

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
**Appellate Jurisdiction, New Delhi**

**A. No. 171 of 2008, A. No. 172 of 2008 & IA Nos. 233/08 and 234/08, A. No. 10 of 2008 and A. No. 117 of 2009**

Dated : 22<sup>nd</sup> September, 2009

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

**IN THE MATTERS OF:**

**Appeal No. 171 of 2008:**

- 1. Kadodara Power Pvt. Ltd.**  
Surat – 394 327, Gujarat
- 2. Surbhi Infrastructure Services Ltd.**  
Surat – 394 230, Gujarat
- 3. Shahlon Industrial Infrastructure Pvt. Ltd.**  
Surat – 395 002, Gujarat
- 4. Nangalia Group of Association**  
Surat – 329 303 Gujarat ... Appellant(s)

Versus

- 1. Gujarat Electricity Regulatory Commission**  
Ahmedabad – 380 009
- 2. Dakshin Gujarat Vij Co. Ltd.**  
Surat – 396 006, Gujarat ... Respondent(s)

Counsel for the appellant(s) : Ms. Meenakshi Arora  
Mr. Mohit D. Ram,  
Mr. Yogesh Mistry

Counsel for the respondent(s) : Mr. Somnath Padhan,  
Ms. Hemantika Wahi,  
Ms. Uttara Babbar,  
Ms. Pinky, Advocates and  
Mr. Satyendra R. Pandey, Legal  
Advisor, GERC, Resp. No.1

Mr. M.G.Ramachandran,  
Ms. Swapna Seshadri for  
DGVCL, Resp. No.2

Mr. Gunjan Kumar for P.I.Inds.

**Appeal No. 172 of 2008 & IA Nos. 233/08 and 234/08:**

**M/s. Gayatri Shakti Paper & Board Ltd.**

Plot No. 799/1, 3<sup>rd</sup> Phase,  
GIDC Vapi, Pin Code – 396 195  
Dist. Valsad

... Appellant(s)

Versus

**1. Gujarat Electricity Regulatory Commission**  
Ahmedabad – 380 009

**2. Dakshin Gujarat Vij Company Ltd.**  
Surat – 396 006, Gujarat

... Respondent(s)

Counsel for the appellant(s) : Mr. Mohit D. Ram,  
Mr. R. K. Tillan  
Ms. Meenakshi Arora

Counsel for the respondent(s) : Ms. Hemantika Wahi  
Mr. Somnath Padhan,  
Ms. Uttara Babbar, Ms. Pinky  
Advocates and  
Mr. Satyendra R. Pandey, Legal  
Advisor, GERC

Mr. M. G. Ramachandran  
Ms. Swapna Seshadri

Mr. Gunjan Kumar, Adv. for  
P. I. Inds

**Appeal No. 10 of 2008:**

- 1. Dakshin Gujarat Vij Company Ltd.**  
Corporate Office, Nana Varachha Road,  
Kapodara Char Rasta,  
Surat – 396 006, Gujarat
- 2. Madhya Gujarat Vij Company Ltd.**  
Corporate Office, Sardar Patel Vidhyut Bhavan,  
Race Course, Vadodara – 390 007, Gujarat
- 3. Uttar Gujarat Vij Company Ltd.**  
Corporate Office, Visnagar Road,  
Mehsana – 384 001, Gujarat
- 4. Paschim Gujarat Vij Company Ltd.**  
Corporate Office, Laxminagar,  
Nana Mava Road,  
Rajkot – 360 004, Gujarat
- 5. Gujarat Energy Transmission Corporation Ltd.**  
Corporate Office, Sardar Patel Vidhyut Bhavan,  
Race Course, Vadodara – 390 007  
Gujarat

... Appellant(s)

Versus

- 1. Gujarat Electricity Regulatory Commission**  
1<sup>st</sup> Floor, Neptune Tower,  
Opp. Nehru Bridge, Ashram Road,  
Ahmedabad – 380 009
- 2. The Chief Electrical Inspector**  
Udhyog Bhavan, Near GH-4,  
Gandhinagar – 382 011
- 3. M/s. Surabhi Infrastructure Services Ltd.**  
Plot No. 4209, Road No. 24,  
GIDC, Sachin,  
District Surat – 394 230
- 4. Ms/. Kadodara Power Pvt. Ltd.**  
Plot No. 210, Kadodara Char Rasta,  
Ta.: Palsana,  
District Surat - 394 327
- 5. M/s. Gayatri Shakti Paper & Boards Ltd.**  
Plot No. 799/1, Phase – III, GIDC, Vapi,  
District Valsad – 396 195
- 6. P. I. Industries Ltd.**  
Plot No. 237, GIDC, Panoli,  
District Bharuch – 394 001
- 7. M. A. Group Industrial Co-operative Services Society Ltd.,**  
Plot No. 11, Zainab Society,  
Near Shubham Park,  
Adajan Patiya, Surat – 395 009

**8. Shahlon Industrial Infrastructure Pvt. Ltd.**

3<sup>rd</sup> Floor, Dawer Chambers,  
Near Sub mail, Ring Road,  
Surat – 395 002.

**9. Nangaliya Group of Association**

Sr. No. 150, Plot No. 113, A-3,  
Mota Borasara, Taluka: Mangrol,  
Dist. : SURAT

... Respondent(s)

Counsel for the appellant(s) : Mr. M. G. Ramachandran,  
Mr. Anand K. Ganesan and  
Ms. Swapna Seshadri

Counsel for the respondent(s) : Mr. Mohit D. Ram,  
Ms. Meenakshi Arora and  
Mr. Yogesh Mistry, Mr. Manish  
Jajoo for Resp. Nos. 4 & 9

Mr. R. K. Tillan and Mr. Laliet  
Kumar for Resps. 3, 5 & 7

Ms. Uttara Babbar, Ms. Pinky  
Behera, Mr. Somnath Padhan  
and Ms. Hemantika Wahi, Ms.  
Sugeeta Singh, Advs.  
Mr. Satyendra R. Pandey, Legal  
Advisor, GERC, Resp. No.1

Mr. Habibur Rahman for  
Mr. S. Ahmed, Govt. Counsel

Mr. Ehtesham Hashmi for  
Mr. Saleem Ahmed for Resp.  
No.2

Mr. Gunjan Kumar and  
Mr. Rajeev M. Roy, Advs. for  
Resp. No.6, P. I. Inds.

Mr. I. J. Desai, Adv. For Resp.  
No.8

**Appeal No. 117 of 2009:**

**M/s. Shahlon Industrial Infrastructure Pvt. Ltd.**

3<sup>rd</sup> Floor, Dawer Chambers,  
Near Subjail, Ring Road,  
Surat – 395 002

... Appellant(s)

Versus

**1. Gujarat Electricity Regulatory Commission**

1<sup>st</sup> Floor, Neptune Tower, Opp. Nehru Bridge,  
Ashram Road,  
Ahmedabad – 380 009.

**2. Dakshin Gujarat Vij Co. Ltd.**

Corporate Office, Nana Varachha Road,  
Kapodra Char Rasta,  
Surat – 395 006

**3. Madhya Gujarat Vij Company Ltd.**

Corporate Office,  
Sardar Patel Vidhyut Bhavan,  
Race Course,  
Vadodara – 390 007 (Gujarat)

**4. Uttar Gujarat Vij Company Ltd.**

Corporate Office, Visnagar Road,  
Mehsana (Gujarat)

- 5. Paschim Gujarat Vij Company Ltd.**  
Corporate office, Laxminagar,  
Nana Mava Road, Rajkot (Gujarat)
- 6. Gujarat Energy Transmission Corporation Ltd.**  
Corporate Office, Sardar Patel Vidhyut Bhavan,  
Race Course,  
Vadodara – 390 007 (Gujarat)
- 7. Chief Electrical Inspector**  
Block No. 18, 6<sup>th</sup> Floor,  
Sector – 11, Gandhinagar
- 8. Surabhi Infrastructure Services Ltd.**  
Plot No. 4209, Road No. 24,  
GIDC Sachin, SURAT – 394 230 (Gujarat)
- 9. Kadodara Power Pvt. Ltd.**  
Plot No. 210, Kadodara Char Rasta,  
Taluka: Palsana,  
Dist. Surat – 394 327 (Gujarat)
- 10. Gayatri Shakti & Boards Ltd.**  
Plot No. 799/1, Phase – III,  
GIDC Vapi,  
Dist. Valsad – 396 195 (Gujarat)
- 11. P. I. Industries Ltd.**  
Plot No. 237, GIDC Panoli,  
Dist. Bharuch – 394 001 (Gujarat)
- 12. M. A. Group Industrial Co-op. Services Society Ltd.**  
Plot No. 11, Zainab Society,  
Near Shubham Park, Adajan Patiya,  
Surat – 395 009 (Gujarat)

**13. Nangalia Group of Association**

Sr. No.: 150, Plot No. 113, A-3,  
Mota Borasara, Taluka: Mangrol,  
Dist. Surat

... Appellant(s)

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Mr. I. J. Desai  
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Ms. Swapna Seshadri for  
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Ms. Hemantika Wahi  
Mr. Somnath Padhan  
Ms. Uttara Babbar, Ms. Pinky  
Behera  
Mr. S. R. Pandey, Legal  
Advisor, GERC

Mr. Gunjan Kumar, Adv. For  
Resp. No.11, P.I.Inds

**J U D G M E N T**

**Ms. Justice Manju Goel, Judicial Member**

**Introduction :**

This is a group of appeals challenging the order of the Gujarat Electricity Regulatory Commission (the Commission for short) dated 22.10.07 relating to the captive status of some power generation units and certain instructions given to the Chief Electrical



Inspector. One of the appeals, being No. 117 of 2009, challenges an order of the Commission dated 08.05.09 determining the jurisdiction of the Commission to go into the question of the captive status and in issuing instructions to the Chief Electrical Inspector.

02) A petition No. 860 of 2006 was filed before the Commission by M/s.Dakshin Gujarat Vij Co. Ltd. & Others seeking a direction from the Commission to the respondents 1, 2, 3, 4, 5, 7 & 8 therein namely, M/s. Surabhi Infrastructure Services Ltd., M/s.Kadodara Power Pvt. Ltd., M/s. Gayatri Shakti Paper & Boards Ltd., M/s.P. I. Industries Ltd., M/s. M. A. Group Industrial Co-operative Services Society Ltd, M/s. Shahlon Industrial Infrastructure Pvt. Ltd. and M/s.Nangaliya Group of Association to furnish the required information to the competent authority mentioned in Notification No. GHU-2003-53-GEI-11-2003-3898-K dated 22<sup>nd</sup> October, 2003 of Government of Gujarat and for taking action against persons violating the conditions for operation and maintenance of Captive Generating Plant (CGP) and utilization of power from CGP. This petition was against the respondent Nos. 1, 2, 7 & 8 therein for holding that they were not fulfilling the criteria of CGP. These respondents, 1, 2, 7 & 8 as well as respondent 3 therein are in appeal before us. M/s. Kadodara Power Pvt. Ltd, M/s. Surabhi Infrastructure Services Ltd., M/s. Shahlon Industrial Infrastructure Pvt. Ltd. and M/s. Nangalia Group of Association have filed appeal No.171 of 2008. M/s. Gayatri Shakti Paper & Boards Ltd.,

respondent No.3 before Commission, which was prevented from transmitting power to its share holder M/s Kherani Paper Mills Ltd. has filed appeal, being appeal No. 172 of 2008. In appeal No. 10 of 2008, filed by M/s. Dakshin Gujarat Vij Company Ltd. against the same order, an IA, being No. 7 of 2009, was filed by M/s. Shahlon Industrial Infrastructure Pvt. Ltd., respondent No.8 therein, praying that the issue whether the Commission had jurisdiction to decide the application filed before it be decided as a preliminary issue. This Tribunal passed an order on 05.03.09 disposing of the IA. The Tribunal observed that the question relating to jurisdiction of the Commission had not been raised before it and that it would be appropriate to give the Commission an opportunity to decide the issue. Accordingly we directed the State Commission to decide the question regarding jurisdiction after giving an opportunity to the counsel for the parties to make their submissions before it. We gave the Commission six weeks time to record its decision. The appeals were kept pending awaiting decision of the Commission. The Commission vide its decision dated 08.05.09 held that it did have the jurisdiction to decide the petition No. 860 of 2006 filed before it and to issue instructions to the Chief Electrical Inspector as was done by it. This decision of the Commission has come to be challenged by M/s. Shahlon Industrial Infrastructure Pvt. Ltd. in appeal No. 117 of 2009.

03) The appeal No. 10 of 2008 has been preferred by M/s.Dakshin Gujarat Vij Company Ltd. and other electricity distribution companies of Gujarat challenging the following findings of the Commission viz. (a) that the transferee of the share of the captive users could qualify as captive user and (b) that no license was required for CGPs to distribute, supply and deliver electricity to the captive users by use of dedicated transmission lines.

The legal framework :

04) Before going into the further details, it is necessary to briefly narrate the legal framework of the captive power generation under the Electricity Act 2003, hereinafter referred to as the Act.

05) Section 7 of the Act has removed the requirement of a license for establishing a generating station. Section 2(8) defines Captive Generating Plant as under:

*“2(8) “Captive generating plant” means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association;”*

06) Section 9 of the Act has allowed construction of captive generating plant and dedicated transmission lines. The owners of CGPs are also given right to open access for carrying electricity from the captive generating plant to the destination of its use. In exercise of powers conferred by section 176 of the Act the Central Government has made rules known as the Electricity Rules 2005. These rules prescribe certain qualifications for a generating plant to be treated as a captive generating plant. Since the entire arguments of the parties revolved around interpretation of Rule 3 of the Electricity Rules 2005 it will be appropriate to quote the entire rule:

**“3. Requirements of Captive Generating Plant.**

– (1) *No power plant shall qualify as a ‘Captive Generating Plant’ under section 9 read with clause (8) of section 2 of the Act unless-*

(a) *in case of a power plant –*

(i) *not less than twenty six per cent of the ownership is held by the captive user(s), and*

(ii) *not less than fifty one per cent of the aggregate electricity generated in such plant, determined*

*on an annual basis, is consumed for the captive use:*

*Provided that in case of power plant set up by registered co-operative society, the conditions mentioned under paragraphs (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:*

*Provided further that in case of association of person, the captive user(s) shall hold not less than twenty six per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one per cent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten per cent;*

*(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including-*

*Explanation – (1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and*

*(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent, of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant,*

#### *Illustration*

*In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen per cent of the equity shares in the company (being the twenty six per cent proportionate to Unit A of 50 MW) and not less than fifty one per cent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.*

*(2) It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is supply of electricity by a generating company.*

*Explanation – (1) For the purpose of this rule, -*

- (a) “annual basis” shall be determined based on a financial year;*
- (b) “captive user” shall mean the end user of the electricity generated in a Captive Generating Plant and the term “captive use” shall be construed accordingly;*
- (c) “ownership” in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;*

(d) *“Special Purpose Vehicle” shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity.”*

Facts leading to the appeals:

07) The distribution companies alleged before the Commission that the respondents in petition No. 860 of 2006 before it did not fulfill the requirement of captive generating plant (CGP for short) and therefore were liable to pay certain charges to the distribution licensees of the area. M/s. Surabhi Infrastructure Services Ltd., M/s. Kadodara Power Pvt. Ltd., M/s. M. A. Group Industrial Co-operative Services Society Ltd., M/s. Shalton Industrial Infrastructure Pvt. Ltd. and M/s. Nangalia Group of Association had set up group CGP and Gayatri Shakti Paper & Boards Ltd. had set up its own captive CGP.

08) The specific facts of these parties are as under:

(a) M/s. Surabhi Infrastructure Services Ltd.: It is a limited company incorporated under the Companies Act 1956 with a main objective of being a special purpose vehicle. Initially there were 07 members promoting the company but subsequently by issuing additional capital and transfer of shares the membership rose to 14. The Chief Electrical



Inspector, on the instructions of the Commission examined the share holding of these 14 members and the percentage of their consumption. The CEI also examined if the consumption of each of these members during 01.04.06 to 10.10.06 were in proportion to their share holding, within a variation not exceeding  $\pm 10\%$ . The Commission found that the members did not consume the electricity generated in proportion with the share holding of these members within the variation of  $\pm 10\%$ . For example, the member M/s. Kusum Dying and Printing Mill had a share holding of 9.10% and therefore was required to consume, according to the CEI, between 8.19% to 10.01% whereas its consumption was 13.49%. The Commission accordingly held that M/s. Surabhi Infrastructure Services Ltd. did not fulfill the criterion of proportionality of consumption as given in the second proviso to Rule 3(1) (a) (ii).

(b) M/s. Kadodara Power Pvt. Ltd. : It is also a special purpose vehicle set up by four individuals however, at the time of scrutiny by the Chief Electrical Inspector there were four members for the special purpose vehicle who held shares in proportion between 18 to 32%. Two of these members were found to be consuming in proportion to their share holding during September 2005 to October 2006. However, two members were found to consume disproportionately to their share holding.

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(c) M/s. Gayatri Shakti Paper & Boards Ltd.: This company set up the CGP. 27.14% of the equity in this company was held by M/s. Kherani Paper Mills Ltd.. Subsequently the share holding of M/s. Kherani Paper Mills Ltd. increased to 37.86%. M/s. Gayatri Shakti Paper & Boards Ltd. established a 11 kV dedicated transmission line for carrying about one MW of power to M/s. Kherani Paper Mills Ltd. The cable was subsequently removed as it could not get clearance from the Electrical Inspector. The Commission found that merely being share holder of M/s. Gayatri Shakti Paper & Boards Ltd. does not make M/s. Kherani Paper Mills Ltd. an owner of the CGP. The Commission held that M/s. Kherani Paper Mills Ltd. does not have any ownership right in the CGP and was not entitled to utilize power generated by M/s Gayatri Shakti Paper & Boards Ltd. as captive user. The Commission nonetheless held that M/s. Gayatri Shakti Paper & Boards Ltd. could sell power to M/s. Kherani Paper Mills Ltd. subject to Regulations made under Section 42(2) of the Act.

(d) M/s. Shalton Industrial Infrastructure Pvt. Ltd.: It is also a company registered to function as a special purpose vehicle. However, the three members during 09.11.05 to 10.10.06 did not consume the electricity in proportion to their share holding and therefore it was found that this CGP does

not fulfill the criterion of proportionality of consumption and share holding for certain period. It was also observed that this CGP had been energized without proper approval of the competent authority.

(e) M/s. Nangalia Group of Association: It was formed by four companies. For the period of consumption examined, the Commission found that the consumption of members from March 2006 to October 2006 was not in proportion to their share holding. This CGP was also found to have been energized without the approval of the competent authority.

09) The Commission held that consumption of electricity by the aforesaid companies be treated as sale by a generating company to a consumer through open access. The general finding of the Commission can be found in paragraph 12 of the impugned order which can be extracted as under:

*“[12] As noted earlier, in accordance with the Electricity Rules, 2005 notified by the Ministry of Power, the group CGPs are required to fulfill certain conditions. According to these rules, a group CGP may be an association of persons, a company or a co-operative society. The rules also envisage that the company set up for holding, constructing and*

*operating group captive called special purpose vehicle (SPV) will undertake no other business or activity.*

*The members of the group captive (as share holders) have to own atleast 26% of the share capital. Further they have to consume in aggregate not less than 51% of the power generated by the group CGP. In addition, the captive power or the captive generation has to be consumed by the members in proportion to their share capital with  $\pm 10\%$  variation. These conditions have to be met with on annual basis in each financial year. If these conditions are not met with, then the entire power supplied to the members will be treated as if it were supplied from a generating company. If these conditions are violated, two consequences will follow: [1] electricity duty will be payable on the whole of the generation consumed by the members; and [2] cross subsidy surcharge plus additional charges of open access as prescribed by the Commission will have to be paid on the entire consumption.”*

10) The distribution companies submitted before the Commission that once the CGP was set up the share holding was not

transferable and if any share was transferred the CGP would lose its character of being a CGP. This contention was rejected by the Commission on the basis of an analysis of the law regarding transfer of shares of the company and on the basis of the judgment of Supreme Court in case of *A.P. Gas Corporation Ltd. Vs. APERC reported in AIR 2004 SC 3090*. The distribution companies also raised the issue of dedicated transmission lines and the right of the CGPs to supply electricity through such dedicated transmission lines. The Commission held that the dedicated transmission lines were low voltage lines carrying power from CGPs to the end users and that no license was required for construction of dedicated transmission lines.

11) The Commission issued certain instructions to the Chief Electrical Inspector and made him responsible for monitoring the CGPs. The parts of the directions issued by the impugned order which are challenged in these appeals (except appeal No.117/09) are as under:

- “3. *He will have to ensure that the consumption of the members is proportionate to the share holdings on annual basis.*
4. ...
5. ...
6. ...

7. ...
8. ...
9. ...
10. *The persons owning the CGP shall always together own more than 26% of the share capital shown in Memorandum of Association and Article of Association.*
11. *If any person has not participated by way of shareholding / ownership in the CGP but is only a shareholder of the Company which has established the CGP, then the person is not entitled to utilize power generated by the CGP as captive power.*
12. ...
13. ...
14. *In view of above, it is found that the respondent no.4 & 5 fulfill the criteria of CGP. The respondents no.1, 2, 7 & 8 are not fulfilling the criteria of the CGP. The respondent no.3 (Gayatri Shakti Paper & Board Ltd.) is entitled to utilize power from the CGP for his own use. The use o power from the CGP of Gayatri Shakti Paper & Board Ltd. by M/s. Kherani Paper Mills Ltd. will not constitute captive use.*
15. ... ..”

The contention of the respective parties in the appeals:

12) The appellants in appeal No. 171 of 2008 contend that the special purpose vehicle is not an association of persons and therefore, for them it will be sufficient compliance of Rule 3 if they comply with the requirement of consumption of 51% of the total generation. According to them the Rule of Proportionality of consumption and ownership prescribed for association of persons is not attracted to the case of a special purpose vehicle. These appellants have also challenged the manner in which the proportionality of consumption and generation by the members of the special purpose vehicles has been assessed by the Commission.

13) M/s. Gayatri Shakti Paper & Boards Ltd., the appellant in appeal No. 172 of 2008, challenge the finding of the Commission that M/s. Kherani Paper Mills Ltd. which is a share holder of M/s. Gayatri Shakti Paper & Boards Ltd. cannot be a captive owner only by virtue of owning a share of 37.86% in M/s. Gayatri Shakti Paper & Boards Ltd.

14) In appeal No. 10 of 2008, M/s. Dakshin Gujarat Vij Co. Ltd and other distributing companies have raised the plea that once set up a captive generating plant cannot be transferred to another owner and in case such a transfer takes place the CGP will lose its

character. Further it is contended by these distributing companies that these CGPs need license for transmitting power to the captive users or the members of the special purpose vehicle. We will deal with these contentions one by one.

Decision with reasons:

Is a company formed as a special purpose vehicle an association of person?

15) The question has arisen because the word 'association of persons' is not defined anywhere in the Act or in the Rules. The proviso to Rule 3 (1)(a)(ii) makes two special conditions for cooperative societies and association of persons. If the CGP is held by a person it is sufficient that the person consumes not less than 51% of the aggregate electricity generated in such plant. In case the plant is owned by a registered cooperative society then all the members together have to collectively consume 51% of the aggregate electricity generated. In case the CGP is owned by an association of persons the captive users together shall hold not less than 26% of the ownership of the plant in aggregate and shall consume not less than 51% of the electricity generated in proportion to their shares of the ownership of the plant within a variation not exceeding  $\pm 10\%$ . A special purpose vehicle is a legal entity owning, operating and maintaining a generating station with no other business or activity to be engaged in by the legal entity.



Now if three companies need to set up the power plant primarily for their own use they can come together and form another legal entity which may itself be a company registered under the Companies Act. This company may set up a power plant. In that case the company formed by three different companies would become a special purpose vehicle. If a company which is a special purpose vehicle is one person then all that is necessary is that this company should consume 51% of the generation. However, if it is treated as association of persons apart from a condition of consuming minimum 51% of its generation the three share holders will also have to consume 51% of the generation in proportion to their ownership in the power plant. It is contended on behalf of some of the appellants before us who are special purpose vehicles that they are not an association of persons and accordingly it is only necessary for them to consume 51% of their generation collectively without adhering to the Rule of proportionality of consumption to their share. This does not appear to us to be the correct view. Section 2(8) of the Act, as extracted above, says that a captive generating plant may be set up by any person and includes the power plant set up by any cooperative society or association of persons. Mr. M. G. Ramachandran contends that going by this definition if the special purpose vehicle is not an association of persons it cannot set up a captive generating plant because the definition does not mention any person other than a cooperative society and association of person. There is small flaw in the

argument of Mr. M. G. Ramachandran in as much as the definition of captive generating plant is inclusive. In other words, the captive generating plant may be set up by any person including a cooperative society or association of persons. In other words, the person to set up a generating plant may be somebody who does not fulfill the description of either a cooperative society or association of persons. Nonetheless, reading the entire Rule 3 as a whole it does appear to us that a CGP owned by a special purpose vehicle has to be treated as an association of person and liable to consume 51% of his generation in proportion to the ownership of the plant. Every legal entity is the person. Therefore, the special purpose vehicle which has to be a legal entity shall be a person in itself. Any generating company or a captive generating company is also a person. The Rules specially deals with cooperative society. In an association of persons it has to be a 'person' because without being a person it cannot set up a captive generating plant. Therefore it will be wrong to say that since the special purpose vehicle is a 'person' in itself it cannot be covered by a definition of 'association of persons' and has to be covered by the main provision which requires the owner to consume 51% or more of the generation of the plant. In our view the definition is somewhat strange in as much as the term 'person' is said to include an 'association of persons'. One therefore cannot say that a CGP owner can be either a 'person' or an 'association of persons' a special purpose vehicle thus can be a 'person' as well as an 'association of persons'. A cooperative

society is an 'association of persons' in the sense that some persons come together to form a cooperative society. However, the moment an association or society is formed according to the legal provisions it becomes a person in itself. A special provision has been made permitting a cooperative society from consuming 51% collectively. The first proviso 3 (1)(a)(ii) itself suggests that a special privilege has been conferred on a cooperative society. Other persons who are also legal entities formed by several persons coming together have not been given such special privilege. Who can such association of persons be? Of the various legal entities comprehended as persons owning a CGP the special purpose vehicle does seem to fit the description of 'association of persons'. We fail to comprehend who other than a special purpose vehicle can be an 'association of persons'. None of the lawyers arguing before us gave example of 'association of persons' other than a special purpose vehicle. Therefore, we have no hesitation to hold that special purpose vehicle is an association of persons.

16) In case the special purpose vehicle was not required to maintain the rule of proportionality of consumption, the Central Government could have specifically mentioned the same just as it has done for a cooperative society. The Rule having not exempted a special purpose vehicle from the requirement of consuming 51% of the generation in proportion to the ownership of the persons forming the special purpose vehicle as has been done in the case of

cooperative society it will only be rational and logical to hold that a special purpose vehicle is also subject to the rule of proportionality of consumption to the percentage share of ownership as an 'association of persons'.

How proportionality of consumption has to be assessed:

17) The Electricity Rules 2005 have set down that not less than 51% of the aggregate electricity generated by a CGP, determined on an annual basis is consumed for captive use. However, in case there are more than one owner then there is a further rule of proportionality in consumption. In case the power plant is set up by a cooperative society the condition of use of 51% can be satisfied collectively by the members of the cooperative society. However, if it is an 'association of persons' then the captive users are required to hold not less than 26% of the ownership of the plant and such captive users are required to consume not less than 51% of electricity generated determined on an annual basis in proportion to the share of the ownership of the power plant within a variation not exceeding  $\pm 10\%$ . For example, if a CGP produces 10,000 kWh of electricity, 5100 kWh need to be consumed by the owners of CGP. In case there are three owners holding equal share, each one must consume  $1/3^{\text{rd}}$  of the 5100 kWh within a variation of  $\pm 10\%$  i.e. between 1530 kWh to 1870 kWh. It will not be proper to assess the proportionality of the consumption on 100% of the generation. The

Commission, however, appears to have calculated the proportion of use to 100% of the total consumption which may be more than 51% of generation. For example, M/s. Surabhi Infrastructure Services Ltd. has eight owners namely, M/s. Kusum Dying and Printing Mills Ltd., M/s. Suman Dying and Printing Mills Ltd., M/s. High Choice Processor Ltd., M/s. Vardhaman Dying & Printing Mills Ltd, M/s. Sachin Infrastructure Environment Ltd., M/s. Vimlon Dying & Printing Mills Ltd, M/s. Vividh Syntex Pvt. Ltd. and M/s. Sachin Private Water Supply Ltd. They hold shares in the ratio of 9.10%, 4.91%, 9.10%, 9.10%, 10.92%, 9.10%, 4.55% and 7.28% respectively. The total consumption figure against each of these owners has been given in a chart. Thereafter the percentage of their consumption during 01.04.06 to 10.10.06 has been calculated. On analysis of such calculation it has been found that M/s. Kusum Dying & Printing Mills Ltd. consumed 13.49% of the total consumption whereas the consumption should have been between 8.19% to 10.01%. It may be recalled that consumption could be within  $\pm 10\%$  of the same proportion as ownership. There is no column in the tabular statement given in page 77 of the impugned order showing what was the total production of the CGP at the relevant period. Nor is there any column showing what 51% of the total production would have been. The 51% of total generation only has to satisfy the rule of proportionality in consumption and ownership. The rest 49% of the generation could be sold to anyone including grid, Distribution Company and the CGP owners

themselves. Further such calculation has to be done on an annual basis i.e. for a financial year. The calculation for the other co-sharers of the CGP owned by M/s. Surabhi Infrastructure Services Ltd. is also equally flawed. It will not be fair to disqualify M/s. Surabhi Infrastructure Services Ltd. or the co-sharers of this special purpose vehicle as a CGP on the basis of such calculation relied upon by the Commission. The proportion of consumption of the special purpose vehicles namely M/s. Kadodara Power Pvt. Ltd., M/s. Shalton Industrial Infrastructure Pvt. Ltd. and M/s. Nangalia Group of Association, the appellants in appeal No. 171 of 2008 have also been assessed in the same manner. The Commission has clearly gone on a wrong path and the orders issued on such calculations of proportionality certainly cannot be sustained.

The next question to deal with is whether M/s. Kherani Paper Mills Ltd. is a captive user.

18) M/s. Kherani is a private limited company and holds 37.86% shares in M/s. Gayatri Shakti Paper & Board Ltd. Both the companies are engaged in manufacturing of paper board. The captive plant with a capacity of 400 MW is a co-generation type. M/s. Gayatri Shakti Paper & Board Ltd. is a consumer of the grid also. M/s. Gayatri Shakti Paper & Board Ltd. established a captive generating plant and dedicated line for carrying about 1 MW power to M/s. Kherani Paper Mills Ltd. The line laid was 11 kV cable connecting generating plant M/s. Gayatri Shakti Paper & Board

Ltd. to M/s. Kherani Paper Mills Ltd. situated at 1.5 km from M/s. Gayatri Shakti Paper & Board Ltd. However, on account of denial of clearance from Electrical Inspector for commercial operation the cable laid has been removed. The Commission has refused to recognise M/s. Kherani Paper Mills Ltd. as a captive user. The Commission held in the impugned order that the members of CGP should have ownership rights in the CGP through formation of association, cooperative society or a special purpose vehicle. The Commission held that merely being a share holder of M/s. Gayatri Shakti Paper & Boards Ltd. does not make M/s. Kherani Paper Mills Ltd. the owners of the CGP. It said that both the companies were separate entities. It said *“If company ‘A’ owns a CGP and if company ‘B’ owns share in ‘A’ and ‘B’ consumes power from ‘A’s’ CGP it does not constitute captive consumption. It would fall under the category of supply of power to non participating industries by a CGP holder.”* The Commission recognised newly added proviso permitting a captive generating plant to any consumer subject to Regulations made under sub-section 2 of section 42. Accordingly, the Commission held that supply to M/s. Kherani Paper Mills Ltd. can be permitted as a supply to a consumer subject to the Regulation under sub-section 2 of section 42. The question for determination therefore is whether M/s. Kherani Paper Mills Ltd. can be termed as a captive user.

19) The question raised by the Commission is certainly an interesting question, however, the question is no more *res integra* and the same has been dealt with in detail in appeal No. 32 of 2007 in Malwa Industries Ltd. Vs. Punjab State Electricity Regulatory Commission decided on 06.12.07. In the case of M/s. Malwa Industries Ltd., the company M/s. Malwa Industries had a share holder called the M/s. Malwa Cotton and Spinning Mills Ltd., which was also described as a sister concern. M/s. Malwa Cotton and Spinning Mills Ltd. had a share of 23.93% in M/s. Malwa Industries Ltd. M/s. Malwa Industries Ltd. owned a CPP. It asked for permission to supply power from its CPP to the sister concern namely M/s. Malwa Cotton and Spinning Mills Ltd. The prayer was declined by Punjab State Electricity Regulatory Commission. This Tribunal allowed the appeal, being No. 32 of 2007, arising out of this order. It was held by our judgment in appeal No. 32 of 2007 that the ownership of the captive users together should be atleast 26% and it is not necessary that each captive user should have more than 26% of the ownership. Secondly, it was held that though ownership of CPP is of the company but for the purpose of Rule 3 (1)(a), read with explanation 1(c) of the Rules ownership in relation to the CPP would mean equity share capital with voting rights of the users. The share capital of the captive users in total in that case was found much above 26% and therefore it was held that the sister concern was also a captive user. It was also held that no license was required to supply power to the captive user but that the same



should be subject to Regulations framed under sub-section 2 of section 42 of the Act namely those relating to use of open access. Accordingly, M/s. Kherani Paper Mills Ltd. etc. holding 37.86% of share capital in M/s. Gayatri Shakti Paper & Board Ltd. is a captive user. M/s. Kherani Paper Mills Ltd. does not need any license to receive power from the CPP held by M/s. Gayatri Shakti Paper & Board Ltd. As already mentioned above, open access through grid of the distribution licensees is available to M/s. Gayatri Shakti Paper & Board Ltd. but it is not necessary for them to do so. A dedicated transmission line can be erected from the CPP to the destination of its use including the premises of M/s. Kherani Paper Mills Ltd. The view taken by the Commission that supply from the CPP of M/s. Gayatri Shakti Paper & Board Ltd. etc. to M/s. Kherani Paper Mills Ltd. would amount to supply by the generating company to a consumer therefore cannot be upheld.

Can the ownership of the CGP be transferred after its set up?:

20) It is contended on behalf of the distribution licensees that the appellants in other appeals namely the CGP owners are not entitled to the benefit of the provisions of the Rules and the Act facilitating captive generation as they were not the persons who “set up” the generating plants. Reference can be made to section 2(8) of the Electricity Act which defines “captive generating plant” as a power

plant “*set up by any person to generate electricity primarily for his own use*”.

21) It is submitted that the words “set up” here are important and that the person who has set up the plant alone can own captive generating plant and not the person(s) who is transferee from the original owner(s). This proposition has not been accepted by the Commission in the impugned order. Nor does this proposition appeal to us. The Act nowhere prescribes that once set up by a person(s) a captive generating plant cannot be transferred to another owner. Nor does the Act say that on transfer of ownership the captive generating plant will lose its character of being captive despite fulfillment of all other conditions requiring it to be so. Section 9 of the Act which permits captive generation begins with the following words: *notwithstanding anything contained in this Act, the person may construct, maintain or operate a captive generating plant and dedicated transmission lines*”. Obviously the owner of a captive generating plant need not be one who constructs. Set up defined in section 2(8) has been made equal to “*construct, maintain or operate*” by the use of these words in section 9. As we view it a captive generating plant does not lose its character by transfer of the ownership or any part of the ownership provided the generating plant produces power primarily for the use of its owner(s). The Regulation quoted above lays down further restrictions on the user of the power generated by a CGP. If all the provisions of the Act

and Regulations governing captive generation and consumption from the CGP are specified a plant will be a CGP notwithstanding the fact that the plant at present is not owned by the person who originally set up the plant.

Is any license required for the CGPs to transmit power from the CGP to the members of special purpose vehicle / the captive user?

22) M/s. Kherani Paper Mills Ltd. claims to be a captive user and not a third party. In case M/s. Kherani Paper Mills Ltd. can be treated to be a captive user there is no question of any license because consumption by it will be equal to consumption by the owner of the captive generating plant. In case it is treated to be merely a consumer and not the owners of the CGP section 9 will come to the aid of M/s. Gayatri Shakti Paper & Board Ltd. which by a proviso exempts the captive generating plant from needing a license for supply to any consumer or to any licensee. The proviso which was added vide an amendment of 15.06.07 is as under :

23) Section 9 of the Act exempts a CGP from the requirement of a license for supplying to a licensee or a consumer. The section is extracted below:

*“9. Captive generation.- (1) Notwithstanding anything contained in this Act, a person may*

*construct, maintain or operate a captive generating plant and dedicated transmission lines:*

*Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company:*

*Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.*

*(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:*

*Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be*

*determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:*

*Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission”*

24) Even before the second proviso to section (1) was brought in, in June 2007, the section granted the owner of a CGP the right to open access for the purpose of carrying electricity from the CGP to the destination of its use. Section 9 also permitted the CGP owner to have dedicated transmission lines. Even if, M/s. Kherani Paper Mills Ltd., is not the owner of the CGP it can get a supply from the CGP of M/s. Gayatri Shakti Paper & Board Ltd. as a consumer and for such a supply no license is required by the CGP. The newly added proviso, quoted above, requires that a supply to a consumer although without a license would be subject to Regulation for open access. In an earlier judgment in appeal No. 139 of 2007 titled M/s.Nalwa Steel & Power Ltd. Vs. Chhattisgarh State Electricity Board & Ors. Decide on 20.05.09 we expressed the view that open access regulations are required to be followed when open access is availed of and that if no open access is availed of as not necessary or because no existing network is available the captive generating company cannot be prevented from supplying to a consumer by

laying its own dedicated line. The following part from our earlier judgment can be quoted with profit:

*“...When a captive generating company supplies to a consumer, as permitted by the second proviso to Section 9(1) of the Act, such supply would be subject to the regulation for open access [Section 42(2) of the Act]. Obviously such open access regulations are required to be followed when open access is availed of. If no open access is availed of, as not necessary or because no existing network is available, it cannot be said that the captive generating company cannot supply under the enabling provision because the generating company has laid its own lines and the existing transmission utility has not laid its lines so far. If the term ‘subject to’ is interpreted to mean ‘only under’ it may lead to absurd result. For example, if the consumer is situated at a close proximity to the captive generating station and the existing network is at a distance of several kilometers, the captive generating company will then have to route the electricity first to the existing lines and then back to the consumer and pay the charges for using open access. The legislature, we can safely conclude, meant that if a captive generator wants to supply electricity to a consumer, it will be entitled to use the lines of any transmission or distribution licensee on*

*complying with the relevant rules and on payment of the required charges and not that even if the existing lines are too far away, the generating company cannot directly supply to a consumer.*

*12) The Act permits a captive generating company and a generating company to construct and maintain dedicated transmission lines 'Dedicated Line' as per Section 2(16) means any electric supply line for point to point transmission which connects electric lines or electric plants to "any transmission lines or sub stations, or generating stations or load centers". Load centre, it is said is conglomeration of load and not an individual industry/factory as consumer. According to Mr.Ramachandran, advocate for the Commission, a load centre cannot be a consumer because if the two could be the same, Section 10 would permit a generating company to reach a consumer through such dedicated line which will amount to distribution which is not permissible except with a license. We are not in agreement with Mr.Ramachandran. A dedicated line can go, admittedly, from the captive generating plant to the destination of its use. Such destination, i.e. the point of consumption, has to be covered by the term 'load centre'. The consumption point is neither electricity transmission line nor substation*

*or generating station. Hence, the only way such a line can be termed dedicated transmission line when we treat the point of consumption as a 'load centre'. In other words, a single consumer can be a load centre. A dedicated transmission line can go from the captive generating station to a load centre and such load centre can also be a consumer. Section 9 of the Act with the amendment of 2007 specifically provides that to supply to a consumer, the captive generating station shall not need a license.*

*13) The Act, thus, does envisage transmission and supply of electricity from a captive generating plant to a consumer – although subject to the provisions of the Act and Rules and Regulations made thereunder. ...”*

25) Hence we can conclude that M/s. Gayatri Shakti Paper & Boards Ltd. does not need any license for supplying power to M/s.Kherani Paper Mills Ltd.

26) Appeal No. 117 of 2009 is not pressed.

27) In view of our findings, as above, the appeal Nos. 171 and 172 of 2008 succeed and appeal No. 10 of 2008 and appeal No. 117 of 2009 fail. We dismiss appeals No. 10 of 2008 and 117 of 2009 and allow appeal Nos. 171 and 172 of 2008 and set aside the impugned



order to the extent indicated in this judgment. We hold that M/s. Kherani Paper Mills Ltd. is a captive user and M/s. Gayatri Shakti Paper & Boards Ltd. does not need any license to transmit power to M/s. Kherani Paper Mills Ltd. either through open access or by a dedicated transmission line. The CGP owners including the special purpose vehicle are liable to maintain the proportionality between consumption and ownership as an 'association of persons'. The Commission will determine the proportionality of consumption and ownership afresh within 60 days hereof in the light of our discussion in paragraph 17 above and issue appropriate direction following such re-determination.

28) With this all interlocutory applications also stand disposed of.

29) Pronounced in open court on this **22<sup>nd</sup> day of September, 2009.**

**( H. L. Bajaj )**  
**Technical Member**

**( Justice Manju Goel )**  
**Judicial Member**

REPORTABLE / NON-REPORTABLE