HIGH COURT OF ORISSA : CUTTACK.

W.P.(C) NO.10928 of 2007

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Dwaraka Resorts Pvt. Ltd. ..... Petitioner

- Versus-

State of Orissa and others ..... Opposite Parties

For Petitioner : M/s. Milan Kanungo, D.Pradhan, Y.Mohanty, S.K.Mishra and S.N.Das

For Opp. Parties : Mr. S.K.Patnaik (Special Counsel), U.C.Mohanty, P.K.Patnaik, N.Satpathy, D.P.Das (for O.P.No.1),

Shri B.K.Nayak (for O.P.Nos.2 to 4)

M/s Biswajit Mohapatra and S.K.Sahoo (for O.P.No.5)

THE HONOURABLE SHRI JUSTICE B.K. PATEL

Date of Hearing: 1.8.2014 :: Date of Judgment – 23.12.2014

B.K. PATEL,J. The petitioner has filed this writ petition praying to :-

(i) quash disconnection notice No.8332 dated 7/8/2007 issued by the Manager(Electrical) City Dist. Division No.I Ranihat, Cuttack/opposite party no.4 under Annexure-1;

(ii) direct the opposite parties to bill the petitioner hotel at Medium Industrial Tariff as per the Industrial Policy 2001;

(iii) quash the order of the O.E.R.C. dated 22.3.2005 (Annexure-7) and direct opposite party no.2(CESU) to supply power to the petitioner-hotel under Industrial Tariff."

2. Petitioner is a hotel and registered under the Companies Act, 1956.

3. Petitioner's case is that dispute between the petitioner and electricity distribution licensee CESU represented by opposite party nos. 2 to 4 with regard to consumption of electricity by the petitioner exceeding contract demand compelled the petitioner to institute O.J.C.No.6772 of 1999 which was disposed of by this Court by order dated 18.5.2006 directing opposite party no.4-Executive Engineer-cum-Manager(Electrical), CESU to look into the petitioner's grievances upon filing of representation. Pursuant to such direction, an enquiry committee was constituted by opposite party no.4. Upon enquiry the committee passed resolution at Annexure-2 containing the following order:-

"Hence, it is ordered that:

1. A domestic connection of 22KW will immediately be provided to the consumer by upgrading existing single-phase consumer.

2. The consumer is also directed to execute a fresh agreement for 95KW of load, with retrospective effect from Jan'99 if not executed earlier observing the Departmental formalities with the Executive Engineer(El.), City Distribution Division No.1 Cuttack within 15(fifteen) days of issue of the Order.

3. The billed amount up to 12/96 may be paid by the consumer for which there is no dispute. After 01/99 the bill may be re-casted basing on the Maximum Demand recorded taking 95KW to be the CD.

4. The consumer may clear any electricity dues pending on single-phase connection before availing the new service connection. This may be given effect from 15 days of issue of this order.

5. The penalty charges for the months, the MD exceeded than the CD may be billed in the appropriate tariff. Overdrawal penalty (beyond 95KW) may be re-casted with retrospective effect from 01/99.

6. The total amount due after revision of the bill may be paid by the party within one month from receipt of the revised bill.

7. The Executive Engineer may observe other Departmental formalities as per Rule."

In accordance with the above directions, opposite party no.3-Superintending Engineer issued to the opposite party no.4 letter dated 21.8.2006, copies of which are at Annexure-3 to the writ petition and Annexure-B/4 to the counter affidavit filed on behalf of opposite party nos.2 to 4, to impress upon the petitioner to execute fresh agreement for 95 KW of load with retrospective effect from the month of January, 1999 and for recasting the bills accordingly. It was also mentioned in the letter that tariff of Medium Industries category would be applicable and continue after execution of fresh agreement with retrospective effect from January,1999. In accordance with the directions contained in the letter at Annexure-3 the petitioner sent standard agreement duly signed by the

petitioner with a request to the Executive Engineer to execute agreement and to send the duplicate copy to the petitioner. It is further averred that opposite party no.4-Executive Engineer-cum-Manager (Electrical) having insisted the petitioner to execute fresh agreement for contract load of 100 KW contrary to the specific direction in the resolution at Annexure-2 as well as letter of the opposite party no.3 at Annexure-3, petitioner preferred W.P.(C) No.16467 of 2006 before this Court with a prayer to quash the order passed by opposite party no.4-Executive Engineer-cum-Manager(Electrical). The writ petition was disposed of by order dated 11.5.2007 allowing the prayer of the petitioner to quash the order of opposite party no.4-Executive Engineer-cum-Manager(Electrical) and directing the CESU authorities to implement the orders contained in the resolution at Annexure-2. The concluding paragraph of the order passed by this Court in W.P.(C) No.16467 of 2006 reads as follows:

> "Accordingly, we have no hesitation to quash Annexure-18 i.e., order dated 27.11.2006 passed by the Manager(Electrical)-cum-Executive Engineer, City Distribution Division No.1,Cuttack, O.P.No.3 and direct the O.Ps. to implement the orders contained in the resolution dated 3.6.2006 in Annexure-14. So far as the prayer of the petitioner to charge it under Medium Industrial Tariff is concerned, it is open to the petitioner to approach the appropriate authority in this regard.
>
> The writ petition is disposed of accordingly."

In response to the representation filed by the petitioner to implement the order of this Court, opposite party no.4 issued letter dated 10.7.2007, copies of which are at Annexure-4 to the writ petition and Annexure-A/4 to the counter affidavit filed on behalf of opposite party nos.2 to 4, and intimated the petitioner that agreement would be executed for contract load of 95 KW in the General Purpose Tariff Category and not

in the Medium Industrial Tariff Category. Thereafter, opposite party no.4 issued notice dated 7.8.2007 at Annexure-1 calling upon the petitioner to pay differential amount of the current dues for the months of May, 2007 and June, 2007 within 15 days specifically indicating therein that the petitioner was liable to pay electricity dues at General Purpose Tariff Category and not at Medium Industrial Tariff Category under threat of disconnection of electricity supply. It is contended that action of opposite party no.4 applying General Purpose Tariff to the petitioner hotel is arbitrary, illegal and contrary to Industrial Policy Resolution, 2001 (IPR-2001) as well as OERC Code, 2004, Electricity Act, 2003 and Orissa Electricity Reform Act, 1995. Such action is contrary also to the directions of opposite party no.3 in the letter at Annexure-3. The petitioner was enjoying benefit as per IPR-1996 and is entitled to benefit under the IPR-2001 under which the petitioner hotel comes under the existing tourism related activities and has been identified as priority sector. The petitioner has also been certified by the District Industries Centre, Cuttack in their letter dated 5.9.2006 at Annexure-5 as an Unit which has availed Industrial Tariff concessions and to be entitled to avail the same as per provision made under IPR-1996. It is further averred that observation made by the OERC at paragraph 5.5.1 of the order dated 22.3.2005 at Annexure-7 to the effect that plea of categorization for electricity tariff should match the criteria fixed by the Industries Department of Government for classification of industries is not possible, is illegal, arbitrary and without jurisdiction. General Purpose Tariff Category is not applicable to the petitioner.

4. Three separate counter affidavits have been filed on behalf of the opposite party no.1 the State of Orissa in the Industries Department, the opposite party nos.2 to 4 on behalf of CESU and the opposite party no.5 OERC.

5. In the counter affidavit filed on behalf of opposite party no.1 it is admitted that the petitioner's unit comes under "Other Small Scale Industry (OSI)" category as per PMT Registration No.15/04/00001 dated 16.4.1993 issued by the District Industries Centre, Cuttack. It is also averred that the unit started commercial production with effect from 23.4.1992 with approval of Tourism Department. The State Government issued IPR-2001 on 3.12.2001, paragraph 18.11 of which provides as follows:

> "18.11- Information Technology, Bio Technology and Tourism related activities (existing and new) which are treated as industrial activity will be entitled to have power at industrial and not commercial rate of tariff subject to O.E.R.C. approval."

It is specifically provided in the above clause that benefit under the provision was to be given effect to subject to the OERC approval. As the hotels were not treated as industrial units, the matter was raised before the OERC which by order dated 22.3.2005 refused to consider the matter. Paragraphs 5.5.1 and 5.5.2 of the order of the OERC dated 22.3.2005 at Annexure-7 read as follows:

> "5.5.1 Some of the objectors submitted that categorization for electricity tariff should match the criteria fixed by the Industries Department of Govt. for classifying industries. It is not possible for us to agree with this suggestion. Firstly, price of electricity should progressively reflect the cost of supply in accordance with Section 61(g) of the Electricity Act, 2003. The cost of supply can be fairly determined with

reference to the investment made, quantum of connected load, timing of supply and voltage at which it is supplied. Hence, electricity price has to be in relation to these factors. Secondly, *the purpose of classification by Industries Department and other departments of Govt. are for different purposes like preferential treatment in financing, taxes, etc. which have no relevance for determining price of electricity*. Thirdly, electricity charges are to be non-discriminatory from economic point of view. As such, it may not be possible to synchronize the pricing of electricity in keeping with classification decided by the Industries Department.

5.5.2 (a) *The representative from Govt. of Orissa pleaded that, hotels should be classified under the industrial category. Since the Dept. of Industry allows them the benefits due to an industry, there is no justification for them to be billed at General Purpose tariff. It needs to be noted that for the purpose of applicability of electricity tariff the classification of an electricity consumers as prescribed in OERC Distribution (Condition of Supply) Code, 2004 is only applicable.*

(b) xx xx xxx xx xx xx

(c) xx xx xx xx xx xx xx xx xx xx xx xx xx xx"

IPR-2001 provides that hotels are treated as industries so as to be entitled to have power at the industrial rate of tariff and not at commercial rate of tariff. However, it is further pleaded that Electricity Act, 2003, repealing earlier Acts, provides under Section 185(3) that the provisions of the enactments specified in the Schedule to the Act, which includes Orissa Electricity Reform Act, 1995, not inconsistent with the provisions of the Electricity Act, 2003, shall apply to the State in which such enactments are applicable. Section 12 of Orissa Electricity Reform Act, 1995 as well as Section 65 of the Electricity Act, 2003 provide that in case State Government desires to give any subsidy to any class of consumers, then the amount of loss has to be deposited with licensing companies in advance by the Government. In IPR-1996 as well as IPR-2001 the State Government did not make any provision for bearing the differential

amount between industrial and commercial rate of tariff if the hotels are to be treated as industrial units. It is pleaded that it is not possible for the State Government to pay the differential tariff to the distribution licensees with a view to ensure power supply to the hotels at industrial rates considering the present economic condition of the State. Since the OERC is not ready to apply power tariff at industrial rate to hotels, the petitioner cannot claim the said benefit. Decision of the OERC dated 22.3.2005 at Annexure-7, having not been challenged by anyone, has become final and binding. In such circumstances, the petitioner's prayer to avail industrial rate of tariff is untenable.

6. In the joint counter affidavit filed by opposite party no.4, on behalf of opposite party nos.2 to 4, it is stated that opposite party no.4 after joining as the Executive Engineer on 16.6.2006, received the letter of the Superintending Engineer dated 21.8.2006 at Annexure-3. It is further stated that another communication was also received from the General Manager, Commerce for disposal of the matter by the Executive Engineer. It is averred that after going through the records, opposite party no.4 disposed of the matter and communicated the order to the petitioner on 27.11.2006 which was challenged by the petitioner in W.P.(C) No.16467 of 2006 before this Court. W.P.(C) No.16467 of 2006 was disposed of by order dated 11.5.2007 with the directions extracted at paragraph 3 above. Thereafter, the petitioner submitted a standard draft agreement in duplicate for execution of agreement under Medium Industrial Tariff Category. Opposite party no.4 returned back the draft agreement intimating the petitioner under letter dated 10.7.2007 at Annexure-4 to

modify the draft agreement to General Purpose Tariff Category. In the letter at Annexure-4 it was pointed out that in view of the directions in W.P.(C) No.16467 of 2006 to the petitioner to approach the appropriate authority for application of Medium Industrial Tariff, till a decision on application of tariff is taken by the appropriate authority, such a decision to change the billing on Medium Industrial Tariff in respect of the petitioner is not possible. Though the petitioner was billed on General Purpose Category Tariff from May, 2007, the petitioner went on making payment calculating on its own way on Medium Industrial Tariff Category for the months of May and June, 2007. In such circumstances, disconnection notice dated 7.8.2007 at Annexure-1 was issued to the petitioner with intimation to make payment of differential amount. It is contended that though by letter dated 21.8.2006 at Annexure-3 direction was given to the petitioner to execute agreement on Medium Industrial Tariff Category, subsequently, by letter dated 31.8.2006 at Annexure-C/4, direction at Annexure-3 was modified to the extent that the petitioner was to go on paying commercial tariff pending adjudication of the matter by the High Court. It is stated at paragraph 7 of the counter affidavit that the letter dated 31.8.2006 at Annexure-C/4 also was a communication of opposite party no.3-Superintending Engineer. Since the petitioner failed to pay the energy bill as directed, disconnection notice at Annexure-1 was issued. In the meanwhile, energy bills for the period from January, 1999 till September, 2007 has been revised and revised bill after adjustment of all payment has been presented to the consumer by communication dated 2.11.2007 at Annexure-D/4. It is categorically pleaded that as per

paragraph 18.11 of IPR-2001 and letter of the District Industries Center, Cuttack at Annexure-5, the petitioner's unit is entitled to avail the industrial tariff concession as per provisions made under IPR-1996 subject to OERC approval. Section 65 of the Electricity Act, 2003 dealing with the provisions for subsidy by the State Government lays down that grant of subsidy to the consumers is to be regulated by the OERC. Clause-7(g) of the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 as well as IPR-2001 and the OERC Code also provide for the matter relating to extension of subsidy by the State Government. In the present case, no communication has been received by CESU either from the State Government or from the OERC for extension of subsidy. No notification of the State Government has been communicated to the CESU declaring the petitioner to be subsidized so as to enable the CESU to make an estimate of subsidy and submit the same before the OERC as provided under Clause-7(g) of the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004. By letter dated 31.8.2006 at Annexure-C/4 opposite party no.3-Superintending Engineer modified the earlier communication at Annexure-3 and directed for raising the petitioner's bill under Commercial/General Purpose Category pending final decision in the matter. It is reiterated that in absence of any notification by the State Government and the OERC indicating the petitioner's entitlement to avail subsidy, notice at Annexure-1 has rightly been issued directing the petitioner to pay electricity dues under General Purpose Tariff Category.

7. In the counter affidavit filed by opposite party no.5 it has been averred that no illegality or irregularity has been committed by the CESU in categorizing the petitioner hotel under General Purpose Tariff Category in view of the provision under Clause-2 of Regulation 80 of the OERC Code. It is categorically pleaded that industrial policy resolution formulated by the State Government has no application to the provisions under the Electricity Act, 2003 in view of provision under Section 174 of the Electricity Act, 2003. At the same time it is pleaded that Section 108 of the Electricity Act, 2003 provides that in discharge of its functions the State Electricity Commission shall be guided by such directions in the matter of policy involving public interest as the State Government may give to it in writing. If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final. Opposite party no.5 also has reiterated the provisions under Section 65 of the Electricity Act, 2003 with regard to the manner and modalities of grant of subsidy by the State Government. Placing reliance on the order of the OERC dated 22.3.2005 at Annexure-7 extracted above as well as judgment dated 28.6.2013 passed by this Court in W.P.(C) No.266 of 2008 and batch of other writ petitions filed by some other hotels, it is averred that the petitioner hotel is not entitled to any benefit in electricity tariff. It is also pleaded that the petitioner ought to have assailed the order of the OERC dated 22.3.2005 at Annexure-7 by filing appeal. Opposite party no.5 further pleads that the petitioner is liable to pay electricity dues under General Purpose Tariff Category under Clause-2 of Regulation 80 of the

OERC Code. State Government having refused to extend any subsidy, there has been no violation of provisions under Section 108 of the Electricity Act, 2003 or Section 12 of the Orissa Electricity Reform Act, 1995. More or less opposite party no.5 has, in its counter affidavit, taken stands similar to that of opposite party nos.2 to 4.

In the additional affidavit filed on behalf of opposite party no.5 the OERC, it has been averred that the OERC has approved fifteen categories of consumers under Regulation 80 of the OERC Code. Regulation 82 of the OERC Code empowers the concerned engineer of the licensee to reclassify a consumer under the appropriate category after giving notice to such consumer to execute a fresh agreement in case it is found that the consumer was erroneously classified or the purpose of supply has changed or the consumption of power has exceeded the limit of that category or the contract demand has been enhanced or reduced. It is contended that in the present case "classification/reclassification" of the petitioner hotel under "industrial" or "commercial/general purpose" category has been made by the engineer of the licensee under Regulation 82 of the OERC Code, as premises of the petitioner is used for the purpose of business, without there being any sort of industrial activity. It is averred that order dated 22.3.2005 at Annexure-7 was passed after hearing the parties concerned who appeared pursuant to public notice and it was held at paragraph 5.5.2 that for the purpose of applicability of electricity tariff the classification of an electricity consumer as prescribed in the OERC Code is only applicable. Paragraph 5.5.1 of the order at Annexure-7 is also relied upon to aver that classification of hotels for the

purpose of determination of tariff has attained finality. The OERC having not approved the concession granted to the hotels under IPR-2001, the petitioner is not entitled to avail power supply at the industrial rate of tariff, more so when the State Government has not made any provision to bear the differential amount between concessional rate of tariff and commercial rate of tariff.

8.1 Learned counsel for the petitioner submitted that it has not been disputed that the petitioner hotel was being billed under Medium Industrial Tariff Category pursuant to IPR-1996. Tourism related activities including hotels were treated as industrial activities by the State Government since 1986, and IPR-1996 specifically provided that hotels also would be entitled to have power at industrial and not at commercial rate of tariff. Similarly, IPR-2001 provided at Clause 18.11 that tourism related activities including hotels which are treated as industrial activity will be entitled to have power at industrial and not commercial rate of tariff subject to the OERC approval. Industrial Policy Resolutions of the State issued from time to time contains policy decisions and directives of the State. Hotels were billed on Industrial Tariff Category even after coming into force of the Orissa Electricity Reform Act, 1995. The Electricity Act, 2003 provides under Section 174 that provisions of the Act shall have overriding effect. Provisions in the IPR with regard to applicability of Industrial Tariff rate to the hotels is in consonance with letter dated 5.9.2006 at Annexure-5 of the District Industry Center, Cuttack to opposite party no.4 pointing out that the petitioner's unit has availed Industrial Tariff concession and is entitled to avail the same as per

the provision made under IPR-1996. Even after consideration of the petitioner's grievance by the committee formed by CESU pursuant to the order of this Court in OJC No.6772 of 1999, by letter dated 25.8.2006 at Annexure-3 opposite party no.3-the Superintending Engineer categorically held that the petitioner is entitled to the IPR benefit as per order of the Government of Orissa applicable for Medium Industries. However, all in a sudden, the CESU took an unilateral decision to withhold from the petitioner the concession of payment of electricity charges at Medium Industrial Tariff rate by letter dated 10.7.2007 at Annexure-4. The petitioner approached the authority to act in accordance with the policy of the State Government to boost tourism related activities. Learned counsel for the petitioner vehemently submitted that not only the OERC but also the CESU, being entrusted with the power to regulate the matters relating to electricity supply, are discharging State functions. Provisions under OERC Code cannot be construed to be in supersession of policy direction of the State Government. Neither of the IPRs of the year 1996 or 2001 refers to provision for subsidy to hotels as a condition for grant of concession of payment of electricity charges in the Industrial Tariff Category. It has been categorically admitted by the State that there was no policy by the State to reimburse/subsidize the differential cost of tariff between the commercial rate and industrial rate to the hotels or distribution licensees. Section 108 of the Electricity Act, 2003 providing that in the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government give, has also no reference to payment of any

subsidy. Sub-Section (2) of Section 108 of the Electricity Act, 2003 provides that decision of the State Government in the matter of policy involving public interest is final. Section 65 of the Electricity Act, 2003 refers to a situation where State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission. In the present case, State Government has not required grant of any subsidy. On the other hand, in unequivocal terms, IPR-1996 and IPR-2001 provide for application of industrial tariff rate to the tourism related activities including hotels in the State. Section 12 of the Orissa Electricity Reform Act, 1995 also provides under Sub-Section (1) that the State Government shall have the power to issue policy directives on matters concerning electricity in the State. However, Sub-Section (2) of Section 12 provides that if any dispute arises between the Commission and the State Government as to whether a question is or is not a question of policy, it shall be referred to the Central Electricity Authority for decision whereas Sub-Section (2) of Section 108 of the Electricity Act, 2003 provides that decision of the State Government in the matter of policy is final. Provision to issue policy directives concerning subsidy to be allowed for supply of electricity to any class or classes or persons or in respect of any area in addition to subsidies permitted by the Commission while regulating and approving the tariff structure is there in Sub-Section (3) of Section 12 itself of the Orissa Electricity Reform Act, 1995. However, in the Electricity Act, 2003, separate provisions under Section 65 have been made in the matter of grant of subsidy by the State. There is no provision either in the Orissa Electricity Reform Act, 1995 or

in the Electricity Act, 2003 that tariff concession granted to any consumer or class of consumers as a matter of Industrial Policy directive by the State has to be compensated by grant of subsidy. Rather, the Government policy as contained in the IPR is unconditional. It was argued that any other conclusion would be inconsistent with the provisions under Clause 18.11 of the IPR-2001 as well as the provisions under the Central Act and the State Act. No provision can be inconsistent with the provision of the Electricity Act, 2003, in view of provision under Section 174 as well as Section 185 (3) of the Electricity Act, 2003. Moreover, it is well settled principle that the State cannot be allowed to speak in different voices.

8.2 It was further argued that there is no scope for the CESU to deny to the petitioner the benefit of payment of electricity charges at industrial rate of tariff as envisaged at paragraph 18.11 of IPR-2001 by placing reliance on paragraph 5.5.1 or 5.5.2 of the order dated 22.3.2005 of the OERC at Annexure-7. It is obvious from a bare reading of paragraph 5.5.1 that the OERC did not consider the industrial policy of the State to treat hotels as industrial activities so as to be entitled to have power at industrial rate of tariff. The specific observation of the OERC is that 'the purpose of classification by Industries Department and other departments of Government are for different purposes like preferential treatment in financing, taxes, etc. which have no relevance for determining price of electricity'. The OERC has made it clear that while making its observation the OERC did not take any view regarding policy of the Government to classify tourism related activities as industrial

activities for the purpose of payment of price of electricity at industrial tariff rate. At paragraph 5.5.2(a) having noted the pleading of representative of the Government of Orissa, the OERC has simply observed that for the purpose of applicability of electricity tariff the classification of an electricity consumer as prescribed in the OERC Code is only applicable. It was argued by the learned counsel for the petitioner that Regulation 80 of the OERC Code makes separate classifications according to quantum of contract demand for industries in the matter of fixation of rate of tariff. The State Government having, as a matter of policy, directed to treat the hotels as industrial activities for the specific purpose of payment of price of electricity at industrial tariff rate, and the same having been accepted by the CESU till 2006, when letter at Annexure-3 was issued, opposite parties are estopped from taking a different stand to the disadvantage of the petitioner by demanding electricity charges as a General Purpose Tariff Category consumer with retrospective effect from the year 1999.

8.3 Learned counsel for the petitioner also submitted that Regulation 80 of the OERC Code provides that licensee may classify or reclassify the consumer into various categories from time to time as may be approved by the Commission and fix different tariffs and conditions of supply for different class of consumers. In the present case, CESU, the licensee had classified the petitioner as Industrial Tariff Category consumer with a contract demand of 95 KW. Having so classified, the CESU could have reclassified the petitioner as a General Purpose Tariff

Category consumer only in accordance with Regulation 82 read with Regulation 80 of the Code upon approval of the OERC. In the present case, neither the CESU nor the OERC has asserted that approval for reclassification of the petitioner from Industrial Tariff Category consumer to General Purpose Tariff Category consumer was obtained from the OERC. The petitioner is also not aware of any such approval by the OERC inasmuch as the petitioner was never given an opportunity of being heard in the matter of approval by the OERC of the change of classification of the petitioner by CESU at any point of time.

8.4 As regards the contention of opposite party nos.2 to 4 with regard to decision dated 28.6.2013 of this Court in W.P.(C) No.266 of 2008 and a batch of other writ petitions is concerned, it was contended by the learned counsel for the petitioner that the petitioner was not a party to any of the writ petitions. Moreover, the writ petitions were not disposed of on merit. On the contrary, having specific reference to paragraph 14.2 and paragraph 20 of IPR-2007 as well as definition and interpretation provided in Annexure-1 thereto at paragraph 10, it was observed that no concession was extended to tourism sector. On the basis of such observation and upon reference to provisions under Section 108(1) and Section 65 of the Electricity Act, 2003 the writ petitions were disposed of granting liberty to the petitioners to file appeal or to make representations to the State Government to provide them incentive. It was argued that in the present case there being no dispute that the petitioner was being treated as an industry so as to be entitled to pay

electricity charges at Industrial Tariff Category consumer by the CESU till 2007, and the petitioner having repeatedly approached the authority, till all in a sudden the CESU reclassified the petitioner as a General Purpose Tariff Category consumer, observation of this Court in the said decision is not applicable to the case of the petitioner.

9.1 Learned Special Counsel for the State in course of his argument did not dispute that Industrial Policy Resolutions of the State contain directions in the matter of policy of the State involving public interest and IPR-2001 envisages concessional rate of tariff to be paid at industrial rate by hotels.

9.2 It was further pointed out that though hotel is not an industry as understood in its ordinary sense, in order to boost the growth of tourism in Odisha, tourism related activities including hotels were extended certain incentives under the IPRs issued by the State Government since 1986. Such incentives were revised/expanded/abridges in different IPRs. Under paragraph-16 of IPR-1996 it was provided, *inter alia*, as follows:

> "Para-16.1 – The following tourism related activities will be treated as industrial activity and will be entitled to incentives applicable to new industrial units, except for exemption/deferment of sales tax and exemption of octroi on raw materials and packing materials.
>
> (i) Hotels/motels/golf courses/ropeways and wayside amenity centres satisfying the norms/conditions stipulated by the State Government.
> Xxx xxx xxx
>
> 16.2- Such tourism related activities(existing and new), will be entitled to have power at industrial and not commercial rates of tariff."

That apart, IPR-1996 also provided at paragraphs 22.2 and 23.1 as follows:

> "Para-22.2 – Industrial units, hotels, cinema halls etc. covered under earlier Industrial Policy Resolution shall continue to enjoy the incentives admissible under the said Policy except to the extent abridged/modified/enlarged in this Policy
> Para-23.1- No right or claim for any incentive under this Policy shall be deemed to have been conferred merely on the ground of provision in this Policy. The State Government may issue operational guidelines/instructions for administration of incentives contained in this Policy. An industrial unit which considers itself eligible for any incentive, shall apply for the same in accordance with the operational guidelines/instructions and the same shall be considered and disposed of on merit."

9.3 Referring to the above directives, it was argued that incentives allowed in the IPR were subject to specific orders to be passed by the concerned departments of the Government. In the present case, such an order under Annexure-5 was passed by the District Industries Centre,Cuttack in the Department of Industries. It was categorically contended that though tariff for industrial sector was lesser than the tariff for commercial consumers like hotels, there was no policy by the State to reimburse or subsidies differential cost of tariff either to the consumer or to the electricity supply agency.

9.4 It was further submitted that when IPR-1996 was issued the electricity sector was under the exclusive control and domain of the State Government which fixed tariff rates applicable to different types of consumers. The Orissa State Electricity Board, a State public sector undertaking, was responsible for generation, transmission and distribution of electricity in accordance with the directives of the State Government. However, State of Orissa brought in reforms in the

electricity sector and enacted Orissa Electricity Reform Act,1995 with effect from 1.4.1996 as a result of which electricity sector was privatized and OERC came into existence to regulate electricity sector. Subsequently, State Government denuded itself of power to regulate tariff structure and classifying the consumers. The incentives allowed in IPR-1996 was no more operational and became subject to the regulatory power of the OERC Nevertheless, till framing of OERC Regulations, Grid Corporation of Orissa Limited applied the tariff rate fixed earlier including the tariff for the hotels at industrial rate by issuing specific order dated 14.5.1996 to that effect.

9.5 It was pointed out that Section 12 of the Orissa Electricity Reform Act,1995 conferred power on the State Government to issue policy directives on matters concerning electricity. The OERC Code, 1998 was framed on 7.9.1998 in exercise of power conferred under Section 54 of the Orissa Electricity Reform Act,1995. Under Regulation 80 of the O.E.R.C. Code, 1998 providing for classification of consumers, hotels were not kept under the industrial category of consumers. When the matter stood thus, IPR-2001 was issued on 3.12.2001 specifically providing therein at paragraph 13.2 and 18.11 that hotels, existing or new, shall continue to be entitled to have power at industrial and not commercial rate of tariff subject to OERC approval. Thereafter, Electricity Act, 2003 came into force. Section 108(1) of the Electricity Act did contain provision similar to the provision under Section 12 (1) of the Orissa Electricity Reform Act, 1995 to the effect that in discharge of its functions, the Regulatory

Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. Section 65 of the Central Act separately provided for subsidy by the State Government. In exercise of powers under Section 181(2) of the Electricity Act, 2003, the OERC by notification dated 21.5.2004 framed OERC Code, 2004 and repealed OERC Code, 1998. Regulation 80 of the OERC Code, 2004, providing for classification/re-classification of consumers, also does not include hotel under any of the industrial categories.

9.6 In the written submission submitted on behalf of the State in para-10 it has been unequivocally conceded that under IPR-2001 hotels are to be charged tariff at the rate applicable to industries. Paragraph-10 of the written submission reads as follows:

> " That as per the IPR-1996 followed by IPR-2001, the Hotels are to be treated as 'Industrial Activity" and to be charged @ tariff applicable to Industries."

9.7 It was contended that while classifying the consumers in the OERC Code, 2004, tourism related activities including hotels should have been either classified under Industries group or separate provision should have been made implementing the policy decision under Clause 18.11 of IPR-2001 for charging tourism related activities at the Industrial rate of tariff. In case OERC was not inclined to accept the directives in the IPR-2001 as a policy of the State Government in public interest, the matter should have been referred to the State Government for its final decision as per Section 108(2) of the Electricity Act,2003. However, as it appears from paragraphs 5.5.1 and 5.5.2 of the order of OERC at

Annexure-7, the OERC simply did not accept the proposal of the Government to allow hotels to be charged at the industrial rate of tariff. It was reiterated by the learned Special Counsel for the State that State Government has not provided for grant of any subsidy to the hotels or any tourism related activities to the extent of differential tariff in any of the IPRs. It was also contended that fiscal condition of the State does not permit allowance of such subsidy to the hotels for all time to come.

9.8 In course of his argument learned Special Counsel made reference to the judgment of this Court in W.P.(C) No.266 of 2008 and batch of other writ petitions to urge that the writ petitions were not disposed of on merit with regard to the claim of the petitioners therein for availing concessions in the electricity tariff under IPR-2001.

9.9. Referring to the decision of the Hon'ble Supreme Court in **Kusumam Hotels(P) Ltd. –v- Kerala State Electricity Board and others):** (2008) 13 SCC 213 it was urged by the learned Special Counsel that concessions allowed to hotels to be charged as industrial can be withdrawn by the State Government at any time. However, learned Special counsel did not take the stand that in the present case State Government has withdrawn the concessions under the IPR-2001. Concluding his argument, learned Special Counsel for the State urged that the writ petition should be disposed of with direction to the State Government to decide the dispute in exercise of power under section 108(2) of the Electricity Act, 2003.

10. Learned counsel for opposite party nos.2 to 4 contended that the petitioner falls under General Purpose Category Consumers under Regulation 80 (2) of the OERC Code, 2004. Upon execution of agreement by the petitioner, CESU had provided electricity supply. The agreement itself provides that the petitioner shall observe and abide by all the terms and conditions stipulated in the OERC Code. The petitioner executed the agreement under the Commercial Tariff Category and was being charged as per the tariff determined by the OERC under the said category. Subsequently, with the commencement of OERC Code, 2004, the petitioner has been categorized under the General Purpose Tariff Category. Hence, there is no scope for the petitioner to allege illegality on the part of the CESU in billing the petitioner under the General Purpose Tariff Category. It was urged by the learned counsel for the CESU that IPRs formulated by the State Government provide for extending concession to different types of industries as mentioned therein and has no application to the Electricity Act, 2003 as well as the rate of tariff determined by the OERC. In course of argument, learned counsel for the CESU referred to Sections 65, 174 and 108 of the Electricity Act, 2003 as well as Section 12 of the Orissa Electricity Reform Act, 1995 to contend that if the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the OERC, the State Government is required to deposit the amount in advance to compensate the distribution licensee. Learned counsel for the CESU also referred to Regulation 7 (g) of the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 laying down modalities of grant

of subsidy by the State Government. It was argued that order dated 22.3.2005 at Annexure-7 was passed by the OERC holding at paragraph 5.5.2 that for the purpose of applicability of electricity tariff, classification of an electricity consumer as prescribed in the OERC Code, 2004 is only applicable. It was contended that State Government having not made provision for grant of subsidy towards concessional rate of tariff for the hotels, the petitioner has to be charged tariff at the rate applicable to General Purpose Category consumer. In case the petitioner was aggrieved by the order of the OERC, it was open for the petitioner to file appeal in accordance with Section 111 of the Electricity Act, 2003. Having referred to the judgments of this Court passed in W.P.(C) No.266 of 2008 and a batch of other writ petitions as well as in W.P.(C) No.16467 of 2006 it was contended that though in the former judgment the petitioner hotels therein were granted liberty to file representations before the State Government and in the later judgment the petitioner was granted liberty to approach the appropriate authority, CESU has not received any communication from any authority to categorize the petitioner under Industrial Tariff Category Consumers. It was specifically contended that the State Government has also not issued any direction to the CESU to take further action for extending the benefit of IPR-2001 and to bill the petitioner at Industrial Tariff Category rate. So far as letter of opposite party no.3-Superintending Engineer, Electrical Circle, Cuttack dated 21.8.2006 at Annexure-3 is concerned, it was contended on behalf of the CESU that not only the said letter was internal official correspondence between opposite party no.3-Superintending Engineer, Electrical Circle,

Cuttack and opposite party no.4-Executive Engineer-Cum-Manager (Electrical), City Distribution Division No.1, Ranihat, Cuttack and not communicated to the petitioner, but also opposite party no.3-Superintending Engineer, Electrical Circle, Cuttack modified the order by communication dated 31.8.2006 at Annexure-C/4. Learned counsel for the CESU in course of his argument reiterated and elaborated the averments made in the counter affidavit filed on behalf of opposite party nos.2 to 4.

11. Learned counsel for opposite party no.5 also reiterated the averments made in the counter affidavit filed by the OERC. In course of hearing, it was categorically submitted by the learned counsel for opposite party no.5 that so far as the present petitioner is or hotels generally are concerned, the OERC has not passed any order for classification or reclassification under Regulation 80 of the OERC Code, 2004.

12. Before considering issues raised in the case, it is necessary to bear in mind that petitioner has approached this Court upon receipt of disconnection notice dated 7.8.2007 at Annexure-1. Petitioner's claim is confined to concessions as per IPR-2001. It has been specifically averred by opposite parties 2 to 4 in the counter-affidavit that in the meanwhile energy bills for the period from January,1999 till September,2007 has also been revised raising demand from the petitioner at the rate applicable to General Purpose Tariff Category. Therefore, controversy in the writ petition is confined to entitlement of the petitioner to the benefit

of concessional rate of tariff till IPR-2001 was in force and substituted by IPR-2007.

13. As has been pointed out by the Hon'ble Supreme Court in **Kusumam Hotels(P) Ltd. –v- Kerala State Electricity Board and others***(supra)* liability to pay electricity charges is a statutory liability and its consequences are provided in the statute.

14. Legal issue involves in **Kusumam Hotels(P) Ltd. –v- Kerala State Electricity Board and others**(supra) was whether Kerala Government could withdraw concessions in electricity tariff already granted, and that too, retrospectively. Facts in brief in the case has been summarized in the report as follows:

> "When the Central Government declared tourism as an industry, the Kerala Government extended certain concessions to the tourism industry, including concessions in electricity tariffs. The respondent Electricity Board was not in a position to afford these concessions, and therefore took a decision on 11.10.1999 that institutions which were already enjoying industrial tariffs prior to 15.5.1999 on the basis of certificate issued by Director of Tourism would continue to enjoy this concession until further orders, subject to decision of the Government on payment of subsidy. However, from 15.5.1999 onwards, fresh applications for grant of industrial tariff would not be sanctioned. Thereafter, the Kerala Government issued G.O. dated 26.9.2000 restricting the period of tariff concession to five years only including the period for which the concession had already been availed prior to 15.5.1999."

15. While allowing the appeal, Hon'ble Supreme Court held, *inter alia*, as follows:

> "Tourism was declared to be an industry. The wide range of concessions as noticed hereinbefore, inter alia, covered electricity and water charges. It is not a case where some exemptions or concessions were to be given for a specific period or as a one-time measure. No time-limit was

fixed for applicability in respect of the policy decisions. Pursuant thereto long-term investments might have been made. It is not based on a principle of giving benefit with a view to facilitate the initial growth of the industry. It was not based on any formula or criteria to evaluate the realization of the object of grant of such concession over a period. It was an open-ended offer. It must, therefore, be held that the Government was satisfied that the need was to grant concession if not permanently, at least for a long time."(para-18)

"There cannot be any doubt whatsoever that a policy decision can be reviewed from time to time. It is also beyond any doubt that the concessions granted can be withdrawn in public interest."(para-19)

"Indisputably, the State is also entitled to change or alter the economic policies. The appellants do not have any vested right to enjoy the concessions granted to them forever, particularly when the Board is constituted and incorporated under the provisions of the Electricity(Supply) Act,1948. Any policy decision adopted by the State would not be binding on the Board save and except provided for in the Act. The Board being an independent entity, the duties and functions of the Board vis-à-vis the State are enumerated in the Act. The Board, however, would be bound by any direction issued by the State Government on the questions of policy. A dispute which may arise as to whether a question is or is not a question of policy involving public interest, the Central Government is the final arbiter. The policy decision adopted by the State on the basis whereof the Board felt obliged to grant electrical connection in favour of the appellants on the basis of industrial tariff must, therefore, be understood in the context of Section 78-A of the 1948 Act. What is binding on the Board is the policy of the State. The direction of the State was to apply a particular category of tariff to the appellants. Such directions could have been withdrawn while making another tariff. The State indisputably has the power to grant subsidy from its own coffers instead of directing the Board to grant concession."(para-20)

"It is now a well-settled principle of law that the doctrine of promissory estoppel applies to the State. It is also not in dispute that all administrative orders ordinarily are to be considered prospective in nature. When a policy decision is required to be given a retrospective operation, it must be stated so expressly or by necessary implication. The authority issuing such direction must have power to do so. The Board, having acted pursuant to the decision of the State, could not have taken a decision which would be violative of such statutory directions."(para-21)

> "15.5.1999 was fixed as the cut-off date by the Board. It, by itself, could not have done so. But the State for issuing the G.O. dated 26.9.2000 could have fixed the said cut-off date on its own. Although we do not agree that by granting retrospectivity to the said order, the entirety of the government order should be set aside, or the same per se would be held to be unreasonable, but what we mean to say is that it could be given effect to only from the date of the order i.e. prospectively and not from an anterior date i.e. retrospectively."(para-22)

> "We are not concerned with the exercise of a statutory power in this case. We are concerned with issuance of a direction by the State which is binding on the Board as also how and to what extent it can be rescinded."(para-30)

Upon reference to a plethora of earlier decisions, it was further held :-

> "The law which emerges from the above discussion is that the doctrine of promissory estoppel would not be applicable as no foundational fact therefore has been laid down in a case of this nature. The State, however, would be entitled to alter, amend or rescind its policy decision. Such a policy decision, if taken in public interest, should be given effect to. In certain situations, it may have an impact from a retrospective effect but the same by itself would not be sufficient to be struck down on the ground of unreasonableness if the source of power is referable to a statute or statutory provisions. In our constitutional scheme, however, the statute and/or any direction issued thereunder must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication. It is a principle of the rule of law. A presumption can be raised that a statute or statutory rule has prospective operation only."(para-36)

> "The State of Kerala in this case did not grant any concession by itself. The Central Government took a larger policy of treating tourism as an industry. A wide range of concessions were to be granted by way of one-time measure; some of them, however, had a recurring effect. So far as grant of benefits which were to be recurring in nature is concerned, the State exercises its statutory power in the case of grant of exemption from payment of building tax wherefor it amended the statute. It issued directions which were binding upon the Board having regard to the provisions contained in Section 78-A of the 1948 Act. The Board was bound thereby. The Board, having regard to its financial constraints, could have brought its financial stringency to the notice of the State. It did so. But the

> State could not have taken a unilateral decision to take away the accrued or vested right. The Board's order dated 11.10.1999 in law could not have been given effect to. The Board itself kept the said notification in abeyance by reason of the order dated 8.11.1999."(para-37)
>
> "The appellants, indisputably, continued to derive the benefits in terms of the original order. They obtained certificates of classification. It is in the aforementioned context, the question as regards construction of the impugned Notification dated 26.9.2000 arises. Ex facie, the said policy decision could not be given a retrospective effect or retroactive operation. The State was not exercising the power under any statutory to grant or withdraw the concession. It was exercising its statutory power of issuing direction. It is, therefore, a statutory authority(sic). The 1948 Act does not authorize the state to issue direction with retrospective effect. The Board, therefore, could only give prospective effect to such directions in absence of any clear indication contained therein. By reason of withdrawal of concession with retrospective effect, the accrued right of the appellants had been affected."(para-38)
>
> "We, therefore, are of the opinion that the impugned G.O. dated 26.9.2000 must be held to have a prospective operation and not a retrospective operation. That view would save it from being vulnerable to the challenge of being hit by Article 14 of the Constitution of India."(para-40)

16. Thus, upon reference to Section 78-A of the Electricity(Supply) Act,1948, it has been laid down by the Hon'ble Supreme Court that the State is entitled to change or alter economic policies. The beneficiaries do not have any vested right to enjoy the concessions granted to them forever, particularly when the Electricity Board is constituted and incorporated under the provisions of the Electricity(Supply) Act,1948. The Board being an independent entity, the duties and functions of the Board vis-à-vis the State are enumerated in the said Act. The Board would be bound by any direction issued by the State Government on the questions of policy. With regard to the dispute which may arise as to whether a question is or is not a question of policy

involving public interest, the Central Government is the final arbiter. The policy decision adopted by the State on the basis whereof the Board felt obligated to supply electricity in favour of the consumer at industrial tariff rate must, therefore, be understood in the context of Section 78-A of the 1948 Act. What is binding on the Board is the policy of the State. The direction of the State was to apply a particular category of tariff to the consumer. Such directions could have been withdrawn while making another tariff. The State indisputably has the power to grant subsidy from its own coffers instead of directing the Board to grant concession.

17. In **Pepsico India Holdings Private Limited –vs- State of Kerala and others**: (2009)13 SCC 55, **Kusumam Hotels(P) Ltd. –v- Kerala State Electricity Board and others** (supra) has been referred to and it has been reiterated that it is now well settled principle of law that doctrine of promissory estoppels applied to the State. In this case, the dispute between the State authorities and the appellant was with regard to the meaning and import of the term "effective steps" for acquiring or placing firm orders for the purchase of the necessary plant and machinery for being entitled to exemption under notification dated 3.11.1993 issued under industrial policy of State of Kerala. In allowing the appeal, it was held by the Hon'ble Supreme Court that the exemption notification was issued for the purpose of achieving the economic growth in the State, and the circumstances indicating taking of 'effective steps' by the appellant including commencement of commercial production prior to stipulated cutoff date were elaborately taken note of. Hon'ble Supreme Court also

referred to some of its earlier decisions dealing with construction of exemption notifications. It was pointed out:-

> "53. An exemption notification and a notification withdrawing the benefit granted stand on different footings. For the said purpose, the industrial policy is required to be kept in mind. It must also be taken into consideration for the purpose of construing the exemption notification. In A.P.Steel Re-Rolling Mill Ltd. v. State of Kerala : (2007) 2 SCC 725 this Court held:
>
> > "32. The general principles with regard to construction of exemption notification are not of much dispute. Generally, an exemption notification is to be construed strictly, but once it is found that the entrepreneur fulfils the conditions laid down therein, liberal construction would be made.
> >
> > 34. A question as to whether, in a given situation, an entrepreneur was entitled to the benefit under an exemption notification or not, thus would depend upon the facts of each case. A bare perusal of the Notification dated 6.2.1992 issued by the first respondent would show that the purport and object thereof was to grant benefit of a concessional power tariff which came into force on and from 1.1.1992. The phraseology used in the said notification postulates that the benefit was to be granted in regard to the 'enhanced power tariff'. Thus, where the new units had started production between 1.1.1992 and 31.12.1996, such exemption was available to the entrepreneurs."
>
> 54. Yet again in U.P.Power Corpn. Ltd. v.Sant Steels & Alloys(P) Ltd: (2008) 2 SCC 777 it was opined:
>
> > "24. Learned Senior Counsel invited our attention to a decision of this Court in State of Punjab v. Nestle India Ltd.: (2004) 6 SCC 465 in which a representation was made by the Government in the manner dehors the Rules but a statement was made by the Finance Minister in his Budget speech for 1996-1997 making representation to the effect that the State Government had abolished purchase tax on milk. The manufacturers of milk products, therefore, were not paying the purchase tax on milk for Assessment Year 1996-1997 and mentioned this fact in their returns. The taxing authority entertained such returns. The manufacturers passed on the benefit of exemption to the dairy farmers and mill producers. However, after expiry of the said assessment year, the Government took a decision not to abolish purchase tax on milk and the taxing authority therefore raised a demand for Assessment Year 1996-1997. On these facts, the Court held that in absence of proof of any overriding public interest rendering the enforcement of estoppel against the Government was inequitable, notwithstanding that no exemption notification as required by the statute

was issued. It was held that the State Government cannot resile from its decision to exempt milk and raise a demand for the aforesaid assessment year. However, the same principle of estoppel was not invoked after Assessment Year 1996-1997. The Court enforced the principle of estoppel. All the earlier cases on the subject were reviewed by the Court and ultimately it was concluded as follows:

'47. The appellant has been unable to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government. The representation was made by the highest authorities including the Finance Minister in his Budget Speech after considering the financial implications of the grant of the exemption to milk. It was found that the overall benefit to the State's economy and the public would be greater if the exemption were allowed. The respondents have passed on the benefit that exemption by providing various facilities and concessions for the upliftment of the milk produces. This has not been denied. It would, in the circumstances, be equitable to allow the State Government now to resile from its decision to exempt milk and demand the purchase tax with retrospective effect from 1.4.1996 so that the respondents cannot in any event readjust the expenditure already made. The High Court was also right when it held that the operation of the estoppel would come to an end with the 1997 decision of the Cabinet."

55. It was furthermore observed in Sant Steels Case:

"35. In this 21st century, when there is global economy, the question of faith is very important. The Government offers certain benefits to attract the entrepreneurs and the entrepreneurs act on those beneficial offers. Thereafter, the Government withdraws those benefits. This will seriously affect the credibility of the Government and would show the short-sightedness of governance. Therefore, in order to keep the faith of the people, the Government or its instrumentality should abide by their commitments. In this context, the action taken by the appellant Corporation in revoking the benefits given to the entrepreneurs in the hill areas will sadly reflect their credibility and people will not take the word of the government. That will shake the faith of the people in the governance. Therefore, in order to keep the faith and maintain good governance it is necessary that whatever representation is made by the Government or its instrumentality which induces the other party to act, the Government should not be permitted to withdraw from that. This is a matter of faith.""

18. In order to appreciate the law laid down in **Kusumam Hotels(P) Ltd. –v- Kerala State Electricity Board and others**(supra), it

is necessary to refer to the provisions under Section 78-A of the Electricity(Supply) Act,1948 which reads as follows:

> "**Directions by the State Government** – (1) In the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government.
>
> (2) If any dispute arises between the Board and the State Government as to whether a question is or is not a question of policy, it shall be referred to the Authority whose decision thereon shall be final."

19. Legal position with regard to obligation cast on a State Regulatory Commission to abide by directions on question of policy as may be given by the State Government has not changed even after provisions under Section 78-A of the Electricity (Supply) Act,1948 ceased to remain in force. Provisions similar to Section 78-A of the 1948 Act were incorporated in the Orissa Electricity Reform Act,1995 as well as Electricity Act,2003.

20. Section 12 of the Orissa Electricity Reform Act, 1995 reads as follows:

> "**General Powers of the State Government**- (1) The State Government shall have the power to issue policy directives on matters concerning electricity in the State including the overall planning and coordination and all such policy directives shall be consistent with the objects sought to be achieved by this Act.
>
> (2) If any dispute arises between the Commission and the State Government as to whether a question is or is not a question of policy, it shall be referred to the Central Electricity Authority whose decision thereon shall be final and binding and for this purpose the Central Electricity Authority may appoint one or more of its members to act on behalf of the said authority.
>
> (3) The State Government shall be entitled to issue policy directives, concerning the subsidies to be allowed for supply of electricity to any class or classes or persons or in respect of any area in addition to the subsidies permitted

> by the Commission while regulating and approving the tariff structure.
>
> Provided that the State Government shall pay the amount to compensate any concerned body or unit affected by the grant of subsidies by the State Government to the extent the subsidies granted."

Thus, the above provisions make a distinction between policy directives in general under Sub-section(1) and policy directives concerning subsidies under Sub-section (3). Dispute between OERC and State Government as to whether a question is or is not a question of policy was provided to be decided by Central Electricity Authority.

21. Section 108 of the Electricity Act,2003 provides in unequivocal terms that Electricity Regulatory Commission is bound to be guided by directions in matters of policy involving public interest as the State Government may give and in case of dispute decision of the State Government shall be final. Section 108 of the Electricity Act, 2003 does not contain any provision with regard to grant of subsidy. Section 108 of the Electricity Act,2003 reads as follows:

> "**Directions by the State Government.**- (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.
>
> (2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final."

22. Separate provision has been made in the Electricity Act, 2003 with regard to grant of subsidy by the State Government. Section 65 of the Electricity Act, 2003 reads as follows:

> "**Provision of subsidy by State Government.**- If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by

> the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government.
>
> Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by the State Commission shall be applicable from the date of issue of orders by the Commission in this regard."

23. Distribution licensees also perform statutory functions and, therefore, cannot do anything which it cannot do under the provisions of law. This Court has held in **Ajay Kumar Agrawal –vs- OSFC & Ors**: AIR 2007 Orissa 37:

> "xxxx electricity, being a public property, its supply is controlled by the statute. Therefore, elements of public law govern the situation at the stage of supply. Under such circumstances, WESCO as a distribution licensee is clothed with the status of a State under Art.12 of the Constitution of India since it is to discharge preeminently governmental function, namely, supply of power to industries. In such a situation, the WESCO cannot act like a "public giver". It cannot act its caprice, whims or fancy nor can it, taking advantage of its monopoly status, exact an amount which it cannot do under the provision of law. If the Court, ignoring the provision of the said Act, permits WESCO to realise the amount which is contemplated under Clause 9 of its purported agreement dated 28.11.2001 then the Court would be permitting WESCO, a State under Art.12 to flout the provisions of the said Act and to enrich itself by virtue of its superior bargaining position through a method, not contemplated under law and therefore prohibited by law. Here, the silence of the statute would amount to a prohibition, otherwise it amounts to an exaction of a sum from a consumer who is under no legal obligation to pay the same. That would amount to deprivation of one's property without authority of law. Thus the Constitution's mandate under Art.300A would be breached. Article 300A runs as follows:

> "300A. Persons not to be deprived of property save by authority of law.- No person shall be deprived of his property save by authority of law."

24. Section 108 of the Electricity Act, 2003 not only mandates that in the discharge of its functions, the State Electricity Commission is to be guided by directions issued by the State in matters of policy involving public interest, but also recognizes the dominant position of the State Government in deciding as to whether any direction issued by the State Government relates to a matter of policy involving public interest. In other words, in the matter of policy involving public interest, decision of the State Government is final. All the instrumentalities of the State are required to speak with one voice. In **Vadilal Chemicals Ltd. –vrs.- State of Andhra Pradesh and others** : (2005) 142 STC 76 SC which also dealt with the issue relating to incentive by way of deferment/ tax holiday on sales tax to new industrial units, the Hon'ble Supreme Court held that the State, which is represented by the departments, can only speak with one voice.

25. In the present case, it is not disputed that the petitioner as a hotel was entitled to avail power at industrial rate of tariff as a matter of industrial policy of the State as provided under IPR-1996 and IPR-2001. Paragraph-1 of the written note of submissions filed on behalf of opposite party no.1-State of Odisha reads as follows:

> "Hotel is not an Industry as understood in its ordinary sense. However, to boost the growth of Tourism in Orissa Hotels, Motels, Transport services, Aero sports, Water sports, Health Resorts, Tourism Camps etc. are extended certain incentives under the Industrial Policy Resolutions issued by the State Govt. since 1986. Such incentives are revised/ expanded/ abridges in different IPRs. In the IPR of 1996,

made effective from 1.3.1996, also certain incentives were extended for the Tourism related activities."

Nature of concession granted to the hotels under IPR-1996 in Paragraphs 16, 22.2 and 23.1 have already been extracted above at paragraph 9.2.

26. It is also not disputed that Orissa State Electricity Board as well as Grid Corporation of Orissa Limited, the entities which regulated electricity supply earlier, allowed the petitioner hotel to avail power at the industrial rate of tariff. Learned Special Counsel for the State has placed on record the order dated 14.5.1996 of Grid Corporation of Orissa Limited, which is at Annexure-4 to the written note of submissions filed by the learned Special Counsel for the State, with regard to implementation of IPR-1996 wherein paragraphs 16.2 and 22.2 of IPR-1996 have been reiterated. The CESU itself by letter dated 21.8.2006 at Annexure-3 to the writ petition issued by oppoiste party no.3 Superintending Engineer, Electrical Circle, Cuttack to the Manager, City Distribution Division No.1, Ranihat, Cuttack has given out that Medium Industries rate of tariff shall be applicable to the petitioner and continue after execution of fresh agreement with retrospective effect from January, 1999. As late as in the year 2006, District Industries Center, Cuttach, which is an organ of the Department of Industries of the State Government, has issued letter dated 5.9.2006 at Annexure-5 to the distribution licensee stating that the petitioner is entitled to avail Industrial Tariff concession. The letter at Annexure-5 reads as follows:

"To

The Executive Engineer (Elec.),
CESCO, Cuttack Distribution Division,
No.(I), Ranihat, Cuttack.

Sub:- Grant of Industrial Tariff concession in favour of M/s Dwaraka Resorts(P) Ltd., Bajrakabati Road, Cuttack-1.

Sir,

On the above subject, I am to say that, M/s. Dwaraka Resorts (P) Ltd., Bajrakabati Road, Cuttack is a registered unit under this D.I.C. The captioned unit has availed Industrial Tariff concession and entitled to avail same as per provision made under IPR-1996, even if enhancement of existing load.

This is for your information and needful action.

Yours faithfully,
Sd/-
General Manager,
D.I.C., Cuttack.

xx xx xx xx xx xx xx xx xx xx xx xx xx xx"

27. Concession in the tariff rate granted to the hotels under IPR-1996 and IPR-2001 has, thus, not been withdrawn by the State Government till IPR-2001 was in force. Obviously, in the present case, the question before the Court is not a case of withdrawal of exemption or concession by the State Government. State Government has made it clear that concession granted to Hotels under IPR-2001 has not been abridged, modified or altered. As has been pointed out in **Kusumam Hotels(P) Ltd. –v- Kerala State Electricity Board and others** (supra), therefore, the policy decision adopted by the State on the basis of which the electricity licensee is obliged to grant tariff concession in favour of the petitioner on industrial rate must be understood in the context of Section 108 of the Electricity Act, 2003. There being no doubt that the petitioner was entitled to concessional rate of tariff as a matter of policy of the State involving public interest, even the State Government has no authority to deny the petitioner to such concession in an arbitrary manner or retrospectively.

28. Reliance is being placed on the observations of the OERC at paragraphs 5.5.1 and 5.5.2 of the tariff order dated 22.3.2005 at Annexure-7 to the writ petition by the CESU to justify denial of concession contemplated in the IPR to the petitioner. A close look on such observation, extracted at paragraph 5 above, does not support the contention. The very observation at paragraph 5.5.1 to the effect that '*the purpose of classification by Industries Department and other departments of Govt. are for different purposes like preferential treatment in financing, taxes, etc. which have no relevance for determining price of electricity"* shows that while making observation at paragraph 5.5.1 of the order at Annexure-7, the OERC did not consider the policy direction of the State for treating the hotels as industrial activities so as to be entitled to power at industrial rate.

29. So far as observation at paragraph 5.5.2 (a) is concerned having referred to the request of the representative of the Government of Orissa that hotels should be classified under the industrial category, it has simply been observed by the OERC that for the purpose of applicability of electricity tariff the classification of an electricity consumer as prescribed in OERC Code, 2004 is only applicable. Such observation can neither be construed to be an observation negating the entitlement of hotels to avail electricity at industrial rate of tariff nor can such observation be construed to be contrary to the policy direction of the State issued under Section 108 of the Electricity Act, 2003. Observation at paragraph 5.5.2 (a) of the OERC at Annexure-7 reveals that a request was

made to classify hotels under the industrial category. The OERC felt that such reclassification is not necessary. There is no reference to the industrial policy of the State containing direction to the effect that hotels are entitled to have power at the industrial rate of tariff. The policy was not to classify the hotels as industries. But, the hotels were to be treated as industrial activities for the purpose of availing the concessional rate of tariff at the industrial rate. At paragraph 10 of the written submissions filed by the learned Special Counsel the stand of the State Government has been categorically stated as follows:

> "That as per the IPR-1996 followed by IPR-2001, the Hotels are to be treated as 'Industrial Activity' and to be charged @ tariff applicable to Industries."

30. Not only in case of dispute between the OERC and the State as to whether any direction of the State relates to a matter of policy involving public interest, decision of the State is final, but also provisions under the OERC Code, 2004 as well as provisions of any other Act or Rules or Regulations will have no effect in so far as it is inconsistent with the provisions of the Electricity Act, 2003. Section 174 of the Electricity Act, 2003 provides that the Act shall have overriding effect. It reads:

> "**Act to have overriding effect.**- Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

31. In spite of coming into force of Electricity Act, 2003, in view of provision under Section 185 (3) of the Electricity Act, 2003, the provisions

of the Orissa Electricity Reform Act, 1995, not inconsistent with the provisions of the Electricity Act, 2003 shall apply to the State of Orissa. Also, all directives issued by the State Government under the Orissa Electricity Reform Act, 1995 shall continue to apply for the period for which such directions were issued by the State Government. Provisions under Section 185 of the Electricity Act, 2003, *inter alia*, read as follows:

> "**Repeal and saving.**- (1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910 (9 of 1910), the Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions Act, 1998 (14 of 1998) are hereby repealed.
> (2) Notwithstanding such repeal,-
> (a) xx xx xx xx xx xx xx xx xx xx xx xx xx
> (b) xx xx xx xx xx xx xx xx xx xx xx xx xx
> (c) xx xx xx xx xx xx xx xx xx xx xx xx xx
> (d) xx xx xx xx xx xx xx xx xx xx xx xx xx
> (e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.
> (3) xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx
> (4) xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx
> (5) xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx"

It has already been pointed out that enactments under the Schedule to the Electricity Act, 2003 specifies the Orissa Electricity Reform Act, 1995 at serial no.1. It is needless to observe that directives under IPR-1996 and IPR-2001 with regard to concessional tariff to the Tourism related activities at the industrial rate were issued as policy directives in exercise of power under Section 12 (1) of the Orissa Electricity Reform Act, 1995.

32. Decisions of this Court in W.P.(C) No.266 of 2008 and batch of other writ petitions as well as in W.P.(C) No.16467 of 2006 also in no manner affect the right of the petitioner to claim benefit of concession to

have power at industrial rate of tariff. The petitioner was not a party to W.P.(C) No.266 of 2008 or any of the batch of writ petitions in which common judgment dated 28.6.2013 was passed. In the said judgment referring to directives under IPR-2007 it was observed that since the hotels shall not be eligible for any fiscal incentive other than land at concessional industrial rate, no such concession was extended to the tourism sectors as per the said IPR. Be that as it may, the writ petitions were disposed of, not on merit, but with an observation that the petitioners therein may file appeal challenging the order passed by the OERC or may make representation(s) to the State Government to provide them incentives taking into consideration the development of tourism sectors of the State. Similarly, while disposing of W.P.(C) No.16467 of 2006 by order dated 11.5.2007 petitioner's claim of entitlement to have power at industrial rate was not decided on merit and liberty was granted to the petitioner to approach the appropriate authority to charge it under Medium Industrial Tariff Category. Disconnection notice dated 7.8.2007 at Annexure-1 having been issued soon thereafter the petitioner has filed this writ petition on 31.8.2007. While issuing notices in the present writ petition by order dated 6.9.2007, this Court has passed interim order directing maintenance of *status quo* with regard to electric power supply to the petitioner. The petitioner has approached this Court assailing demand of electricity tariff under General Purpose Category as arbitrary and without jurisdiction. The matter is pending in Court since 2007. Specific stand has been taken by the State that the petitioner is entitled to concessional rate of electricity tariff under IPR-1996 and IPR-2001 as a

matter of policy directives of the State Government involving public interest in exercise of power under Section 12 of the Orissa Electricity Reform Act, 1995 and Section 108 of the Electricity Act, 2003. In such view of the matter, there appears no cogent reason to direct the petitioner to approach the authorities or to exhaust the alternative statutory remedies at this stage.

33. Learned Special Counsel appearing for the State in course of his argument urged that in case the OERC disputed that IPR-2001 is a policy decision not in public interest, the dispute should have been referred to the State Government for final decision as contemplated under Section 108(2) of the Electricity Act, 2003 and the present case may be disposed of giving direction to the State Government to decide the dispute. However, reference of the dispute to the State at this stage when IPR-2001 is no longer in force shall be absolutely of no purpose in view of settled legal position. As has been laid down in **Kusumam Hotels(P) Ltd. –v- Kerala State Electricity Board and others** (supra) concession granted subsequent upon the policy directives of the State either under Section 12(1) of the Orissa Electricity Reform Act, 1995 or under Section 108(1) of the Electricity Act, 2003 cannot be withdrawn with retrospective effect. That is another reason why there is no scope for directing the petitioner to approach the authorities or the State Government for allowing continuance of benefit which the petitioner used to avail under the prevailing IPRs.

34. By setting up the plea of non-granting of subsidy by the State Government as a ground to deny the benefit of having power at concessional rate to the petitioner, the CESU and OERC appear to have made malfusion between the provisions under sub-Section (1) of Section 12 of the Orissa Electricity Reform Act, 1995 and Section 108 of the Electricity Act, 2003 on the one hand and sub-Section (3) of Section 12 of the Orissa Electricity Reform Act, 1995 and Section 65 of the Electricity Act, 2003 on the other. The State Government has made its stand clear that the policy decision of the State was to provide power to the Tourism related activities at the rate of industrial tariff. At paragraph 6 of the counter affidavit filed on behalf of opposite party no.1 the State Government it has been averred:

> "That in IPR-96, or in IPR-2001, the State Government had not made any provision for bearing the differential amount between industrial and commercial rate of tariff if the hotels are to be treated as industrial activity. Now also it is not possible for the State Government to pay the differential tariff to the licensing companies with a view to ensure power supply to the hotels at industrial rates in view of the present economic condition of the State. Xx xx xx xx xx".

At paragraph 2 of the written note of submissions submitted by the learned Special counsel appearing for the State Government it has been contended:

> "xx xx xx xx xx xx xx there was no policy that the State Government shall reimburse/subsidize the differential cost of tariff between the Commercial rate and Industrial rate to the Hotels or to the authority supplying electricity."

35. Such being the stand of the State Government, as provided under sub-Section (2) of Section 108 of the Electricity Act, 2003, decision of the State Government is undoubtedly final. The State Government has

taken stand that policy decision for grant of concessional rate of tariff to hotels issued in exercise of power under Section 12(1) of the Orissa Electricity Reform Act,1995 has not been altered, amended or rescinded during the period in which IPR-2001 was in force. As has been observed in **Kusumam Hotels(P) Ltd. –v- Kerala State Electricity Board and others** (supra) direction of the State was to apply a particular category of tariff to the petitioner. Such direction could have been withdrawn by the State. The State indisputably has the power to grant subsidy from its own coffers instead of directing to grant concession (paragraph 20). The licensee (i.e. CESU in this case) having regard to its financial constraints, could have brought its financial stringency to the notice of the State (paragraph 37). The CESU could have moved the State for grant of subsidy. Denial of entitlement of having power at concessional rate of industrial tariff to the petitioner, without withdrawal of the directive of the State Government under the IPR, that too at a belated stage on the eve of coming into force of IPR-2007, is not sustainable.

36. For the reasons stated above, notice at Annexure-1 issued by the CESU is held to be without jurisdiction and illegal. Accordingly, notice at Annexure-1 is quashed. It is held that the petitioner is entitled to have power at industrial rate for the entire period till IPR-2001 was in force.

37. The writ petition is, accordingly, disposed of.

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B.K. Patel, J.

Orissa High Court, Cuttack
Dated 23rd December,,2014/Palai