Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal Nos. 231 of 2006 and 233 of 2006

Dated : 03rd February 2009

Coram : Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

IN THE MATTER OF:

North Eastern Electy. Supply Co. of Orissa Ltd.
Corporate Office,
Januganj, Balasore
(represented by its Company Secretary) … Appellant(s)

Versus

1. M/s. Tata Sponge Iron Ltd.
   At-Bileipada, Joda,
   Distt. Keonjhar,
   Orissa.

2. Orissa Electricity Regulatory Commission
   Bhubaneswar,
   Orissa – 751 012. … Respondent(s)

Counsel for the appellant(s) : Mr. Raj Kumar Mehta,
Ms. Suman Kukrety
Mr. Mragank Sharma
Mr. Shobhit Jain
Ms. Sarvodya Lakshmi
Mr. P. Soma Sundaram
Ms. Nalini Pal, Mr. Premji

Counsel for the respondent(s) : Mr. Ashwini Mata, Sr. Adv.
Mr. Gajender Kumar
Mr. Amit Prasad,
Mr. Chander Shekhar
Ms. Shama Sharma

Mr. Chandrasekharan, Adv.
Mr. S. K. Swain, Resident Executive (Legal) for Resp. No.1

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

Introduction:

The two appeals, being Nos. 233 of 2006 and 231 of 2006, are directed against the orders of the Orissa Electricity Regulatory Commission (Commission for short) in Case No. 10 of 2005 and Case No. 4 of 2006 respectively. The impugned order dated 19.08.08 was passed on a review petition, case No. 4 of 2006, seeking review of the order dated 13.02.2006 passed in case No. 10 of 2005. The two appeals arise out of common facts. They have been heard together and are being disposed of by this common judgment.

Facts:

2) Sans details the facts leading to the appeals are as under:
The appellant is a distribution company distributing electricity in the north eastern region of Orissa. The TSIL, respondent no. 1, is

engaged in manufacturing sponge iron in its factory at Joda in District Keonjhahar, Orissa. The respondent has a 7.5 MW capacity Captive Power Plant (CPP) which was set up with a permission from the Commission under section 44 of the Electricity (Supply) Act, 1948 vide order No. OERC 187 dated 26.07.2000 with the direction that the power generated in the captive power plant would be entitled to meet their own load. Subsequently, TSIL approached the appellant NESCO for purchase of surplus power from its CPP along with the term of annual banking facility to meet its emergency power requirement. The NESCO filed Case No. 1 of 2003 before the Commission for permission to purchase such surplus power at 80 paisa per kWH and also for providing banking facility to the respondent to the extent of 3 MU per annum. The Commission vide its order dated 11.02.2003 (hereinafter referred to as the first order) allowed NESCO and TSIL to enter into an agreement on the above terms for a period of one year with banking facility limited to the extent of 1/6th of the power sold to the appellant. Any extra unit was to attract the rate as envisaged in the general tariff for emergency power fixed by the Commission. The parties then entered into an agreement dated 16.02.2003 for the period ending 15.02.2004 (hereinafter referred to as the first agreement). The parties entered into another agreement on 15.02.04 for the subsequent period up to 16.02.2004 (hereinafter referred to as the second agreement). For this second period the mutually agreed rate was Rs.1.00 per kWH and banking facility was

limited to 1/3rd of the power sold by the respondent to the appellant. Before the expiry of the second agreement the respondent approached the appellant for a third agreement for another period of one year commencing from 16.02.2005. The appellant agreed to buy the surplus power for the third term but declined the facility of banking. The respondent approached the Commission with a letter seeking its intervention. Nonetheless the parties entered into the agreement on 12.02.2005 effective from 16.02.2005 for a period of two years without banking arrangements. This will be referred to as the third agreement in this order. The Commission asked the respondent to file a formal case. The respondent filed Case No. 10 of 2005 before the Commission praying for continuation of banking facility as per the first order of the Commission dated 11.02.2003 passed in Case no.1 of 2003. The appellant submitted before the Commission that it was not possible for it to continue with the banking arrangements since it had suffered a loss of Rs.381 Lacs on account of such an arrangement. The OERC vide order dated 13.02.2006 (hereinafter referred to as the second order) directed that the terms and conditions of second agreement shall be deemed to have continued up to 31.03.2006. The review petition filed by the appellant was dismissed vide the order dated 19.08.2006 (hereinafter referred to as the third order). The second order and the third order are in challenge in appeal Nos. 233 and 231 of 2006.

The plea of NESCO, the appellant:

3) It is contended by the appellant that the respondent having voluntarily entered into an agreement on 12.02.2005 could not have asked for a relief of banking facility during the continuance of the third agreement.

4) It is contended by the appellant further that the power purchase agreement between the two parties was a commercial agreement and the OERC had no jurisdiction to incorporate a term in the agreement already concluded between the parties. The appellant also pleads that the National Tariff Policy does not provide for banking of energy which the OERC entirely ignored while passing the impugned order of the OERC. It is pointed out by the appellant that the OERC erred in ignoring the fact that after conclusion of the period of the second agreement the parties had actually entered into a third agreement and hence the Commission was wrong in directing the second agreement to continue.

Response of TSIL:

5) The respondent no. 1 has filed replies to the appeals supporting the impugned order and contending, *inter-alia,* that the Commission had the jurisdiction to pass the impugned order within its regulatory power. The respondent no. 1 further contends that it had entered into the third agreement with the appellant under undue influence as the appellant enjoys monopolistic existence in

the State of Orissa and therefore, it (respondent) had to approach the Commission to avoid being exploited. The appellant has filed a rejoinder. In the rejoinder, it is contended by the appellant that the respondent no. 1 was free to sell its surplus power to GRIDCO at the relevant period and, therefore, it is wrong to allege that the respondent no.1 had no option but to enter into the agreement with the appellant. The appellant denies that it adopted a monopolistic posture. The appellant also contends that it has to safeguard its own commercial interest and was justified in not extending the banking facilities as it was causing loss to the appellant which the appellant did not want to bear.

Decision with reasons:

6) TSIL had installed a 7.5 MW captive co-generation plant with the aim that the power generated would be used to meet their own demand. However, in 2003, the CPP had a load of only 4.5 MW and therefore 3 MW of surplus potential was still existing. This situation arose as the TSIL deferred its investment in the 3rd kiln. TSIL wanted to sell the surplus power to Tata Ferro Alloy Plant at a distance of 7 KM. Commission turned down the prayer for permission to sell to Tata Ferro Alloy Plant. While the appeal against Commission's order refusing permission was pending, NESCO agreed to buy the surplus power at 80 paisa/kWH with banking facility of 3 MU to meet emergency requirement of TSIL. The Commission considered the prayer for permission. It found

that the proposal was a win-win for both the parties. The data which led to this conclusion was as under:

(a) NESCO would save in power purchase since it would get around 18 MU from TSIL at a very cheap rate of 80 paisa/kWH as against prevailing BST rate of Rs.1.25 paisa/kWH.

(b) The Commission recognized the loss in allowing banking but found that loss of NESCO in selling emergency power would be completely offset if the drawal by TSIL could be limited to 1/6th of the total power purchased by NESCO from TSIL.

(c) So far as TSIL was concerned, it would be able to sell the surplus power and so the plant would operate at 100% load factor resulting in reduction in average cost of generation.

(d) To the extent of banking of 1/6th TSIL would gain as for the emergency power requirement TSIL would pay only 80 paisa/kWH instead of Rs. 3.80/kWH.

(e) For the total electricity sector the gain was addition of 3 MW which would have remained unutilized.

7) They further observed that to the extent of purchase from TSIL, NESCO would reduce their purchase from GRIDCO. The Commission ensured that there was no loss to NESCO as it would reduce the cost of purchase without reducing the price at which it actually sold electricity to consumers. The Commission accordingly allowed the prayer before it and in order to ensure that there was no revenue loss to NESCO, limited the banking to 1/6th of the purchase from TSIL. Nonetheless the Commission said in paragraph 8 of the order that:

> "*the Commission would also like to send a clear signal that facilities of wheeling/banking & third party sale can be progressively introduced in EHT/HT systems and DISTCOs would also be allowed to purchase surplus power from captive units provided it is technically feasible, rates offered are mutually acceptable, revenue loss, if any, has to be borne by them*".

8) The parties entered into an agreement on 16.02.03 for a period of one year. The 2nd agreement was entered into on 16.02.04 which called itself the extension agreement and referred to the same order dated 13.02.03 of the Commission as having permitted the transaction. However, there are two basic changes in the terms viz. rate of purchase of surplus power i.e. Rs. 1 per kWH and banking of 1/3rd of the power sold to NESCO.

9) Is this a win-win situation? No comparison as to the price at which NESCO purchased power from various sources at the relevant time and the rate offered by TSIL in the 2nd agreement is available on record. However, it is clear that the 2nd agreement offers a higher price to TSIL and also gives banking to a greater extent of 1/3rd of the power sold by it to NESCO. TSIL thus gets emergency power at the rate of Rs.1 per kWH whereas the same may have been well above Rs.3.50 per kWH without such an agreement. This emergency power had to be procured by NESCO and NESCO had to procure it at whatever price power may have been available at the relevant time. Hence profit or loss made by NESCO under the 2nd agreement is a matter of internal accounts of NESCO. Further to the extent NESCO could earn profit by supplying 1/3rd of TSIL's surplus power to its consumers, is lost on account of banking of power to TSIL. NESCO has submitted its accounts to prove the loss suffered by it. NESCO declined to provide the banking facility after the expiry of the second agreement which led TSIL to write to the Commission. After the third agreement was entered into without banking TSIL filed a regular case on which the second order was passed.

10) The Commission does not take into account the loss suffered. Nor does the Commission say that there would be no loss on account of banking. The Commission does not say that it will be a

win-win situation if the 2nd agreement is continued to operate for the third year. The circumspection shown in the first order of the Commission is conspicuous by its absence in the second order.

11) The 2nd order is passed by the Commission without noticing that the 3rd agreement had already been entered into. There is no dispensation about the 3rd agreement. This order mentions that TSIL approached the Commission on being jolted by NESCO's letter by which NESCO offered to purchase surplus power at 86 paisa/kWH without any banking facility. It mentions that NESCO alleged that the banking facility granted by the 2nd agreement resulted in a loss of Rs.3.81 Crores. TSIL disputed the allegation of loss and put forward a calculation showing that NESCO had gained Rs.4.68 Crores by the arrangement. The surplus power injected by TSIL was sold at the rate of Rs.3/- to the retail customers which brought a profit of Rs.6.27 Crores. It was alleged by TSIL that because of the profit earned NESCO entered into the 2nd agreement. The Commission, however, does not give any detail of this calculation. Nor does it appear from the order that Commission has at all examined the calculations. It is also not clear from the order as to whether such profits were given during the 1st or the 2nd agreement. The Commission then says that the arrangement of injection of power by TSIL is still continuing beyond the expiry of the 2nd agreement. The Commission concluded as under:

"9. With the national objective of harnessing captive generation, the Commission directs that the terms and conditions of the 2nd agreement entered between the parties shall be deemed to have continued up to 31.3.06, as the arrangement is still continuing. The commercial arrangement may have to be suitably modified in the light of the National Tariff Policy in vogue.

10. From 1.4.06, both the parties are free to deal with this issue independently. M/s. TSIL may explore avenues for export of the surplus power either to M/s GRIDCO or any other trading company or NESCO keeping in view the objective set forth in National Tariff Policy."

12) It is to be noticed that TSIL approached the Commission with the following prayer:

"*In the circumstances, it is therefore prayed that the Hon'ble Commission may kindly be pleased to direct the North Eastern Electricity Supply Co. of Orissa Ltd. to continue with applicants banking facilities in the 33 KV NESCO grid as per Hon'ble Commission's order dated 11.02.03 passed in Case No. 1 of 2003".*

13) If the Commission was to award this prayer the Commission would have directed evacuation of electricity from the CPP of TSIL at the rate of 80 paisa per unit with the facility of 1/6th of banking for that was the order dated 11.02.03. Instead the Commission has ordered that the terms and conditions of the 2nd agreement be continued upto 31.03.06. For the 2nd agreement the price to be paid by NESCO was Rs.1/- per unit. Banking was to the extent of 1/3rd. While the 1st order was passed after calculation of the cost and profit of the arrangement, the 2nd arrangement of the 2nd agreement was not so weighed by the Commission at any point of time. The parties did not approach the Commission before entering into the 2nd agreement. Nor did the Commission examine the contentions of parties regarding profit or loss out of the banking facility. Accordingly, the Commission included the line "*The commercial arrangement may have to be suitably modified in the light of National Tariff Policy in vogue*". The Commission, however, does not take a step further and spell out what should be an appropriate commercial arrangement. Obviously, commercial arrangement would include the price at which the parties would trade power. The Commission while permitting the parties to suitably modify the commercial arrangement is showing flexibility about the arrangement of the 2nd agreement. The TSIL is not willing to go back to the arrangement of the 1st agreement namely to sell power at 80 paisa per unit and take 1/6th as banking. It perhaps was a win-win situation. During the 1st agreement, NESCO

purchased at a price much lower than the price paid to GRIDCO and accordingly could spare 1/6th for banking. There is no plea that a margin between the prices offered to GRIDCO and price offered to TSIL was so large as to allow banking to the extent of 1/3rd of total purchase. Further, the order remains vague and unworkable since no commercial arrangement has been laid out in this order. The NESCO certainly is not agreeable to extending the terms of the 2nd agreement. The TSIL who had applied for extension of terms, as given in the order dated 11.02.03, is no more interested in getting the same offer. Thus the 2nd order fails to resolve the dispute between the parties.

14) Since in the entire order the Commission did not refer to the 3rd agreement and there was no dispensation in respect of the 3rd agreement which was to remain in force for two years, NESCO came up with an application for review. The petition for review is disposed of vide a 3rd order dated 19.08.06.

15) Stated in brief, NESCO in the review petition submitted the following: The Commission had acknowledged that national objective of harnessing captive generation but banking of power was not the objective of harnessing captive generation. Banking was initially allowed as a part of the total transaction vide order dated 11.02.03 as the same was requested by NESCO. The Commission

had not directed banking as if so requested by TSIL. The Commission ignored the execution of the 3rd agreement, termination of the 2nd agreement by efflux of time and the submission of NESCO that banking had led to loss for NESCO. TSIL did not ask for banking facility to be continued retrospectively. The first order dated 11.02.03 was only for banking for a period of one year. On account of the aforesaid errors the order dated 13.02.06 is liable to be reviewed.

16) The Commission, however, mentions, in the third order only two grounds of this review petition: (a) since there was no provision for banking in the National Tariff Policy, the 2nd agreement should not have been extended up to 31.03.06 and (b) NESCO had sustained loss as was pointed out in affidavit in the case of 10 of 2005 non consideration of which was error apparent on the face of the record. The Commission says that NESCO did not challenge in its review petition the part of the order which said that the 2nd agreement would be deemed to have continued up to 31.03.06. It further says that this decision of the Commission was based on the "understanding" that an arrangement was continuing. The Commission further said that this "understanding" has also not been challenged and there is no error apparent on the face of the record. The review petition is accordingly dismissed.

17) This order is rather strange in as much as the Commission has blatantly refused to face the facts. NESCO challenged in the review petition the very order to continue the second agreement up to 31.03.06. NESCO has also challenged the "understanding" that arrangement as per the 2nd agreement was continuing. NESCO specifically challenged and pleaded that a 3rd agreement was in place and therefore the 2nd agreement could not have been extended.

18) Further the Commission did not at all rule on the other grounds namely Commission's omission to note loss suffered on the account of banking arrangement, the effect of two agreements running during the same period of time and the fact that the 3rd agreement was for purchase of surplus power at 86 paisa per unit.

19) Whether the generating company and the distribution company would enter into a commercial agreement of purchase with banking is a question of a calculation of profit and loss. The facility of banking is merely a facility of purchasing power from the distribution company at a concessional price. It is entirely a commercial arrangement and has to be worked out by the parties keeping in view their respective commercial interests. It is to be noticed further that the Commission itself had clarified in the very first order that the revenue loss, if any, would have to be borne by the parties themselves. This meant that the distribution company

was not entitled to pass the loss suffered by the transaction with TSIL to its ultimate consumers by raising the tariff. In this context it becomes all the more important to examine all the details of the calculations submitted by NESCO before the Commission could direct NESCO to purchase power as per the 2nd agreement that is at the rate of Rs.1/- per unit and to bank 1/3rd of the power purchased. It is also to be noticed that although TSIL wants the power to be banked it does not propose an alternate commercial arrangement namely the price at which it is willing to sell to NESCO. Nor has the TSIL made any allegation that on account of denial of banking it has suffered any loss. Banking is not the usual term of a power purchase agreement. It is only an exception. The National Tariff Policy does not provide for banking. It can be understood that banking cannot be a part of tariff policy and can only be permitted if the financials of the purchasing company permits such an agreement, particularly if loss, if any, cannot be passed on to the consumers of the purchasing company. No order asking the purchasing company to bank can be passed without noticing the consequences of banking on the company which purchased power. In case banking is not allowed the generating company will buy at the same rate at which all other similarly placed consumers of the distribution company will take electricity. The Commission has passed the two impugned orders without taking into consideration the financials of NESCO and the financial

consequences of its order of banking as per the 2nd agreement. Such an order cannot be upheld.

20) Another reason for setting aside the two impugned orders is that the two orders are based on incorrect supposition of facts. Both the orders suppose that the arrangement of the 2nd agreement is continuing and both ignore that the parties had entered into a 3rd agreement. The Commission has not ruled that the 3rd agreement was bad for any reason. The Commission has not set aside the 3rd agreement. Nor has the Commission ruled that the 2nd agreement can be continued despite the parties having entered into a 3rd agreement. The Commission has thus passed an order on the basis of facts which were not correct.

21) Apart from the factual position, as explained above, there are points of law that are required to be gone into in the present case.

22) The legal issues involved are as under:

(i) Was the 3rd agreement violative of the intents the Electricity Act or the National Tariff Policy or the National Electricity Policy requiring the Commission to take corrective measures?

(ii) Whether the 3rd contract between the parties was void or voidable for any reason requiring judicial interference?

(iii) Did the appellant adopt a monopolistic posture in entering into the 3rd agreement warranting an interference by the Commission?

(iv) Did the Commission have the power and jurisdiction to interfere with the 3rd agreement voluntarily entered into between the parties and direct that the 2nd agreement would continue in effect superceding the 3rd agreement?

23) We will take up the issues in the above order.

(i) The National Tariff Policy admittedly did not speak of banking. The National Tariff Policy and the National Electricity Policy encourage co-generation and generation from non-conventional energy sources and also required that the DISCOMs purchase a minimum percentage of its requirement from such sources even if such purchases are to be made ahead of merit order. There is no allegation that NESCO had not purchased the required minimum from such sources. NESCO in order to harness non-conventional energy sources is duty bound to evacuate power from the CPP of the TSIL. NESCO is fulfilling this obligation. There is nothing in the Act, Rules or the policy declarations that require NESCO to extend the facility of banking. Therefore, the 3rd agreement cannot be said

to be violative of the Electricity Act or the National Tariff Policy or the National Electricity Policy.

24)(ii & iii) Undue influence is defined in section 16 of the Contract Act which is as under:

> *"16. '**Undue influence' defined**.- (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."*

It is contended by the respondent that the 3rd agreement was bad as it had been entered into under undue influence. The appellant was the only person who could have purchased the surplus energy produced by the respondent. Thus being in a monopolistic and dominant position the appellant was in a position to dominate the will of the respondent. On such submission the respondent alleges that the 3rd agreement between the parties could not be enforced.

25) Undue influence does not make the contract/agreement void. It only makes the contract/agreement voidable. The respondent at no point of time resented the contract/agreement. In any case there is nothing on record from which it could be assumed or held

that the 3rd agreement was as a result of undue influence. The appellant offered the same price to the respondent as it offers to the GRIDCO. The appellant has not extended the benefit of banking to the respondent. But no other CPP has been given the benefit of banking by the appellant. Moreover, the respondent was free to sell its excess generation to any third party also. NESCO may have been in a monopolistic situation and therefore, may have been in a position to dominate the will of the TSIL. However, this itself does not make the contract/agreement voidable. If the contract/agreement with a monopoly becomes voidable simply on account of the monopoly holding such status in the market and in a position to dominate the will of the others all contract/agreement with a monopoly would become voidable. Take the case of Indian Railways or the Delhi Transport Corporation who are in a similar monopolistic status vis-à-vis the passengers. Will that mean that all fairs chargeable by these transport organizations are bad? The illustration of section 16 can be read to appreciate what is undue influence:

"Illustrations

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) *A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B a unreasonable sum for his professional services, B employs undue influence.*

(c) *A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.*

(d) *A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence."*

26) In each of these illustrations the contract/agreement which is found to be bad is for: (a) a greater amount than the sum due, (b) an unreasonable sum and (c) unconscionable. As per example (d), given above, even when the rate of interest is unusually high, the transaction has been found to be in the ordinary course of business and not induced by undue influence.

27) In the present case NESCO has offered a price which it is also offering to another supplier of power. It has not extended facility to TSIL which it has declined to other CPPs as well. There is nothing unreasonable or unconscionable in these terms. Therefore, the 3rd agreement is not hit by section 16 of the Contract Act.

28.(iv) So far as the power of the Commission in interfering with the agreement entered into by the parties is concerned our attention has been drawn to the Commission's power under section 86(1)(b) and 86(1)(e) of the Electricity Act, 2003 (hereinafter called the Act). Section 86(1)(b) of the Act endows the Commission with the function to "regulate electricity purchase and procurement process of distribution licensees including the price at which the electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State." Section 86(1)(e) of the Act requires the Commission to "promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person and also specify for purchase of electricity from such sources, a percentage of total consumption of electricity in the area of a distribution licensee."

29) So far as the function as enumerated in Section 86(1)(b) of the Act is concerned, the function of the Commission is to regulate the

purchase and procurement process of the distribution licensee. This can include the function to fix the price at which electricity shall be procured. Such function has to be performed keeping in view the object of the Act which can be seen from the long title of the Act which is as under:

> "*An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.*"

30) The Commission has to keep in view the interest of the entire electricity sector so as to (a) develop the electricity industry, (b) promote competition, (c) protect interest of the consumers, (d) supply of electricity to all areas, (e) rationalize electricity tariff, (f)transparency regarding subsidies, (g) promotion of efficient and environmentally benign policies. In this situation, regulation of the procurement process of a distribution licensee would mean that the

Commission while encouraging purchase from the CPP which is a co-generation plant has to protect the interests of the consumers. The Commission also had to keep in mind the development of electricity industry and promotion of competition. Obviously all these purposes cannot be achieved if a distribution company is asked to purchase power from the co-generation plant on terms which are not commercially viable. The impugned orders requires the NESCO to provide for banking without examining at all whether banking would be conducive for the development of electricity industry even if such banking may lead to monetary loss to the distribution company.

31) Section 86(1)(b) of the Act requires the Commission to regulate the purchases of a licensee so that the licensee purchases at a minimum possible cost and supplies to the ultimate consumer at the minimum possible price. The tariff policy allows every distribution company or licensee to sell at a profit although the extent of profit can be regulated. The cost of purchase can be passed on to the consumer. The Commission is required to regulate such purchases in order to ensure that the distribution company does not procure power at an exorbitant cost and does not burden the ultimate consumer with such cost.

32) So far as clause (e) of Section 86 (1) is concerned, the Commission is required to provide suitable measures for

connectivity with the grid and sale of electricity produced by co-generation and from renewable sources of energy. The Commission can also specify, for purchase of electricity from such sources, a percentage of total consumption of electricity in an area of a distribution licensee which has to be purchased from such sources. The impugned orders of the Commission have not been passed either for providing connectivity with the grid or for sale of electricity of the CPP or for specifying the percentage of total consumption of electricity from such sources within the area of NESCO. The impugned order therefore, has not been passed in discharge of function mentioned in clause (e) of 86(1). Thus it is amply clear that the two impugned orders are passed without any sanction from the Act and hence without jurisdiction.

33) In view of the above analysis the two impugned orders are liable to be set aside. The appeals No. 231 & 233 of 2006 are accordingly allowed and the impugned orders set aside. The petition of the TSIL before the Commission, case No. 10 of 2005, is dismissed and accordingly review petition of NESCO before Commission being case No. 4 of 2006 is rendered infructuous.

Pronounced in the open court on this ***03rd day of February, 2009***.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member