioning of the Special Officers who have a proven record in the field of electricity in different States.”

16. In terms of the said order two Special Officers assumed charge and the three Discoms are under their direct control. The Special Officers submitted status reports and action taken from time to time and appropriate directions were also issued for their effective functioning of special officers to manage the entire affairs of the Three Discoms and to serve the cause of power distribution.

17. The learned counsel for the appellant, while referring to the factual matrix of the case, counter case of the appellant and respondents contended that each one of the claims/ allegation against the appellant are factually not correct and the complaints have been built up to give a cause of action for the OERC to proceed. We are not going to examine the factual

disputes at this stage and it would be sufficient to indicate that the appellants have valid explanations in respect of each and every allegation or alleged omissions, complained and they have placed materials before the Commission as well as before us and the report of Special Officers in this respect would advance and support the case of appellants to a considerable extent in respect of factual disputes.

18. The learned counsel for the appellants elaborated his submissions arguments with respect to the alleged omissions or commissions and prima-facie it is to be pointed that the appellants are in a position to repel what has been alleged against the appellants or the explanations offered by the appellants. Be that so, we will not be justified in examining the truth or otherwise of the allegations or omissions alleged against appellants in these appeals. Suffice to hold that the allegations/ inferences/ imputations made against the appellants by the contesting respondents and which were the subject matter of consideration before OERC are mostly born out of motivation or malice or out of frustration by certain

disgruntled elements. However, we do not propose to examine truth or otherwise of the allegations/ imputations or complaints as it may warrant consideration of disputed facts and materials in the hands of Regulator, who had not chosen to advert or record its findings after consideration yet it has arrived at adverse conclusions. On this short ground we will be justified in setting aside and remitting the matter for fresh consideration. However, we proceed to consider the legal contentions including jurisdictional issues raised by the learned counsel for the appellants as well as contesting respondents in these three appeals.

19. It is contended that the contents of paragraph 26, 27 & 28 of the impugned order would show that OERC has predetermined the entire issue of suspension of the distribution license. It is contended that the very contents of paragraph 28 of the impugned order would show that even at this stage the OERC has already formed an opinion and foreclosed its conclusions under Section 24 (1) (a) (b) (c) & (d) of The Electricity Act 2003. It is the further contention that

the OERC has foreclosed the issue against the Discoms and the issuance of notice under proviso to Section 24 (1) of The Electricity Act 2003 is an empty formality and thus violating the fundamental principles of natural justice as well as statutory provisions. It is also contended that the order of appointment of Special Officers as seen from paragraph 30 and 31 of the impugned order is without jurisdiction and runs counter to the statutory provisions of The Electricity Act 2003. It is incumbent on OERC to pass a speaking order supported by reasons to exercise the jurisdiction and powers conferred under Section 24 (1) of The Electricity Act 2003,

20. It is emphasized that OERC has no power to pass an interim order of suspension pending the procedure of affording opportunity to the Discoms of being heard or to make representation against the proposed action. The OERC has neither jurisdiction nor authority to pass any Interlocutory direction or Interim Order in the nature of appointment of a Special Officer as has been resorted to in this case. The exercise of power by OERC and the very contents of the

impugned order, in paragraph 31,31 & 32 are outside the ambit and purview of Section 24 of The Electricity Act 2003 and hence the order impugned is liable to be quashed as one without authority of law. It is pointed out that the various grounds suggested against the appellants are factual misconceptions or without any basis and the OERC has not even chosen to advert and consider the objections/representations made by the appellants as to contents of the complaint/petition filed by the respondents and this vitiates the entire proceedings. There is force and merit in this contention.

21. It is also pointed out that the appellants have carried out directions or rectified the alleged deficiencies by appropriate action and this is clear from the status report submitted by the Special Officers. In any event, there is neither justification nor warrant to exercise powers under Section 24 (1) of The Electricity Act 2003 even assuming that the alleged deficiencies or omissions are made out, since they cannot form the valid or legal basis to exercise the power under Section 24

(1) of The Electricity Act 2003. The learned counsel for the appellants placed sufficient material with respect to the rectification or carrying out or attending to alleged deficiencies/omissions or other complaints and according to the learned counsel for appellants there could be no action against the three Discoms against their commercial decisions or with respect to internal matters of management or with respect to the day today management or affairs of the three Discoms or with respect to the purchase of materials or with respect to the appointment or transfer policy of their employees. There is substance and merit in these contentions advanced by the learned senior counsel appearing on behalf of the appellants.

22. The learned counsel appearing on either side advanced arguments with respect to the following aspects concerning the three Discoms and highlighted their respective contentions:

- (i) Refusal of Reliance Energy Ltd. to renew share holders agreement
- (ii) Failure to appoint Managing Director/Managers
- (iii) Absence of guidelines of transfer
- (iv) Failure to resolve the issue of servicing Rs. 400 Crores NTPC Bonds.
- (v) Failure to submit a business plan and the failure of the Reliance Energy to be a party in such business plan.
- (vi) Failure to evolve plan to meet the out standings
- (vii) Failure to provide counter part funding in respect of APDRP Schemes
- (viii) Non-infusion of capital
- (ix) Failure to take up full scale energy auditing
- (x) Failure to introduce spot billing in entire areas of the Discoms
- (xi) Failure to recruit adequate manpower
- (xii) Failure in timely procurement of materials and failure to procure materials in a transparent manner
- (xiii) Failure to attend to maintenance of lines, up-gradation of Transformers, power supply for LT Load

- (xiv) Restricting power through load shedding to reduce the input energy
- (xv) Failure to achieve the target for T&D as well as AT losses.
- (xvi) Non-redressal of consumers grievances

23. In respect of the above, the learned counsel for appellant submitted very many details to establish that the alleged omissions/commissions are without any basis nor it could be made out if there is an independent inquiry. The respondents submitted to the contra. We may not be justified in examining the merits of each one of the allegations omissions/ failures on the part of the Discoms at this stage and it may be that the appellants may have valid explanations or answer to all the above. Suffice to add that most of the above has been explained and the same are also clear from the reports of the Special Officers. Yet we may be not justified in passing orders on merits in this appeal at this stage by examining the merits of the case and counter case in respect of the above allegations/omissions/ complaints/ suggestions as it is for the

Regulator to decide at the appropriate stage, if required or necessary.

24. In the nature of order we propose to pass in the light of the subsequent developments that have taken place, after the appointment of Special Officers by this Appellate Tribunal, pending the appeal and the status report submitted by them, we would be justified in considering the legal contentions and jurisdictional challenges advanced by the appellants in challenging the order impugned, though the same is referred to as “order” by appellants and “show cause” by respondents, in these appeals.

25. In the circumstances we frame the following common points for consideration in all the three appeals:

(A) Whether Orissa Electricity Regulatory Commission (OERC) has acted illegally and in excess of jurisdiction in passing the impugned order?

(B) Whether OERC has acted in violation of statutory provisions of Section 24 of The Electricity Act 2003, and principles of natural justice while passing the impugned order?

(C) Whether the OERC has predetermined the entire issue and foreclosed its action by appointing Special Officers for the three Discoms and whether it is in excess of jurisdiction and illegal or whether it is sustainable ?

26. The entire action was initiated at the instance of Mr. Sarat Chandra Mohanty, who submitted petitions purported to be one under Section 19 or 24 of The Electricity Act 2003. The OERC as seen from the paragraph 27, 28, 29 & 30 of the impugned order has called upon the three Discoms to submit representations by 1st March, 2006 to the notice issued under Section 24 (1) proviso of The Electricity Act 2003. The notice is absolutely bald and none could answer or respond to such a bald notice. The order of the Commission, on a perusal, it could be noticed that the commission has not made up its mind either to proceed under Section 19 or Under Section 24

of The Electricity Act 2003. However, the Commission sought to proceed under Section 24 (1) of The Electricity Act 2003 under certain assumptions and surmises, as rightly pointed out by the learned counsel for the appellants. It is but essential to consider the scope and purport of Section 24(1) of The Electricity Act 2003.

Section 24 (1) of The Electricity Act 2003 reads thus:

“24. Suspension of distribution licence and sale of utility:

(1) If at any time the Appropriate Commission is of the opinion that a distribution licensee—

- (a) has persistently failed to maintain uninterrupted supply of electricity conforming to standards regarding quality of electricity to the consumers; or*
- (b) is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or*
- (c) has persistently defaulted in complying with any direction given by the Appropriate Commission under this Act; or*
- (d) has broken the terms and conditions of licence,*

and circumstances exist which render it necessary for it in public interest so to do, the Appropriate Commission may; for reasons to be recorded in writing, suspend, for a period not exceeding one year, the licence of the distribution licensee and appoint an Administrator to discharge the functions of the distribution licensee in accordance with the terms and conditions of the licence:

Provided that before suspending a licence under this section, the Appropriate Commission shall give a reasonable opportunity to the distribution licensee to make representations against the proposed suspension of licence and shall consider the representations, if any, of the distribution licensee.”

(2) xxx xxx xxx

(3) xxx xxx xxx

27. As seen from Section 24 (1) proviso, it is mandatory for the commission to afford a reasonable opportunity to make representations against the proposal to suspend the license. As such a suspension, if ordered, after following the procedures prescribed, it shall be for a period not exceeding

one year or upto the date on which such further action is taken in terms of Subsection (2) of Section 24 whichever is later. Such suspension could be affected by the Appropriate Commission for reasons recorded in writing, in public interest and after affording sufficient opportunity to the distribution licensees to make representations. Before the suspension, the representation called for, is required to be considered and if public interest warrants suspension of license could be ordered and not otherwise. This section has to be construed as a mandatory as it has a far reaching consequence.

28. On a reading of Section 24, it is clear that the power to suspend is to be exercised for one or more grounds falling either under Clause (a) or Clause (b) or Clause (c) or Clause (d) of Section 24 (1), as the facts of the given case may warrant. The Commission, as seen from the impugned order, has not made up its mind to proceed against the appellants under one or more of the said Clauses of subsection (1) of Section 24 of The Electricity Act 2003. Gravamen of allegations extracted by the Commission in its proceedings, also it did not specify its

action as falling under one or more Clauses of Section 24 (1) of the Act.

29. Nowhere, it has been mentioned that the appellants have broken the terms and conditions of license, nor it is suggested that they have persistently failed to maintain uninterrupted supply of electricity falling under Clause (a) nor it could be spelt out that the appellants have persistently defaulted in complying with the directions issued by the Commission. Except vague suggestions no specific imputation or allegation have been set out in the order as well as in the notice. That apart, as seen from the entire order none of the representations or the claims of the appellants or objectors, where they have controverted the imputations/ various complaints/ allegations, have been adverted to or considered or a prime-facie finding has been recorded by the Commission after application of mind. Yet in paragraph 28, 29 & 30, as rightly pointed out by the learned senior counsel, appearing for the appellants the Commission has predetermined its conclusion and action are foregone already and has issued a

notice, which itself is violative of natural justice and fair play, for want of opportunity or disclosure of specific allegations or commissions or omissions. It is rightly contended that the further notice is a mere empty formality.

30. In the absence of specific allegations or imputations in the show cause notice issued, and basis on which the Commission has proceeded, it is not possible for the appellants to make their submissions or explain themselves. This action is a patent violation of natural justice, fair procedure and fairness in action. For the grave infirmities and illegalities, the order impugned is liable to be set aside, though it is referred as a notice. In fact it is not a simple notice but a predetermination.
31. Nextly, it is further contended by the learned counsel for the appellants that there could be no appointment of Special Officers or interference with the day to day administration of the three Discoms before suspending the license. As seen from the impugned order, the Special Officers are appointed, will have the powers of a Director of a Company in terms of

the Indian Company's Act 1956. In other words, as rightly pointed out by the appellants, it is an appointment of administrators for the three Discoms in the guise of appointment of Special Officers, an indirect action, by which the entire operation and affairs of the Discoms are sought to be dislodged and placed at the disposal of the Special Officers. The learned counsel appearing for the respondents contended that the order would just enable the Special Officers to collect information and it shall not be taken as if the Special Officers are appointed to run the three Discoms. Such a construction placed on the order and as sought to be advanced by the learned counsel for the respondents, in our view runs counter to the very content, purport and tenor of the impugned order. It is clear, before suspension the Commission sought to place the functioning of the three Discoms in the hands of Special Officers appointed by it, which is illegal, and an infraction of statutory provisions of Sec. 24 (1) & (2) of The Electricity Act 2003.

32. Section 24 should be construed and given its full meaning and the doctrine purposive Construction should be adopted, as has been held by the Hon'ble Supreme Court in *Nathi Devi v. Radha Devi Gupta* (2005) 2 SCC 271 : AIR 2005 SC 648:

“The interpretative function of the court is to discover the true legislative intent. In interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. In such a case no question of construction of statute arises, for the Act speaks for itself. Literal interpretation should be given to a statute if the same does not lead to an absurdity. Even if there exists some ambiguity in the language or the same is capable of two interpretations, it is trite that the interpretation which serves the object and purport of the Act must be given effect to. In such a case the doctrine of purposive construction should be adopted. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are

capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness, which may render the statute unconstitutional. Moreover, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted, except for compelling reasons such as obvious drafting errors.”

In Reserve Bank of India Vs. Peerless General Finance Investment Co. Ltd. 1987: 1 SCC 424, with respect to the contextual construction of the statutory provisions the Hon’ble Supreme Court ruled thus:

“Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With the knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses, we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and every thing is in its place.”

In the light of the above rulings of the Hon'ble Supreme Court, the construction sought to be placed by Respondents cannot be sustained and our view is fortified by the said pronouncements.

33. The impugned orders of the Commission, as already pointed out, is in-excess of jurisdiction and violative of Section 24 (1) of The Electricity Act 2003. It is a settled law, that when a Statutory Authority is required to do a things, in a particular manner, the same shall be done in that manner alone and not otherwise.

In Bhavnagar University Vs. Palitana Suger Mills, 2003 Vol. 2 SCC 511, Hon'ble Supreme Court held thus:

“ When a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the statute are only creature of statute. They must act within the four corners thereof.”

34. When Section 24 (1) as well as sub-section (2) provides that the Regulatory Commission shall follow the procedure prescribed therein, the Regulator shall exercise its powers in the manner prescribed by the said statutory provisions and not at all. In this case there is glaring violation of Section 24, violation of principles of natural justice and very many illegalities stares at the impugned order.

35. It is also pointed out that show cause notice issued in terms of Section 24 (1) proviso shall enumerate one or more grounds which may support the conclusions or consequences or which may enable the Discoms to put forth their objections and defend. In the absence of affording minimum opportunity, it may not be possible for the Discoms to state their objections with respect to the proposed action of OERC. As already pointed out, it is not clear as to whether the proceedings are being initiated by OERC either under Clause (a) or Clause (b) or Clause (c) or Clause (d) of Section 24(1) of The Electricity Act 2003. It is settled law that the powers of the Commission are derived from The Electricity Act 2003 and in particular to

Sec. 24 of the Act with respect to the Case on hand and the Commission has to function within the limits and conditions imposed and act according to the said Section 24. It is also settled law that the Regulatory Commission, a quasi-judicial functionary while exercising such quasi-judicial function should assign reasons in support of its conclusion even for passing an interim order or direction or to proceed further by issue of notice. Assigning reasons is calculated to prevent unconscious arbitrariness or unfairness in reaching the conclusions. The very attempt to search and set out the reasons will keep the authority alert and minimize the chances of unconscious infiltration of bias or unfairness in its action and conclusion. The fairness inaction is an essentiality which the Regulator has to follow, besides it shall not be arbitrary, nor be polarized, not being over enthusiastic and misguided.

36. That apart Clauses (a) & (c) prescribe that there should be persistent failure or persistent default and in the absence of such allegations or imputations of persistent default or failure, the OERC has neither the authority nor jurisdiction to proceed

under Section 24 (1) of The Electricity Act 2003. The legislature has used the expression “persistently” in Clause (a) as well as Clause (c) of Section 24 (1) of The Electricity Act 2003 and it has a significance. Persistency does not mean one or two isolated cases of failure to act, but it means some degree of continuance or repetition of failures or default for which action can be taken and the license can be suspended under Section 24. There is not even a whisper of “persistent failure” or “persistent default” in the impugned order or in the show cause notice. Thus on this ground, also it could be held that there has been no application of mind on the part of the OERC. The order impugned is liable to be interfered and set aside on this short ground as it goes to the very foundation of action initiated.

37. In Para 26 of the proceedings, the Commission has enumerated the alleged defaults, misfeasances/malfeasances as under:

- (a) Apparent refusal of REL to renew shareholders agreement, resulting in abdication by majority shareholder or Distcos of their responsibilities in discharging their regulatory obligations.
- (b) Failure to appoint Managers/MDs for the three Distos, viz WESCO, NESCO and SOUTHCO.
- (c) Failure to resolve the issue of servicing Rs. 400 crores NTPC bonds.
- (d) Failure to evolve a convincing plan for meeting the outstanding PFC/REC and IBRD loans and BST dues to GRIDCO.
- (e) Failure to mobilize counterpart funding in respect of APDRP scheme.
- (f) Non-infusion of capital
- (g) Failure to take up full-scale energy auditing
- (h) Failure to introduce spot billing in entire areas of DISCOs
- (i) Failure to recruit adequate manpower
- (j) Failure to comply with Commission's orders dated 25.10.2005, 03.10.2005, 30.09.2005.

38. The above omissions or defaults enumerated do not fall under Clause (a), (b),(c) or (d) of sub-section (1) of Section 24 of The Electricity Act 2003. Even so, the appellants have submitted factual details of the action taken with respect to each one of them. That apart it is the commercial action or decision or indoor management of the Discoms or its corporate planning with respect to which the Regulator cannot claim jurisdiction.
39. The failure alleged in (J) to comply with the orders again relates to one or more ground of the alleged omissions forming part of (a) to (i) only and nothing further. These will not satisfy Sec. 24 (1) (c) or (d) of the Act nor they are persistent. Simple failure will not amount to persistent default. Here again the Commission has clearly exceeded in its jurisdiction. The allegations in respect of which the complaint has been made are general, vague bereft of details and not specific and they do not warrant an action of suspension under one or more of the Clauses of Section 24 (1) of The Electricity Act 2003. We hasten to add that the report of the Special Officers placed

before us throws more light with respect to the affairs of the three Discoms and their day to day operations.

40. In the light of the above discussions all the three points framed are answered in favour of the appellants and against the respondents.

41. Pending the appeal this Appellate Tribunal, with the consent of all the parties to this appeal, appointed two special officers for the three Discoms. The two Special officers in terms of our orders have been effectively carrying out the functions of three Discoms. As seen from their report there has been a progress and if the Special officers are allowed to continue, the Discoms might turn around the corner. However, there are many hurdles which the Special Officers had to face apart from innumerable petitions. Suffice to state that the Special officers have conducted themselves in a fair manner and within the limited resources, they have also functioned effectively even in the absence of cooperation from the expected corners.

42. We have allowed the appeal and consequently we revoke the orders appointing Special officers, as there is no warrant or justification for the continuance of Special officers any longer.

The Special Officers are discharged and they are directed to hand back the charge of three Discoms to the respective company who were in management forthwith and send a report.

43. IA Nos. 35; 36 & 37 of 2006 filed in Appeal No. 29, 30 and 31 of 2006 are closed as they have become infructuous.
44. In the result, all the three appeals are allowed subject to above observations and the impugned order is set aside but without cost.
45. For any valid reason, if the Commission proposes to continue or initiate fresh action under Section 24 of The Electricity Act 2003, it is always open to the Commission to act strictly in accordance with Section 24 and follow the procedure prescribed therein. We may also administer a caution that motivated petitions or complaint shall be examined by the Commission very carefully before exercise of statutory power, as anxiety alone will not save the statutory authority from the test of bias nor it will satisfy the requirements of fair action which a reasonable authority may act upon. There shall be an action, if at all, which shall be in conformity with the statutory provisions of The Electricity Act 2003, the relevant regulations governing and in conformity with the principles of natural justice.

46. We place it on record the valuable services rendered by the two Special Officers Mr. Kallal Ranganatham, Ex-CMD Northern Power Distribution Co. of AP Ltd. and Mr.V.D. Lulla, Ex-member & Ex-Officio Addl. Secretary to Govt. of India, Central Electricity Authority in the cause of distribution of power in the State of Orissa.

Pronounced in the open court on this 13th day of December, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member