

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Shri Bhanu Bhushan, Member**
2. **Shri R. Krishnamoorthy, Member**

Petition No. 9/2003

In the matter of

Payment of outstanding dues by APTRANSCO to GRIDCO for the period from January 2001 to July 2001.

And in the matter of

GRID Corporation of Orissa Ltd.

.... **Petitioner**

Vs

1. **Transmission Corporation of Andhra Pradesh**
2. **Andhra Pradesh Generation Corporation Ltd., Hyderabad**
3. **Orissa Hydro Power Corporation Ltd, Bhubaneswar** **Respondents**

The following were present:

1. Shri R.K. Mehta, Advocate, OPTCL
2. Ms. Shobhit Jain, Advocate, OPTCL
3. Shri Raja S. Biswas, Advocate, APTRANSCO
4. Shri K. Gopal Choudhary, Advocate, APGENCO
5. Shri Subhash Misra, Advocate, OHPC
6. Shri P.K. Sahoo, OHPC
7. Shri S.K. Sarangi, OHPC

ORDER

(DATE OF HEARING: 6.9.2007)

This application was made on 7.3.2003 under clause (h) of Section 13 of the Electricity Regulatory Commissions Act, 1998 (the 1998 Act) for arbitration or adjudication of dispute arising out of non-payment of wheeling charges amounting to Rs.3.41 crore with interest @ 24% per annum from the date of filing of the present application for transmission of electricity from Eastern Region generating stations to Transmission Corporation of Andhra Pradesh Ltd (APTRANCO), the first respondent, during January 2001 to July 2001, using the transmission system owned at the relevant time by Grid Corporation of Orissa Ltd (GRIDCO).

2. During pendency of the present application, the 1998 Act has been repealed by the Electricity Act, 2003 (the 2003 Act) with effect from 10.6.2003. However, the provision analogous of clause (h) of Section 13 of the 1998 Act are contained in clause (f) of sub-section (1) of Section 79 of the 2003 Act. The parties have, therefore, addressed the question with reference to the provisions of the 2003 Act.

3. In pursuance of the provisions of the 2003 Act and the Orissa Electricity Reforms Act, 1995 the erstwhile GRIDCO was reorganized by the State Government with effect from 1.4.2005. As a consequence of this reorganization, Orissa Power Transmission Corporation Ltd (OPTCL) has been entrusted with the duty and responsibility of transmission of electricity within the State of Orissa and the transmission assets in the State are now owned by it. In this view, OPTCL has substituted GRIDCO as petitioner. In the present order the petitioner refers to GRIDCO as well as OPTCL.

4. At the instance of the parties, AP Generation Corporation Ltd (APGENCO) and Orissa Hydro Power Corporation Ltd (OHPC) have also been impleaded as second and third respondents respectively.

5. The petitioner's claim is that during the period January 2001 to April 2001 and July 2001, the first respondent imported power from NTPC's generating stations located in the Eastern Region via Western Region by utilizing the petitioner's transmission system up to Budhipadar. The petitioner has averred that wheeling charges bills amounting to Rs.2.46 Crore (the principal amount) had not been released by the first respondent despite the efforts made at the various levels. The break-up of the outstanding dues, as claimed by the petitioner is as under:

Principal amount	:	Rs.2.46 crore
Delayed Payment Surcharge (D.P.S) (@2% per month):		Rs.0.95 crore
Total	:	Rs.3.41 crore

6. It has been stated that during pendency of the present application, the first respondent availed of the transmission system owned by the petitioner during April 2003 to July 2003, October 2003, and February 2004 to April 2004 for which also no payments were made. As a result, the amount, according to the petitioner, increased to Rs.5.071 Crore as per details given below:

Principal amount	:	Rs 2.708 crore
D.P.S. (@2% per month)	:	Rs 2.363 crore
Total	:	Rs 5.071 crore

7. The petitioner has not amended its application filed during March 2003 and as such we will be restricting to the claim as per the original application.

8. The first respondent is stated to have acknowledged that an amount of Rs.2.46 crore as principal amount was due to the petitioner, but sought to adjust these dues against the dues of the second respondent amounting to Rs.4.29 crore reportedly payable by the third respondent for the power purchased by the State of Orissa (erstwhile OSEB) from Muchhkund Hydro Electric Project, a joint venture of the States of Orissa and Andhra Pradesh. The petitioner, however, did not agree to the adjustment since its claim is against the first respondent exclusively, an entity separate from the second respondent. It is stated by the petitioner that pursuant to enforcement of power sector reforms in the State of Orissa, the assets and liability of

Muchhkund Hydroelectric Project stood transferred to Orissa Hydro Power Generation Corporation Ltd (OHPGCL), the third respondent herein. According to the petitioner, the dues sought to be adjusted, pertain to the period prior to reorganization of Orissa State Electricity Board (OSEB), and, as such, the liability, if any, stood transferred to the third respondent after enforcement of power sector reforms in the State.

9. The Commission by its order dated 28.3.2006 had constituted a one-Member Bench with Shri A.H. Jung as the Presiding Member to make appropriate recommendations to the Commission for resolution of the dispute. The Bench submitted its recommendations by its order dated 6.2.2007.

10. Before the Bench the first respondent took a preliminary objection to question jurisdiction of the Commission to entertain the application. The Bench did not express any opinion on the preliminary objection because it felt that it was beyond the terms of its reference and, therefore, left the question to be determined by the Commission. We will consider this as a preliminary issue in the later part of this order.

11. At some stage the petitioner agreed for the adjustment of the principal amount of dues claimed by the petitioner against the dues said to be payable by the third respondent to the second respondent provided the amount was reimbursed to it by the third respondent. The Bench in its recommendations accepted the plea of the first respondent for the adjustment. Under these circumstances, the Bench did not recommend payment of interest or late payment surcharge. The petitioner was, however, granted liberty to claim the amount from the third respondent through the

intervention of the State Government of Orissa since the petitioner and the third respondent are owned and controlled by that Government.

12. By order dated 28.2.2007, a copy of the recommendations made by the Bench was sent to the parties for their response.

13. The petitioner has contested the preliminary objection of the respondents as regards the jurisdiction of the Commission to entertain the application. The petitioner has objected to the recommendation made by the Bench in regard to adjustment of dues of second respondent stated to be payable by the third respondent since the parties involved in the present litigation, being the companies incorporated under the Companies Act are independent legal entities and each of them has its own rights and liabilities under the law. Under these circumstances, the petitioner has reiterated its claim for a sum of Rs.2.46 crore as the principal amount and has also claimed the delayed payment surcharge for non-payment of dues payable since 2001.

14. The first respondent in its reply has reiterated that the dispute raised in the application is outside the jurisdiction of the Commission since it involves payment of dues to and by the utilities owned by the State Governments and are under the regulatory superintendence of the concerned State Regulatory Commissions. It has been stated that the jurisdiction of the Commission under clause (f) of sub-section (1) of Section 79 of the 2003 Act is limited to adjudication of disputes involving generating companies or the transmission licensees which are owned or controlled by the Central Government and are limited to the tariff issues or issues arising in relation to grant of licence. It is further stated that the dispute raised in the application can be resolved only through the State Governments in question in

appropriate civil forum, the steps for which had already been initiated. In essence, the first respondent has argued that the Commission being a creature of the statute cannot travel beyond the statute while exercising its powers and thus cannot invoke jurisdiction and/or proceed to adjudicate the *lis* inter-parties. The first respondent has also raised the question of limitation, by alleging that the present application is barred by limitation.

15. The second respondent in its affidavit has also raised the question of jurisdiction of the Commission to adjudicate upon or otherwise entertain the disputes raised in the application. It is, however, inclined to accept the recommendations of the Bench in case the Commission finds that it has the jurisdiction to adjudicate upon the dispute.

16. The third respondent has stated that no dues are payable by it to the second respondent and, therefore, the question of any adjustment in this regard should not arise.

17. Before reverting to the question of jurisdiction which is the major issue, it may be appropriate to deal with certain other preliminary issues raised by the first respondent. The first respondent has stated that the application is not maintainable since it is barred by limitation.

18. The first respondent has made no efforts to elaborate on the issue raised. This was not even argued at the hearing. However, we are considering the issue of limitation raised in the affidavit filed on behalf of the first respondent. We do not find any merit in the objection. Apart from the fact that neither the 1998 Act, nor the 2003

Act provides for any limitation period for making application for adjudication or arbitration of disputes, we are satisfied that the present application has been made within a time considered to be reasonable. The dispute raised pertains to the dues for the period January 2001 to July 2001. The application was made in March 2003. During the period prior to making of the application, the petitioner is stated to have pursued the matter with the first respondent. The petitioner has pursued the matter with due diligence. The question of delay or limitation in the circumstances does not arise.

19. The first respondent has also stated that the dispute can be resolved through the State Governments in an appropriate civil forum and the steps for which were reportedly initiated. We are constrained to point out that the State Governments in the present case have failed to rise to the occasion. The Commission afforded umpteen number of opportunities to the State Governments to enable them to amicably resolve the dispute and for this purpose, hearing was adjourned on eight occasions. In fact, this is the reason for the delay in disposal of the present application. Though meetings certainly took place on 4-5 occasions at Governmental level, but no fruitful result has been achieved. In this manner, lot of energy and effort has been wasted, without arriving at any conclusion near the settlement of disputes. Even now, the first respondent in its affidavit has stated that the steps were initiated by the state Government, but the steps so taken have not been brought to our notice. In the circumstances, we are convinced that the resolution of dispute cannot be left to the State Governments.

20. Next we consider the primary issue of jurisdiction. Learned Counsel for the first and second respondents vehemently argued the point of jurisdiction. The

learned counsel submitted that the Commission as a forum of limited jurisdiction, could not entertain disputes beyond what has been provided in clause (f) sub-section (1) of Section 79 of the 2003 Act. It was argued that the learned counsel that the relevant provision, [Clause (f)] is to be construed narrowly since otherwise it will affect the jurisdiction of the civil courts, established for adjudication of civil disputes under the Constitutional scheme. It was also argued that the direction for payment of dues claimed by the petitioner was outside the scope of clause (h) of sub-section (1) of Section 79 of the Act.

21. The learned counsel for the petitioner sought to establish that the dispute was within the jurisdiction of the Commission. He relied upon the judgements of the Hon'ble Supreme Court in K. Ramanatha vs. State of Tamil Nadu [(1985) 2 SCC 116] and Grindlays Bank Ltd vs Central Government Industrial Tribunal [1980 (Supp) SCC 420] to support the contention that the issue raised in the application is incidental to power of regulation of inter-State transmission of electricity, by the Commission.

22. Before proceeding to examine the issue, it is necessary to have notice of some of the relevant provisions of the 2003 Act. Section 79 of the 2003 Act defines the functions of the Commission. Sub-section (1) of Section 79 lays down that the Commission shall discharge, inter alia, the following functions, namely:

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity ;

(d) to determine tariff for inter-State transmission of electricity;

.....

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

.....

23. Section 175 of the Act further lays down that the provisions of this Act are addition to and not in derogation of any other law for the time being in force.

24. In view of the provisions of Section 175 of the 2003 Act, we do not find any merit in the contention of the learned counsel for the respondents that the provisions of sub-section (1) of Section 79 are to be narrowly interpreted since otherwise it would affect the jurisdiction of the civil courts. The remedy provided under clause (h) of sub-section (1) of Section 79 of the 2003 Act is in addition to the remedies available to the parties under any other law. The jurisdiction conferred on the Commission is concurrent with the jurisdiction of the civil court. The exercise of the jurisdiction by the Commission, does not in any manner oust jurisdiction of the civil courts to adjudicate upon the dispute. It is left to the parties to choose the forum for redressal of their grievances. The application cannot be thrown out merely on the ground that the petitioner has sought to avail of an alternative remedy. Therefore, this contention of the learned counsel by the respondents is to be rejected.

25. It is undoubtedly true that normally, the function of adjudication of disputes is vested in the courts and the Constitution of India provides for establishment of a well-defined hierarchical judicial system. However, the courts are not the exclusive instrumentalities for adjudication of disputes. The Parliament by law has created a large number of quasi-judicial bodies (including the Commission) for discharge of

adjudicatory functions and for settlement of disputes, in view of expansion in governmental operations. The reasons for establishment of quasi-judicial bodies are not far to seek. If all the disputes arising out of the new legislations are to be adjudicated exclusively by the courts, they will be over-loaded with work. This will make the matters worse as the courts are already faced with mounting backlog of cases. The quasi-judicial bodies apart from being quicker and cheaper means of dispute settlement are less formal and have developed expertise into the particular fields of adjudication. These seem to be the objectives behind enactment of clause (f) of sub-section (1) of Section 79 of the 2003 Act. When the matter is viewed against this background, view taken by the Commission in the preceding paras gets reinforced.

26. Clauses (c) and (d) of sub-section (1) of Section 79 of the 2003 Act entrust the Commission with functions of regulation of inter-state transmission of electricity and determination of tariff therefor. The term "inter-state transmission system" has been defined under sub-section (36) of Section 2 of the 2003 Act as under:

"(36) "the inter-State transmission system" includes ----

- (i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;
- (ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;
- (iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility".

27. As has been noted above, the petitioner's transmission system was utilized for conveyance of power from the generating stations of NTPC located in the Eastern Region to the first respondent in Southern Region. The utilization of this

transmission system was necessary for transmission of power to the first respondent. So long as the transmission system owned by the petitioner was being used, it formed part of the inter-State transmission system in terms of clause (ii) of sub-section (36) of Section 2 of the 2003 Act, the regulation of which and determination of tariff for which is exclusively within the jurisdiction of the Commission in terms of clauses (c) and (d) of sub-section (1) of Section 79 of the 2003 Act. Therefore, there is no force in the first respondent's argument that the matter falls within the jurisdiction of the State Regulatory Commissions.

28. The dispute raised in the application relates to the year 2001 when the Commission was already functioning. The Commission in exercise of its powers conferred under Section 28 of the 1998 Act (corresponding to Section 61 of the 2003 Act) had laid down the terms and conditions for determination of tariff for generation and inter-state transmission of electricity under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001, (hereinafter referred to as "the 2001 regulations"). Clause 4.9.2 of these regulations provided as under:

"4.9.2 Wheeling through SEB/State Utility system:

4.9.2.1 In case of wheeling of power through SEB/state utility system, the importing utility and the wheeling utility shall endeavour to mutually agree on wheeling charges as well as transmission losses. In such cases, approval of the Commission shall not be required. However, the wheeling utility shall not deny use of its system merely on the basis of non-agreement on wheeling charges.

4.9.2.2 If the parties are not able to agree on the wheeling charges, the Contract Path method shall be used for calculation of wheeling charges. Monthly transmission charges of this path would be payable in proportion to contracted power vis-à-vis SIL of the lines in the contracted path. The monthly transmission charges for the contract path shall be calculated as per the provisions of this notification.

4.9.2.3 In case, wheeling utility makes some special arrangement (such as backing down cheaper generation) to facilitate exchange, the verifiable opportunity cost or the charges calculated as per contract path method, whichever is higher, shall be payable to the wheeling utility. In any case, the wheeling charges shall not exceed the charges corresponding to a new transmission line of adequate capacity along the contracted path. The Member Secretary, REB of the region in which wheeling utility is located, shall calculate wheeling charges by applying the principles enumerated above.

4.9.2.4 The incremental transmission losses on account of wheeling shall be payable in kind i.e. the transmission losses shall be compensated by an equivalent amount of energy charged to the importing utility. In case of non-agreement on the issue of transmission losses, the studies to determine incremental transmission losses in the wheeling utility system shall also be carried out by the Member Secretary of the region concerned.

4.9.2.5 The Commission may be approached in case of disagreement with the decision of Member Secretary, REB. Pending the final order of the Commission, decision of the Member Secretary, REB shall be implemented on provisional basis.”

29. From the above it would be seen that for wheeling of power through the transmission system owned by a state utility (the petitioner in the present case), the importing utility and wheeling utility are required to make efforts in the first instance to agree on the wheeling charges and the transmission losses. When such an agreement is arrived at, the approval of the Commission was not required. In such a situation, the wheeling charges agreed upon by the wheeling utility and the importing utility are the charges deemed to have been approved by the Commission.

30. In the case on hand we find that the petitioner (the wheeling utility) and the first respondent (the importing utility) had agreed on the wheeling charges payable for use of transmission system of the petitioner. Therefore, the wheeling charges agreed upon between them are the charges payable under the Commission's order. Accordingly, the first respondent should be deemed to have

become liable to pay the charges agreed upon under the order of the Commission.

31. The contention of the respondents is that the Commission cannot adjudicate upon the dispute, since it does not fall within the ambit and scope of clause (f) of sub-section (1) of Section 79 of the 2003 Act. The contention of the respondents does not commend to us. Such an interpretation would render clause (f) of sub-section (1) of Section 79 otiose or unnecessary appendage. We are unable to visualize a situation which may involve adjudication or arbitration of disputes limited to determination of tariff. So long as tariff is not determined, the question of arising any dispute in connection therewith should not arise. After determination of tariff, the remedies of review under Section 94 or of appeal under Section 111 of the 2003 Act are available to the person aggrieved. In both these situations clause (f) of sub-section (1) of Section 79 of 2003 Act does not come into play, and nothing remains to be adjudicated or arbitrated by the Commission. In fact, in our opinion, the disputes of the kind raised in the application at hand are to be covered under the adjudication or arbitration clause.

32. It is established law that a statutory power carries with it all other powers which are incidental to or consequential upon exercise of such power to make exercise of power effective.

33. In *Grindlays Bank Ltd Vs Central Government Industrial Tribunal and others* 1980 (Supp) SCC 420 decided by the Hon'ble Supreme Court, and relied upon by the learned counsel for the petitioner, the question involved was whether the Central Government Industrial Tribunal constituted under the Industrial Disputes Act had the

power to set aside an ex parte order. The Hon'ble Supreme Court held that the Tribunal should be considered to be invested with such incidental or ancillary powers unless there is an indication in the statute to the contrary. The relevant observations of the Hon'ble Supreme Court are extracted hereunder:

“6. We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder_giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary.”

34. A similar view is expressed in Union of India and another Vs Paras Laminates (P) Ltd (AIR 1991 SC 696), the relevant part of which is extracted hereunder:

“8. There is no doubt that the Tribunal functions as a court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. The powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on Interpretation of Statutes (11th edn.) “where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution”

35. It may also be of advantage to refer to the judgement of the Hon'ble Supreme Court in Khargram Panchayat & Others v. State of West Bengal & Others [(1987) 3

SCC 82], wherefrom following observations of the Hon'ble Supreme Court are pertinent :-

"It is well accepted that the conferral of statutory powers on these local authorities must be construed as impliedly authorising everything which could fairly and reasonably be regarded as incidental or consequential to the power itself. See " De Smith's Judicial Review of Administrative Action, 4th edn., p.95, HWR Wade's Administrative Law, 5th edn., p.217, Craies on Statute Law, 6th edn., p.276, Attorney General v. Great Eastern Railway, Baroness Wenlock v. River Dee Co. De Smith in his celebrated work Judicial Review of Administrative Action, 4th edn., at p.95 puts the law tersely in these words :

The House of Lords has laid down the principle that "whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.

This principle was enunciated by Lord Selborne in Attorney General v. Great Eastern Railway, in these words :

The doctrine of ultra vires ought to be reasonably and not unreasonably, understood and applied and whatever may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.

These words have been quoted by Professor Wade in this monumental work Administrative Law, 5th edn., at p.217 and also by Craies on Statute Law, 6th edn., at p.276. Craies also refers to the observations of Lord Watson in Baroness Wenlock v. River Dee Co., to the effect :

Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which, the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions."

36. The Hon'ble Supreme Court in State of Karnataka vs. Vishwabharathi House Building Co-operative Society and others [(2003) 2 SCC 412] *ibid*, had held that the provisions of the enactments providing for establishment of the special tribunals (Consumer Protection Act in the case before the Hon'ble Court) are required to be

interpreted as broadly as possible. On such an interpretation, the Hon'ble Court held that the courts or tribunals must be held to possess power to execute their orders or implement their orders, even if it has not been so provided in the statute under which they are functioning. The relevant observations of Hon'ble Supreme Court are extracted hereunder:

“59. It is well settled that the cardinal principle of interpretation of statute is that courts or tribunals must be held to possess power to execute their own order.

60. It is also well settled that a statutory tribunal which has been conferred with the power to adjudicate a dispute and pass necessary order has also the power to implement its order. Further, the Act which is a self-contained code, even if it has not been specifically spelt out, must be deemed to have conferred upon the Tribunal all powers in order to make its order effective.”

37. The Hon'ble Supreme Court while arriving at the above conclusion has referred to the judgement of the Guwahati High Court in Arabinda Das Vs State of Assam [AIR 1981 Gau 19 (FB)] as under:

“We are of firm opinion that where a statute gives a power, such power implies that all legitimate steps may be taken to exercise that power even though these steps may not be clearly spelt in the statute. Where the rule-making authority gives power to certain authority to do anything of public character, such authority should get the power to take intermediate steps in order to give effect to the exercise of the power in its final step, otherwise the ultimate power would become illusory, ridiculous and inoperative which could not be the intention of the rule-making authority. In determining whether a power claimed by the statutory authority can be held to be incidental or ancillary to the powers expressly conferred by the statute, the court must not only see whether the power may be derived by reasonable implication from the provisions of the statute, but also whether such powers are necessary for carrying out the purpose of the provisions of the statute which confers power on the authority in its exercise of such power.”

38. From the above judgements of the Hon'ble Supreme Court it undoubtedly also follows that the Commission, in exercise of its functions of regulation of inter-State transmission of electricity and determination of tariff of inter-state transmission of electricity, and adjudication of disputes has the power to adjudicate upon the

disputes regarding payment or non-payment of dues by any of the utilities since exercise of such power is considered incidental or consequential to the exercise of power of determination of tariff for inter-State transmission of electricity and adjudication of disputes arising therefrom. Without such a power the functions assigned under the 2003 Act cannot be effectively performed by the Commission. Thus we reject the preliminary objection of the respondents on the question of jurisdiction.

39. Having found that the Commission has jurisdiction to adjudicate upon the dispute raised in the application, we proceed to consider the recommendations made by the Bench. The Bench in its order dated 6.2.2007, has recommended that the principal amount claimed by the petitioner should be adjusted against the dues which the third respondent owes to the second respondent. The Bench while so recommending has stated that the petitioner and the third respondent are companies owned by Government of Orissa and, therefore, dues of the petitioner be set off against the dues payable by the third respondent. The Bench has further observed that the petitioner was entitled to claim the amount due from the third respondent. In the view of the Bench, the *inter-se* settlement between the petitioner and the third respondent could be arrived at through intervention of the State Government as owner of both the companies.

40. The petitioner in its response has objected to this particular recommendation of the Bench. According to the petitioner, it is a separate and distinct legal entity from the third respondent and therefore, its dues cannot be set off against the dues payable by the third respondent to any person. The third respondent has denied its liability towards the second respondent.

41. We have very carefully considered this aspect, in the light of the recommendation made by the Bench. We commend and appreciate the earnestness of the Bench while making this recommendation. The Bench had perhaps the laudable objective that by so recommending the dispute will get a quietus. However, as already noted, the third respondent has denied its liability to pay any dues to the second respondent. Thus, the hypothesis based on which the recommendation was made is no longer valid, and the petitioner will not be able to recover the amount from the third respondent. The objection to the recommendation of the Bench raised by the petitioner are to be understood in this background.

42. In our effort to find the validity of the petitioner's objection, we have to consider the provisions of the Code of Civil Procedure (the Code). Even though the Code has not been made applicable to the proceedings before the Commission in its entirety, still the Commission, being a quasi-judicial authority is required to determine matters coming up before it in a judicial manner, and according to general principles of law and rules of natural justice. Therefore, we may have to be guided by the provisions of the Code on the established principles of law. Rule 6 of Order VIII of the Code relates to the set-off of claims. Sub-rule (1) of Rule 6 provides as under:

“6. Particulars of set-off to be given in written statement .—(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

.....

43. Under Rule 6 of the Code, a number of illustrations are given. We, for our purpose, reproduce illustrations (a) and (b) as below:

Illustrations

“(a) A bequeaths Rs.2000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B’s effects. C pays Rs.1000 as surety for D; then D sues C for the legacy. C cannot set-off the debt of Rs.1000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs.1000.

(b) A dies intestate and in debt to B. C takes out administration to A’s effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A”

44. From the above it would be seen that one of the requisites of a set-off given in Order VIII, Rule 6 of the Code is that the parties must fill the same character in both the cases, that is, cases involving claim and set-off. Therefore, it is essential that both claim and the set-off must be for dues from and to the same parties. This position further gets strengthened from illustrations (a) and (b) reproduced above.

45. By following the principle of law laid down in Rule 6, it cannot be accepted that the dues payable by the third respondent to the second respondent can be set off against the petitioner’s claim because the parties in such a situation do not fill the same character, particularly when the dues stated to be payable by the third respondent pertain to the period prior to re-organisation of OSEB.

46. The matter can be considered from another angle in the light of provisions of the Companies Act, 1956. Under Section 426 of the Companies Act, in the event of a company being wound up, the present and past members (shareholders) are liable to contribute to the assets of such company to an amount sufficient for payment of its debts and liabilities, etc subject to fulfillment of certain qualifications. Thus, as per

the Companies Act also, the debts and liabilities of a company cannot be set-off against the dues of a sister concern.

47. In view of the above discussion, we hold that the dues of petitioner cannot be set off against the dues of the second respondent said to be recoverable from the third respondent, as the petitioner has claimed the dues from the first respondent in its own right. Therefore, the first respondent is liable to pay an amount of Rs.2.41 crore as the principal amount due, about which there is no dispute between the parties.

48. The only question now left to be considered is the payment of surcharge or interest on account of delayed payment. The petitioner has claimed surcharge @ 2% per month. The Bench has not recommended payment of surcharge since it has recommended adjustment of the dues among the different parties. In our opinion, the petitioner is entitled to the late payment surcharge for the reason that it was deprived of use of its legitimate dues, all these years.

49. The matter has been examined, inter alia, in the light of the 2001 regulations, applicable up to 31.3.2004, clause 4.12 of which lays down as under:

4.12 Late payment surcharge

In case the payment of bills by the beneficiary (s) is delayed beyond a period of 1 month from the date of billing a late payment surcharge at the rate of 1.5 percent per month shall be levied by the 'Transmission Utility'.

50. The petitioner shall be entitled to claim late payment surcharge in accordance with clause 4.12 above for a period up to 31.3.2004. With effect from 1.4.2004, late payment surcharge shall be payable in accordance with Regulation 62 of the Central

Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004, as amended vide notification dated 3.9.2004, and, reproduced below:

“62. **Late Payment Surcharge**: In case the payment of bills of the transmission charges by the beneficiary or beneficiaries is delayed beyond a period of 60 days from the date of billing, late payment surcharge at the rate of 1.25% per month shall be levied by the transmission licensee.”

51. Accordingly, we direct that the payments due in terms of paras 47 and 50 of this order shall be paid latest by 31.12.2007. In case the first respondent fails to make the payment by the aforesaid date, it shall be liable to pay interest @ 15% per annum (in lieu of the late payment surcharge) from 1st January 2008 on the aggregated amount arrived at by adding the late payment surcharge payable up to that date to the principal amount of Rs.2.41 crore.

52. We may make it clear that through the above discussion we should not be deemed to have expressed any opinion on the claim of the second respondent against the third respondent. This is to be examined by an appropriate forum.

53. With the above, the petition stands disposed of, with no order as to costs.

Sd/-
(R. KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

New Delhi dated the 18th October, 2007