

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P.(T) No. 2890 of 2011

(M/s Anjaney Ferro Alloys Ltd Vrs State of Jharkhand & Ors.)
With

W.P.(T) No. 6163 of 2006

(M/s Atibir Hi-tech Pvt. Ltd Vrs State of Jharkhand & Ors.)
With

W.P.(T) No.667 of 2007

(M/s Shivan Iron & Steel Co. Vrs State of Jharkhand & Ors.)
With

W.P.(T) No. 2847 of 2008

(M/s Tata Steel Ltd. Vrs. State of Jharkhand & Ors.)

**CORAM: HON'BLE THE CHIEF JUSTICE
HON'BLE MRS. JUSTICE JAYA ROY**

For the Petitioners :Mr. M.S.Mittal, Sr. Advocete,
A.R.Choudhary,A.K.Yadav & N.K.Pasari,Advvs.
For the State :Mr. Rajesh Shanker,Government Advocate
For the D.V.C. : Mr. S.B.Gadodia, Sr. Advocate ----

Reportable

Dated : 3rd April, 2012

Prakash Tatia,C.J. : Heard the counsels for the parties in the Writ Petition (T) No. 2890 of 2011, 6163 of 2006, 667 of 2007 as well as in W.P.(T) No. 2847 of 2008. In these cases, the issues, the facts and question of laws are common, and therefore, they have been considered together and are being decided by this common judgment. However, so far as the W.P.(T) No.658 of 2007, 646 of 2007, 645 of 2007, 656 of 2007 and W.P.(T) No. 650 of 2007 are the matters, wherein the counsels for the parties have submitted that these matters may be decided after disposal of the petitions referred above because the decision in above matters will have material bearing on their petitions and/or some of the petitions may also stand covered by the judgment which is going to be rendered in the writ petition No.2890 of 2011, 6163 of 2006, 667 of 2007 and 598 of 2007 in spite of having some more points raised in these petitions.

2. We take the facts of the case of W.P.(T) No. 6163 of 2006(M/s Atibir Hi- Tech Pvt. Ltd) because of the reason that the

said writ petition was allowed by the Division Bench of this Court by the judgment dated 11.1.2007. But, the Hon'ble Supreme Court in Civil Appeal No.3450 of 2008 in the case of this writ petitioner- Atibir Hi-Tech Pvt. Ltd. sent back the matter to this Court for deciding in accordance with the directions issued by the Hon'ble Supreme Court in its order dated 30.4.2008.

3. In W.P.(T) No.6163 of 2006 M/s Atibir Hi- Tech Pvt. Ltd., challenged the order dated 3.3.2006 issued by the Deputy Commissioner of Commercial Taxes, Giridih Circle, Giridih, whereby the petitioner's application Dated 26.2.2006 for cancellation of registration certificate issued under Rule 4 of the Bihar Electricity Duty Rules, 1949, and for refund of the amount paid by way of electricity duty was rejected. The said Deputy Commissioner of Commercial Taxes also directed the writ petitioner to make the payment of the electricity duty together with the surcharge.

4. The learned Division Bench of this Court considered the definition of the 'consumer' and the 'licensee' as given in the relevant of Bihar Electricity Duty Act, 1948, which has been adopted by the Jharkhand Stated vide notification dated 22.12.2000 in exercise of power conferred by Section 85 of the Bihar Reorganization Act, 2000, and also considered the Section 28 of the Indian Electricity Act. In view of the fact that the reason of dispute was with respect to the levy of the electricity duty and its liability upon the parties; the Division Bench also in detail considered the Section 3 which provides incidence of the duty along with the Section 4 which provides for mode and manner of payment of duty. Thereafter, the Section 3A of the Act of 2003 by which surcharge is levied was considered. The Division Bench

after considering the judgment of the Hon'ble Supreme Court delivered in the case of ***Damodar Valley Corporation Vrs. State of Bihar and Ors., reported in 1976 (3) SCC 710***, observed that the Hon'ble Supreme Court has already discussed that one of the function of the D.V.C. is for generation, transmission and distribution of the hydro-electric and thermal electrical energy. And while answering the question in affirmative whether the D.V.C. is liable to pay the electricity duty under the Bihar Electricity Duty Act, 1948 as amended by Bihar Electricity Duty Amendment Act of 1964, also considered the Clause 1 and 2 of the Article 288 of the Constitution of India. Then, another case was considered by the Division Bench in its judgment delivered in the case of *Tata Iron & Steel Company Vrs. State of Bihar Ors* i.e., the judgment of the Patna High Court reported in 1993 (2) PLJR 59 *M/s Tata Iron & Steel Co. Ltd. The Tata Steel and Iron Co.Ltd.* is also one of the petitioners before us. In addition to above, also considered the case of *Bihar Alloy & Steel Limited Versus State of Bihar and Anr., reported in 1996(1) PLJR 824, Steel Authority of India Limited Versus State of Bihar, reported in 2000 (2) JCR 72* . The Division Bench has relied upon the case of the *M/s Bihar Alloy & Steel Limited (Supra)*, but according to the learned counsel for the parties, the said judgment of *Bihar Alloy & Steel Co. Ltd. Vrs State of Bihar & Anr.* has already been reversed by the Hon'ble Supreme Court in Civil Appeal No.1491 of 1996, the *State of Jharkhand & Ors Versus Bihar Alloy & Steel & Anr.* vide order dated 18th November, 2003 and the matter was remanded to this Court and after remand of the writ petition of the *Bihar Alloys & Steel Co. Limited & Anr*, the said writ petition has already been dismissed by the High Court for non-prosecution. Therefore, the

judgment of ***Bihar Alloy & Steel Co. Limited*** considered in the judgment of this Court in W.P.(T) No. 6163 of 2006 does not exist.

5. Be that as it may, the Division Bench of this Court after considering all above judgments, allowed the writ petition of M/s Atibir Hi-tech Pvt. Ltd. & Ors. vide judgment dated 11.1.2007 and quashed the order dated 3.3.2006 passed by the Deputy Commissioner of Commercial Taxes , Giridih Circle, Giridih and it has been held, that the petitioner-company as held in other cases, even when those companies registered them as assessee under the Bihar Electricity Duty Rules ,1949, yet they are neither licensee nor assessee, the petitioner M/S Atibir Hi-tech Pvt. Ltd is also not be liable to pay the electricity duty and the surcharge thereupon. Even after allowing the writ petition of the writ petitioner and holding that the petitioner -company is not liable to pay the electricity duty and the surcharge thereupon, the Division Bench held that whatever the duty and the surcharge has been paid by the petitioner-company shall not be refundable.

6. Agrieved against the said judgment of this court in said writ petition and other similar petitions, various SLPs were preferred before the Hon'ble Supreme Court which were registered as Civil Appeals Nos. 3451 of 2008, 3453 of 2008, 3454 of 2008 and 3456 of 2008 and all these appeals were decided by the order dated 30th April, 2008 and the matter has been remanded to this Court.

7. In the said order dated 30.4.2008, the Hon'ble Supreme Court took into account the contentions of the petitioner -company -M/s Atibir Hi-tech Pvt. Ltd. and observed that :-

“In short- the company submitted before the High Court that it was not obliged to pay the duty directly to the State as an 'assessee” The Hon'ble Supreme Court after recording

concession of the said petitioner-company (only M/S Aitbir Hi-Tech Pvt. Ltd.) that it shall not be seeking refund of the payment already made, but it want an authoritative judgment on the question of law, observed that:-

“The key issue which arose for determination before the High Court was whether the company was an assessee under the Act of 1948 read with Rules of 1949. Further in view of the fact that the Indian Electricity Act, 1910 was repealed by a new Act i.e. Electricity Act, 2003 and therefore, the Hon'ble Supreme Court observed that :-

“ It is important to note at this stage that under Section 2(d) of the 1948 Act the word 'licensee' is defined to mean any person including a company licensed under Part II of Indian Electricity Act, 1910 to supply energy. Pre 2003, Damodar Valley Corporation was not a licensee under Indian Electricity Act, 1910. However, on 10.6.2003 the earlier enactment, namely, Indian Electricity Act, 1910 stood repealed and it stood replaced by the Electricity Act, 2003. Under fourth Proviso to Section 14 of the said 2003 Act it has been stipulated that Damodar Valley Corporation shall be deemed to be a licensee under 2003 Act but shall not be required to obtain a license under the said Act and the provisions of Damodar Valley Corporation Act, 1948 insofar as they are not inconsistent with the provisions of the Act, shall continue to apply to that Corporation.”

8. The Hon'ble Supreme Court also observed that:-

“With the enactment of the Electricity Act, 2003, the nature of the dispute has undergone a structural change

particularly in view of the fact that under the Electricity Act, 2003, the entire scheme brings the concept like “Deemed Licensee”. In this connection section 185 which deals with repeal and savings is also relevant”.

Therefore, the Hon’ble Supreme Court remanded the matter to the High Court and directed this Court to address on key issues, for which we may quote from the order of the Hon’ble Supreme Court :-

“However, since an important point of law arises, we are of the view that the point needs to be considered afresh by the High Court keeping in mind the change in law in view of the Electricity Act, 2003. We may reiterate that the respondent-company has fairly given up its claim for refund, and, therefore, what needs to be decided is whether the said company or the Damodar Valley Corporation is the assessee under the 1948 Act particularly in view of the provisions of Section 14 of the said 2003 Act; the effect of 2003 Act on the registration certificate issued earlier under the Bihar Electricity Act, 1948 and the interpretation of 1948 Act, the 1949 Rules in juxta position to the Electricity Act, 2003. These questions were not raised and, therefore, not gone into by the High Court, however, they are of considerable public importance hence we have to remit this matter for consideration in accordance with law”

9. The Hon’ble Supreme Court has permitted the writ petitioner in W.P.(T) No.6163 of 2006, to amend the writ petition with liberty to the Damodar Valley Corporation to submit additional affidavit to the amended writ petition.

10. Apart from the above order, in the matter of M/s Tata Steel Limited Versus State of Jharkhand & Ors in Civil Appeal No. 3457 of 2008, in separate order dated 30.4.2008 Hon'ble Supreme Court observed that two questions arose before the High Court which are (a) Whether Department was entitled to reopen the completed assessment under the provisions of Bihar Electricity Duty Act, 1948; and (b) Whether M/s Tata Steel Limited is the assessee under the said 1948 Act. Then Hon'ble Supreme Court held that, whether the appellant Tata Steel Ltd. , is assessee under the said 1948 act, the dispute is covered by decision in Civil Appeal No. 3450/2008, Aitibir Hi-Tech Case. Hon'ble Supreme Court specifically held that the Tata Steel Ltd. in its original petition before the High Court had raised the dispute, namely , that Damodar Valley Corporation alone was assessee and that Tata Steel Ltd. could not be an assessee under the Act of 1948. Then the Hon'ble Supreme Court permitted Tata Steel to file fresh petition to avoid any confusion. Then the Hon'ble Supreme Court directed to hear the independent writ petition of M/s Tata Steel Limited along with the original writ petition No. i.e., Original Writ Petition (T) No. 6163 of 2006 filed by M/s Atibir Hi-tech Pvt. Ltd. so that the matter can be heard simultaneously and disposed of together .

11. The other ***Civil Appeal No. 3458 of 2008*** preferred by the D.V.C. i.e Damodar Valley Corporation Versus M/s Tata Steel Limited & Ors with Civil Appeals No. 3459-67/08 and SLP(C) No. 2336/2007 State of Jharkhand Vs. Shivam Steel were also decided though by separate order but according to the decision given in the M/s Atibir Hi-tech Pvt. Ltd. case.

12. In view of the orders passed by the Hon'ble Supreme

Court in Civil Appeal No. 3457/2008 the Tata Steel Limited has preferred a fresh writ petition being writ petition No.2847 of 2008.

13. Before these matters could have been heard and decided, the State Government has enacted Jharkhand Electricity Duty Amendment Act, 2011. As per the Clause III of Section 1 of the Amendment Act of 2011, the State Government has been given power to make various provisions of the Amendment Act, 2011, effective from the date to be notified by the State Government. Then, vide notification dated 28.6.2011, while exercising powers conferred by Clause III of Section 1 of Jharkhand Electricity Duty Amendment Act, 2011, Section 2 and Section 3 of the Amendment Act, 2011, have been made effective retrospectively from 10.6.2003, the date on which the Electricity Act, 2003 came into force. Section 5 of the Amendment Act of 2011 has been made effective retrospectively, with effect from 15.11.2000, the date on which the State of Jharkhand was created. Section 4 and Section 6 of the Amendment Act 2011 have been made retrospectively effective from the date of publication of the Amendment Act, 2011. This Enactment, came into force subsequent to the decision of the Hon'ble Supreme Court referred above, in M/s Atibir Hi-tech 's case, therefore, the writ petitioners sought permission to amend the writ petition which was allowed by this Court after hearing the parties and M/s Tata Steel Limited in Writ petition No.2847 of 2008 challenged the validity of the entire Amended Act, 2011, whereas in other writ petitions only retrospectivity of the provisions of the Act have been challenged.

14. In view of the involvement of common question of laws, the reply has been filed by the State in W.P.(T) No.2890 of

2011 whereas the Damodar Valley Corporation has filed its reply in W.P. No.4847 of 2008 and the matter has been argued at length and the relevant provisions have been referred to substantiate the pleas taken by respective counsels for these parties during the arguments.

15. The learned counsel for the petitioners vehemently submitted that the Bihar Electricity Duty Act, 1948, which has been adopted by the State of Jharkhand has defined the “Consumer” and the “Licensee” in Section 2. It has also provided the provisions for levy of the duty upon the energy consumed or sold under Sub-section 1 of Section 3. Then, from who it has to be recovered has been provided under Section 4 of the said Act of 1948. In the year 1985, by the Finance Act of 1985, dated 7.8.1985, Section 3A was inserted in the State Electricity Duty Act, 1948 providing that in addition to the Electricity Duty, “there shall be surcharge at the rate of 2 paise per unit of the energy consumed or sold”.

16. In exercise of powers conferred by Section 2 of Section 10 of the Bihar Electricity Duty Act, 1948, the Bihar Electricity Duty Rules, 1949 were also enacted, wherein the “assessee” has been defined in Clause (b) of the Rule 2. With the help of the above provisions, the learned counsel for the writ petitioner vehemently submitted that firstly the Damodar Valley Corporation (in short, the DVC) is not a ‘Licensee’ but certainly an “assessee” under Rule 2(b) of the Rules of 1949. Since, the D.V.C has been constituted and created under the separate and specific Act known as the “Damodar Valley Corporation Act, 1948” and the writ petitioners are the consumers of the Damodar Valley Corporation and therefore, are not the ‘Licensee’ or ‘assessee’

under the Bihar Electricity Duty Act 1948 or under the Rules of 1949, and in view of this fact that the petitioners are not covered, either under the Electricity Duty Act, 1948 or Electricity Duty Rule, 1949 and the Bihar Electricity Duty Act, 1948 have no application to the writ petitioners. However, the petitioner M/s Atibir Hi-tech Pvt. Ltd. and other companies under mistaken belief or wrong advice treated themselves to be an 'assessee' under Sub Clause (b) of the Rule 2 of the Rules of 1949, applied for registration under Rule 3 of the Rules of 1949 and they have been granted the Certificate of Registration. The writ petitioners, therefore, started paying the electricity duty but when they found that they are not liable to pay the electricity duty to the State Government nor they were obliged to obtain the registration certificate under the Act of 1948 and the Rules of 1949, they submitted a petition before the competent authority for cancellation of the Certificate which cancellation is permissible under Rule 5 of the Rules of 1949 and otherwise also, if a person or the company, is not covered under the Act and the Rules, he or it could not have been registered as assessee, therefore, the Certificate is of no consequence and cannot create liability and should have been cancelled by the authority forthwith and if it has not been cancelled, even then it cannot make the petitioner liable for the duty and surcharge cast obligation upon the petitioner to submit return. It is submitted that the Division Bench in earlier round of litigation and particularly in the case of M/s Atibir Hi-tech Pvt. Ltd. clearly held that the petitioner- company is not an 'assessee' and shall not require to have a registration of the company under the Rules of 1949. The same is the position of all other writ petitioners – companies as they claim that they are also neither licensee nor could be

assessee under the act of 1948 or Rules of 1949.

17. Learned counsel for the petitioner submitted that Section 3 is the charging Section which provides that the electricity duty shall be leviable and “required to be paid to the State Government on the units of energy consumed or sold excluding the losses of energy in transmission and transformation”, and the exemption has been given in Sub Section 2 of Section 3, wherein as per the Sub Clause (e), the Damodar Valley Corporation has been exempted from the levy of the electricity duty only on the units of energy consumed by the Damodar Valley Corporation for generation, transmission and distribution of the electricity by the D.V.C. itself. Hon'ble Supreme Court as back as in 1976, in the D.V.C.s own case referred above held that, other than above exemption i.e. exemption under Sub Clause (e) of Sub Section 2 of Section 3, the D.V.C. liable to pay electricity duty obviously, in view of sub Section 4 of Section 4 of the State Electricity Duty Act, 1948. Everyone who is liable to pay duty under the act of 1948 is assessee as per Rule 2(b) of the Rules of 1949, therefore, the D.V.C. was held to be assessee under the Rules of 1949 (though it was not licensee).

18. Since the Damodar Valley Corporation is not a ‘licensee’ and nor was required to obtain licence as the D.V.C. was constituted and created under the Special Act i.e., the Damodar Valley Corporation Act, 1948. The Damodar Valley Corporation was not required to obtain any sanction under Section 28 of the Act of 1948, therefore, even if there is any liability to pay the electricity duty due to the generation, transmission and distribution of the electricity by the D.V.C. (except for the energy consumed by the D.V.C. for above

purpose), then the DVC falls in the Sub Section (4) of the Section 4, which provides that every person including the department of State Government, who generate energy for its own use and for the use of its employees or partly for use or partly for sale shall pay duty payable under Section 3 on the units of energy consumed by him or his employees or sale by him. Therefore, the liability to pay the duty fall only and only upon the D.V.C. and such duty is not recoverable from petitioners as is recoverable by any licensee from its consumer under Sub Section (2) of Section 4 . Under Sub Section (1) of Section 4, the initial liability to pay the electricity duty is of licensee and a right has been given by Sub Section (2) of the Section 4 to the licensee to recover the said electricity duty from the consumer, but as stated above, such power has not been given to a person who is assessee but not the licensee under the Act of 1948. Therefore, even if the D.V.C. is liable to pay the electricity duty then also the writ petitioners who are consumers of the D.V.C. will not be liable to pay the electricity duty directly to the State Government .

19. Learned counsel for the writ petitioner further submitted that the Damodar Valley Corporation in W.P.(T) No. 2847 of 2008 i.e., in the writ petition of M/s Tata Steel Limited very specifically took the stand in the pleadings that the D.V.C. is not a Licensee within the meaning of the provisions of definition of Licensee under Section 2(d) of the Bihar Electricity Duty Act of 1948. Therefore, with the help of the said admission of the D.V.C., it has been contended that the petitioners are not liable to pay the electricity duty.

20. It is also submitted that under Section 4(1) and 4(2), there is provision for payment of the electricity duty by the

Licensee and the recovery of the said amount from the consumer, but so is not provided for the surcharge and as per the Section 3A, the surcharge is not a liability of the consumer in any manner and it is to be borne by the person liable for electricity duty, therefore, the petitioners are entitled to refund of surcharge amount which has been paid by them.

21. The learned counsel for the petitioners vehemently submitted that the Amendment Act of 2011, though enacted by the State Government but its retrospective effect is given by exercise of delegated legislative power. The legislation, that is to make act of 2011 or its any provision operative retrospectively has not been given by the legislative enactment i.e., by the Act of 2011, and therefore, the notification is invalid. It is also submitted by the learned counsel for the TATA Steel Ltd. that the retrospective operation of the provisions of the Act of 2011 will make a chaotic situation and will make all the things totally unworkable and that will result into not only making of all the electricity users in the State as “consumer” and that will be creating petty electricity users also consumers requiring them to obtain licence under the Rule and furnish return and face penal consequences. Whereas only 'licensee', who are in few number only were collecting the electricity duty from users/consumers and were submitting the return. The penal consequences of penalty upon the electricity users (consumers) of the State of Jharkhand irrespective of the fact , whether they are the consumers of the DVC or they are consumers of the any other Licensee as well as they are the consumers of the even Jharkhand State Electricity Board whose number is more than 15 lacs clearly indicate that while enacting Act of 2011 no mind was applied and operation of

this Act is neither workable nor in public interest but will be detrimental to public interest. It is submitted that the retrospective effect of the above provisions will be against the public policy which will have a grave consequence, both for public as well as for the State. It has been pointed out by the learned counsel for the petitioners by giving example like, the case when the law continued for almost more than half century and the assesseees are obtaining a Certificate of Registration and submitting the returns and obtaining the assessment orders, such law has been sought to be changed entirely so as to include every petty consumer of the electricity who may be even petty consumer residing in a hut having electricity connection for even one electric bulb will be assessee in the definition of the "assessee" and those all 15 lacs consumers will be required to obtain the Certificate of Registration and will be required to furnish the return and will also be subjected to Assessment proceedings and in case of non-furnishing of the return, they may be penalized, therefore, it is against the public policy also.

22. *In W.P.(T) No.2890 of 2011* copies of orders /circulars issued in the light of the judgment given in the case of Central Coalfields Limited Versus State of Jharkhand, decided by the Division Bench of this Court on 8.3.2011 have been placed on record wherein, instructions have been issued for levy and recovery of the electricity duty from the various consumers through the Department of Commercial Taxes of the State of Jharkhand and those circulars / orders have been challenged on the same pleas which we have already referred above.

23. To counter the arguments for the counsels for the petitioners, learned counsel for the D.V.C., Sr. Advocate, Sri

S.B.Gadodia vehemently submitted that the respondents have no reason to approach this Court under Article 226 of the Constitution of India seeking relief which is contrary to their contractual obligation, which contract, they themselves, with open eyes entered into and signed the agreement and that too in the case of M/s Tata Steel Company as back as about more than 30 years ago and they were paying the duty from beginning. It is submitted that there is no dispute that the D.V.C. has been established under the provisions of the Damodar Valley Corporation Act of 1948 and the D.V.C. is not covered by the Electricity Act of 1910. It is submitted that the provisions of the D.V.C. Act 1948 are required to be taken note of and it is clear from the D.V.C. Act of 1948 that the D.V.C. can have the only bulk supply consumers of the electricity and that is clear from the Section 18 of the D.V.C. Act of 1948 which provides that notwithstanding to anything contained in the Indian Electricity Act, 1910 or any License granted thereunder, the corporation can sell the electrical energy to any of the consumers in the Damodar Valley where the energy taken by the consumers at a pressure of 30,000 Volt or more of transmitting electrical energy in the D.V.C. at a pressure of 30,000 Volt or more, generate any electrical energy at an installation having aggregate capacity of 10,000 K.W. in any part of the Damodar Valley etc., therefore, the D.V.C. is a Company constituted for special purpose to supply the bulk energy and therefore, it has been empowered under Section 20 to charge for supply for electrical energy. Section 20 of the D.V.C. Act of 1948 provides that the Corporation shall fix the schedule of charges for the supply of electrical energy including rates for bulk supply and distribution and specified the manner of recovery of surcharge

provided, that the corporation may contract for contractual work to supply electric energy, impose such direction and condition including the rate, schedule as it may be deemed necessary or desirable to encourage the use of electrical energy. The writ petitioners have neither challenged the agreement or its any term and they took the benefit under the agreement and it is in fact, the statutory agreement in view of the Section 20 of the D.V.C. Act 1948, therefore, the petitioners cannot claim for relief from this Court against the statutory contract as they specifically agreed to pay the electricity duty. Learned counsel for the D.V.C. further submitted that Section 3 is the charging Section and this clearly provides the instance of duty and Sub Section 1 of Section 3 further stipulates not only for levy of the electricity duty but specifically provides that the said duty shall be “paid to the State Government”. It further specifically provides that the electricity duty shall be charges on the units of the energy consumed or sold. Therefore, the consumers of the D.V.C are liable to pay the electricity due by virtue of the agreement between the parties and in view of the language used in Sub Section (1)of Section 3 of the Act of 1948, the D.V.C. consumers are liable to pay the duty to the State directly.

24. It is submitted that the electricity is ‘goods’ under the definition of the Sales of Goods Act and yet it is of special nature. The electricity cannot be stored and therefore, required to be consumed forthwith. The energy infact is, first consumed then the sale stands completed because of the plain and simple reason that electricity cannot be stored, therefore, as soon as the energy is generated, then it requires to be transmitted and required to be consumed otherwise it can go waste only. Learned counsel for

the D.V.C. relied upon the judgment of the Hon'ble Supreme Court dealing with this point in detail, reported in (2002) 5 SCC in the case of ***State of Andhra Pradesh Versus National Thermal Power Corporation*** wherein it has been held that energy cannot be stored. Learned counsel for the DVC also submitted that in view of the peculiar nature of the transmission in peculiar circumstance, that consumption of the electricity takes place first to the sale of the electricity because the supplying company can raise the bills after consumption of the electricity and therefore, before that they cannot even raise the bills and before the sale they cannot receive the sale price. Consequently, the sale completes after consumption, upon receipt of sale price. Therefore, when liability is upon both then in consonance with statutory provision, providing law of electricity duty as sell or consumption, the consumer fall in second category and therefore, also liable to pay electricity duty to the State Government directly. Therefore, according to the learned counsel for the D.V.C., if Sub Section 1 of Section 3 is understood properly, then it is in fact the liability of the consumer and Section 3 has been duly assented by the His Excellency the President of India. Not only this, that Section 3 is the charging Section having the assent of the President of India, and the rates prescribed in the schedule also have been assented by His Excellency the President of India and therefore, the Schedule also became the part of Sub Section 1 of Section 3 i.e., the charging section. A bare perusal of the Schedule clearly reveals that the electricity duty is levied according to the nature of consumption of the electricity and the tariff has been prescribed duly for different uses. The DVC is generating and transmitting the electrical energy to the consumers. Sub-Section 1 of Section

3 very specifically provides that it is required to be charged according to its use then the duty can be only fastened upon the end users. It is true that in Sub Section 1 of section 3 it has been mentioned that the electricity duty shall be leviable on the units of energy consumed or sold. But, it is emphatically submitted that the consumption is the relevant and important factor in the light of the charging provision Section 3 read with Schedule. The Section 4 is not the charging section and therefore, no assent of the President of India is required for the Section 4 to become operational as per the decision of the Hon'ble Supreme Court given in the case of ***Damodar Valley Corporation Vs. State of Bihar***, reported in (1976) 3 SCC 710. In the said Damodar Valley Corporation case, the Hon'ble Supreme Court clearly held that the charging Section is Section 3 and Section 3 only and the charging section cannot be amended, altered or modified by any other Section as has been sought in the argument of the learned counsel for the petitioners by stating that Section 4 changed the entire concept of charge of electricity duty making it liable on only Licensee under Section 4(1). However, learned counsel for the D.V.C has submitted that it never admitted itself to be a Licensee under the Act of 1948 and the Rules of 1949 nor admitting so today. However, in view of the judgment of the Supreme Court delivered in the ***Damodar Valley Corporation case (Supra)***, the D.V.C. is liable to pay the electricity duty on the units of electricity which is not exempted under Sub Clause (d) of Sub Section 2 of Section 3 of the Act of 1948.

25. After arguing at length on various points, learned counsel for the D.V.C. drew our attention to the order passed by the Supreme Court in pursuance of which the matters have been sent to the court and according to the learned counsel for the

D.V.C. the only question referred to this Court by the Supreme Court is to find out who is the 'Assessee', who, the writ petitioner's companies or the D.V.C. is the 'Assessee' under the definition of the Rules of 1949?

26. One another core or important issue involved in this writ petition which is raised by the learned counsel for the petitioners is that whether in any circumstance, the State can straight way demand the electricity duty from the writ petitioners who are the consumers of the D.V.C. It is submitted that the challenge to the Amendment Act 2011 was also necessitated because of the reason that by the Amendment Act of 2011, the radical changes have been made in the definition so as to include each and every consumer of the electricity in the State of Jharkhand in the definition of the consumer which was not included in the definition before the Amendment Act 2011 and only the 'Licensee' was the consumer in the definition of the Act of 1948. This change which has been made effective, retrospectively, may make all including the writ petitioner liable to pay the electricity duty to the State. Therefore, validity of Act of 2011 and making it operational from retrospective effect was necessarily required to be examined while deciding these petitions. The learned counsel for the D.V.C. very vehemently submitted that the Tata Steel Company and particularly West Bokaro Colliery itself admitted in its earlier petition that it is providing electricity to its employees and it is selling electricity so it comes in the purview of the Section 4 and liable for the payment of the electricity duty to the State. It is also submitted that the D.V.C.'s consumers –writ petitioners are also the bulk supply energy consumers and therefore, also they are liable to pay the

electricity to the State.

27. Learned counsel for the State also submitted that in view of the clear language of Sub Section 1 of Section 3 of the Act of 1948, the electricity duty is payable on sale as well as upon consumption of the electricity. Learned counsel for the State also submitted that even if, the petitioners as such are the consumers of the D.V.C. but are liable to pay the duty under the provisions of the Electricity Act because the consumers are also liable to pay the electricity duty. The learned counsel for the State has also relied upon the judgment of the Hon'ble Supreme Court in the case of Damodar Valley Corporation and empathetically submitted that in view of the said judgment this issue is no more *res-integra* that, whether the Damodar Valley Corporation is liable for the electricity duty or not ? Therefore, the only question which has been referred to this Court is to determine that who is and who can be the assessee in the facts and circumstances of the case.

28. Learned Counsel for the State has tried to justify the Act of 2011 as well as making it operational retrospectively. Learned counsel for the State relied upon the various judgments and particularly in case of ***Zile Singh Versus State of Haryana And Others***, reported in, **2004 (8) SCC 1**, and submitted that the amendment of the Act of 2011 as well as the notification is curative in nature and therefore, its operation cannot be treated at par for making any enactment retrospectively operative. It is submitted that the definitions were already there and there were some ambiguity which have been clarified. It is submitted that the amendment have been made so as to make the provisions of the electricity duty Act, 1948 in conformity with the Electricity Act 2003, therefore, the State has to include the D.V.C. specifically in

the definition of the 'Licensee' to include the D.V.C.

29. The learned counsel or the State also relied upon the judgment of Hon'ble Supreme Court delivered in the case of 1987 (6) SCC 42, wherein it has been held that even the tax can be imposed retrospectively and learned counsel for the State has also relied upon the judgment of the Supreme Court delivered in **(1995) SCC 338**.

30. Learned counsel for the State vehemently submitted that the scope of the litigation is very narrow and in the counter of the writ petitioner, it took the stand that substantially the issue has been already decided by the Division Bench of this Court in earlier round of litigation in the judgment delivered in the case of M/s Atibir Hi-tech Pvt. Ltd. which has been considered by the Hon'ble Supreme Court in the case of said company in Civil Appeal No.3450 of 2008.

31. We have considered the submissions of the learned counsel for the parties and perused the facts of the case. Sub Clause (d) of Section 2 of the Act of 1948 is as under:-

“(d) 'licensee' means any person, including a company or a local authority licensed under Part II of the Indian Electricity Act, 1910 (IX of 1910) to supply energy, or any persons including a company or a local authority who has obtained sanction under section 28 of the Act to engage in the business of supplying energy and includes the Bihar Electricity Board constituted under Section 5 of the Electricity (supply) Act, 1948 (54 of 1948).”

It is unambiguously clear from the above definition , that the 'Licensee' under the definition as provided in Sub Clause

(d) of Section 2, is any person including a company or a legal authority who is required to take license under Part III of the India Electricity Act 1910 and who supply energy to any person including the company or a legal authority which has obtained sanction under Section 28 of the Act to engage in the business of supplying energy and includes the Bihar Electricity Board constituted under Section 5 of the Electricity Supply Act, 1948.

To examine this issue, who is the licensee, before amendment of the Act of 2011, we need to look into the unamended definition of the Licensee. Admittedly the D.V.C. is not a company who was required to take License under the Electricity Act, 1910 nor it obtained sanction under Section 28 of the Act. It has been constituted and created under its own Act i. e., the Damodar Valley Corporation Act, 1948. In D.V.C's case **(1976) 3 SCC 710** Hon'ble Supreme Court already decided that the D.V.C. is not the licensee under the State Act of 1948. However, that issue is not very much relevant for deciding the issue referred to this Court by the Supreme Court, that whether D.V.C. is an assessee or not under the 1948 Act which will be apparent from the reasons hereinbelow mentioned and particularly in view of the fact that in this case the dispute between the parties are not with respect to the quantification of the duty or distribution of liability among them but the question is only with respect to, upon who this duty can be levied and recovered ? Therefore, the Section 3 is relevant. Section 3 is a charging Section and this question cannot be in dispute in view of the authoritative pronouncement of the Hon'ble Supreme Court given in the Damodar Valley Corporation's case as back as in 1976 reported in **(1976) 3 SCC,710**. In this case the Hon'ble Supreme Court has already

considered the effect of the Clause 1 and 2 of the Article 288 and the requirement of obtaining the assent of the President of India and found that it is required only for Section 3 of the Act of 1948 which is a charging Section and after considering the Sub Clause (e) of Sub-section 2 of Section 3, the Hon'ble Supreme Court held that the Section 3 deals with the instances of duty and makes it clear that the duty has to be paid on the units of energy consumed or sold at the rate or rates specified in the Schedule. The Hon'ble Supreme Court has further held that Section 3 has made clear that the duty is to be levied and paid to the State Government. It is not the case of any of the parties that the State Government cannot levy and recover the duty upon the units of electricity, sold or consumed and rightly it has not been disputed by any of the parties in view of the judgment of the Supreme Court and the Hon'ble Supreme Court has held that Section 4 of Principle Act merely provides for manner and mode of payment of the duty and then held for Section 4 the assent of the President of India was not at all necessary. Therefore, Section 3 and 4 both are valid enactment and their validity has not been challenged by the petitioners and so have been done rightly in view of the judgment of the Supreme Court also.

32. Now, in the light of the above legal position we have to examine arguments advanced by the learned counsel for the D.V.C. who empathetically submitted that by giving any interpretation of Section 4 affecting the effect of Section 3 would be rendering the one statutory provision contrary to the another statutory provision. However, we are in agreement with the submissions of the learned counsel for the D.V.C., so far that Section 3 is the charging Section and Schedule also is a part and parcel of the Sub Section 1 of

Section 3 and , it is also validly enacted law but what has been done by Sub Section 1 of Section 3 is only that it has provided that the units of energy consumed or sold shall be having the liability of the electricity duty. It specifically nowhere provided that inspite of the fact that two persons i.e., seller and consumer, have been included in Sub Section 1 of Section 3 for the purpose of charging electricity duty and it has not been provided who shall be liable to pay the electricity duty to State as primarily responsible. The charging Section cannot be read to destroy the meaning of another Section in the Statute itself when that section in the Statute is legal and valid and which appears to be supplementary to first section. The liability is upon the consumption as well as upon the sale but chargeable from either of them, and therefore, the word 'or' has been used in between the two, "on the units of energy consumed or sold". Now, Section 4 or any of the part of Section 4 whether runs contrary to Section 3 or effects the liability or the duty of payment of the electricity duty? In our opinion none of the provisions made in and under Section 4 effect the Section 3 as it only provides procedure for recovery of the liability created by Section 3 and therefore, it is supplementary to Section 3. The Sub Section 1 of Section 4 says that every licensee shall pay the electricity duty and Sub Section 2 of Section 4 authorizes the licensee to recover the amount of the electricity duty paid by the licensee. Therefore, Section 4 has prescribed the procedure for recovery of the electricity duty and made licensee liable to pay electricity duty to the State. Therefore, two things are clear; that the D.V.C. is licensee and by virtue of Sub-Section 1 of Section 4 is liable to pay the electricity duty to the State, though with a right to recover it from the consumer and another is that as per definition of 'assessee', Rule 2

(b) of the Rules of 1949, D.V.C. is Assessee and consumers of D.V.C. are not the Assesseees.

However, there is an written contract between the parties i.e., between D.V.C. and its consumer, wherein it has been specifically provided that the electricity duty shall be paid by the petitioners to the D.V.C. Learned counsel for the respondent-D.V.C was fully justified in submitting that in view of the agreement the petitioners are liable to pay the electricity duty. The submission of the learned counsel for the petitioner that when in Sub Section 4 of Section 4 of the Act of 1948, licensee's right to recover the electricity duty from its consumer has not been provided specifically or by implication as has been provided in Sub Section 2 of Section 4 of the Act of 1948 therefore, the petitioner are not liable to pay the electricity duty merely because consumers of D.V.C. signed the agreement which according to learned counsel is contrary to law, in view of the fact that right to recover electricity duty from it's consumer is given to only licensee under Section 4 (1) (a) and such right is not given to any other person merely, who is assessee but not licensee. We do not find any force in such argument. The fact situation in that all the petitions, in written statutory contract with D.V.C., agreed to pay the Electricity duty to the D.V.C. In one of the case of M/s Tata Steel, there is an agreement which is old more than 30 years, but that length of period, even if is ignored even then once consumers of D.V.C. agreed to pay the electricity duty to the D.V.C. then, that agreement cannot be said to be illegal or void in any manner because the Act nowhere prohibited the shifting of burden upon the consumer by the supplier of electricity energy. Therefore, the contract to pay electricity duty to D.V.C. is not hit by any law.

Furthermore the condition of payment of electricity duty by the D.V.C.'s consumers has not been challenged by anybody at any time and is also not under challenge in these petitions. Learned counsel for the petitioners very rightly submitted that they are not challenging the agreement or its any part, their contention is only that they are not covered under and governed by the Act of 1948 and the Rules of 1949 and therefore, they are not liable to pay the electricity duty. If this argument is considered ignoring the agreement, this argument may be valid but so far as the liability of petitioners who are party to legal and statutory agreement are bound by the terms and conditions of the agreement and therefore, the D.V.C. has right to recover the electricity duty from its consumers under the terms of the agreement. At this juncture, it will not be irrelevant to mention here that the D.V.C. is liable to pay the electricity duty under the Rules of 1949 inspite of the fact that it is not license and it is governed by D.V.C. Act whereunder it can prescribe what charges will be borne by the D.V.C. consumers, therefore, the D.V.C. statutory has fixed this liability upon its consumers. The writ petitioners were regularly paying the electricity duty to the D.V.C and did not question the right of the D.V.C. under statutory agreement between he parties. In these writ petitions substantially, the petitioners have come before this Court because the State straightway sought to recover the electricity duty from the writ petitioners who are the consumers of the D.V.C. and that was the cause of action. In view of the fact situation, in fact, this ground, legally not sustainable and the petitioner factually cannot raise this issue.

33. It is also submitted that petitioners obtained certificate of registration under the Rules of 1949 for their registration as

Assesse; which is void from inception. The Hon'ble Supreme Court, therefore, has made it clear that the core issue in these matters is that who is the assessee. Therefore, we have to examine that whether the petitioners who have obtained the Certificate of Registration under the Rules of 1949 can be said to be assessee and because of their obtaining the Certificate, whether they are precluded and estopped from saying that they are not the assessee and whether they are liable to pay the electricity duty to the State Government directly or the State Authorities through its Commercial Tax Department who is the in-charge for recovery of electricity duty.

Facts of the Writ Petition No. W.P.(T) No. 3525 of 2005, Central Coal Fields Limited Versus State of Jharkhand are relevant. In that writ petition, the petitioner challenged the demand of surcharge levied under Section 3(A) of the Electricity Duty Act of 1948. In the writ petition No. W.P.(T) No.5325 of 2005, the petitioner's own case was that, the petitioner was using the electricity purchased from the D.V.C for it's own use as well as for sale also, which is not the fact situation in present case and counsel for the petitioner's contentions is that these matters are only of those units on which the petitioners are consuming the electricity purchased from the D.V.C for their own use. Therefore, the judgment given in the W.P.(T) No.5325 of 2005 has no application.

34. This controversy is because, a few orders have been issued by the Commercial Taxes Department directing writ petitioners to pay the electricity duty to the State under the impression that in view of order dated 8.3.2011 passed in the Central Coalfields Limited Vs. State of Jharkhand, delivered in W.P.(T) No. 5325 of 2005 , the State authorities are required to demand the electricity duty from the writ petitioners.

35. Learned counsel for the State in fact could not show us any provision of law under which the petitioners could have been treated to be the assessee under the Act of 1948 and the Rules of 1949. We considered the definition of the “assessee” which has not been given in the Act of 1948 and which has been given in the Rules of 1949. As per the Sub Clause (b) of Section 2, the “Assessee” means a licensee or any other persons who is liable to pay the duty under the Act of 1948”. The liability to pay the electricity duty is not applicable to person who is not liable to pay duty under the Act of 1948 and is liable for the said duty under contract with the assessee under different Act. The liability to pay the duty under the Act can be found out from the Section 3 and Section 4 which we have discussed. For sub-section 1 of section 3, we have already observed that, that only provided that the electricity duty shall be upon the units of energy consumed or sold , therefore the electricity duty is attached to the energy units. Section 3 in absence of Section 4, may have created confusion that who is primarily liable to pay the electricity duty to the State. It appears the charging Section, i.e., Section 3, provided for charging of the electricity duty and the mode and the manner of payment and liability between seller and he consumer(electricity user) has been provided in Section 4. According to sub section 1 initial liability to pay the electricity duty is upon the licensee and the licensee has been given right to recover the amount from the consumers. Therefore, there is no dispute with respect to the case where the licensee has supplied electricity to consumer . The disputes centers around sub Section 4 of Section (4) wherein the language of which is as under :

“4. Payment of Duty -(1).....

(2)....

(3)....

(4) Every person including any department of the State Government, other than a licensee, who generates energy for his own use or for the use of his employees, or partly for such use and partly for sale, shall pay every month at the time and in the manner prescribed the proper duty payable under Section 3, on the units of energy consumed by him or his employees or sold by him.”

36. Sub section 4 provides that the electricity duty shall be on “every person” (1) who generates energy for its own use or (2) for the use of its employees or (3) partly for such use and partly for sale. In case in hand, we are dealing with the petitioners' those units cases where the petitioners are purchasing the electricity from the D.V.C. for their own use, not for its (i) employees or (ii) partly for use of its employees and partly for sale. We are also not considering the cases of petitioners who are generating electricity. Therefore, the cases in hand are not covered under Sub-Section (4) of Section 4. Sub Section 4(a) creates liability to pay the electricity duty upon “every (such) person” other than licensee who (1) obtains bulk supply of energy, whether from licensee or other person (1) for sale or (2) partly for his own use and partly for sale. The petitioner, though are if presumed to purchasing electricity in bulk (bulk energy is not defined) even then they are not selling energy or its any part, therefore, the petitioners are not liable to pay electricity duty under sub section 4(a) of section 4 of the Electricity Duty Act, 1948. As per definition of “Assessee” given in Clause (a) of Rule 2 of Rules of 1949, assessee means the licensee or any other person who is liable to pay electricity duty under the Act. Therefore, the D.V.C who is liable to pay the electricity due under the Act is “Assessee” as defined in the Rules of 1949 but the petitioners, though liable to pay the electricity duty but not to the State nor

under the Act of 1948 or Rules of 1949, are not the assessee for the purpose of above Act and Rule.

37. It is also submitted that the number of consumers of D.V.C. are very few, only less than 200 as compared to the consumers of other electricity generation companies or licensees or assessees. The writ petitioners are in fact consumers of bulk supply of energy. It is also submitted that the TATA Steel Ltd. in its reply admitted that it is supplying energy to its employees whereas, the contention of M/S TATA Steel Co. Ltd. is that it has its other units where they are licensee and they are paying electricity duty and for the unit for which reference has been given by the learned counsel or the D.V.C, the TATA Steel Ltd. itself has its own generation of electricity and electricity generated by them, they are using for their employees and they are not purchasing any part of the electricity to the D.V.C. for that unit. In present case, the mater is of TATA Steel company which is neither generating electricity nor selling the electricity after obtaining it from D.V.C. However, we are of considered opinion in Section 3 and Section 4 there is distinction that these Sections will have different application for bulk supply users and for other users, therefore, this argument does not make the position different then what has been held by us.

38. In view of the above discussions , even if it is provided by sub section 3 that the duty is leviable upon the energy consumed and the writ petitioners are consumers of the units of the energy supplied by the D.V.C even then the state has no right to recover directly the electricity duty from the writ petitioners and when the D.V.C is liable to pay the electricity duty under sub section 1 of section 3 and it has been so held by the Hon'ble Supreme Court in the year 1976 in the D.V.C's case itself then in that situation the

State can recover electricity duty only from D.V.C. and the State authorities have no authority under the **Act of 1948 and rules 1949 to demand the electricity duty from the consumers of the D.V.C. directly and consequentially the consumers of D.V.C. are not the Assesseees in the definition of 'Assessee' and the D.V.C. is assessee under Rule 2(b) of Rules of 1949.**

39. It is also appear from bare reading of the definitions of the licensee as given under sub- clause (d) of Section 2 that the then Bihar Electricity Board and now the Jharkhand State Electricity Board is licensee. Sub Section 1 of Section 3 cannot be read to mean that the liability is simultaneous upon the consumer and the seller of the electricity unit, if so, will be held then that will result into holding that the every consumer of the electricity even of the State Electricity Board is directly liable to pay the electricity duty to the State Government applying same principle, that the energy cannot be stored and first it is consumed then the transaction of sale stands complete. Otherwise also, if it is held that all consumers are liable to pay electricity duty to the State Government directly then the consequence will be grave as all consumers who are lakhs in number will have to obtain registration and will be subjected to agreement under the Rules which will make the procedure unworkable for no reason.

40. Now, the Act of 2003 is very relevant and require to be considered because of the reason that the Supreme Court has directed this Court to examine the effect of the Act of 2003.

41. We have already held that under the Bihar Electricity Act, 1948 and the Rules of 1949, in the definition of the “licensee” the D.V.C. was not included. However, in the Electricity Act of 2003, the D.V.C. has been made “licensee” by deeming provisions as

provided in the fourth proviso to Section 14. The fourth proviso of Section 14 is relevant. Fourth proviso to Section 14 of the Act of 2003 is as under :-

“Provided also that the Damodar Valley Corporation, established under Sub-Section (1) of Section 3 of the Damodar Valley Corporation Act, 1948 (14 of 1948), shall be deemed to be a licensee under this Act but shall not be required to obtain a license under this Act and the provisions of the Damodar Valley Corporation Act, 1948 (14 of 1948), insofar as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation.”

42. With the help of this proviso, learned counsel for the petitioner vehemently submitted that this deeming clause cannot be extended to any other Act like Act of 1948, which is clear from the language used in the Act of 2003 itself, which clearly says that the **D.V.C. shall be deemed to be a Licensee under this Act.** Therefore, the D.V.C. is a Licensee under the Electricity Act, 2003 and not under the Act of 1948 or in the Rules of 1949.

43. The arguments of the learned counsel for the petitioners has not impressed us in view of the fact that what has been provided by the fourth proviso of Section 14 is that the D.V.C. shall be deemed to be a Licensee under the Act of 2003 and further, has been provided that it shall not be required to obtain the License under the Act of 2003. In the Act of 1948, every licensee, who obtained the license under the Indian Electricity Act of 1910, has been declared licensee under Clause (d) of Section 2 of the Act of 1948. Act of 1910 has been repealed by Section 183 of the Act of 2003. Admittedly, the D.V.C was not licensee under the Act of 1910 and therefore, was held to be not licensee under the Act of 1948. Act of 2003 took place of Act of 1910. There is no Act of 1910 with coming in the force of the Act of 2003, yet there is reference of Act

of 1910 in Section 2 (b) of the Act of 1948. Section 8 of General Clauses Act 1897 taken case of such situation. Section 8 of the General Clauses Act of 1897 is as under :

“8. Construction of references to repealed enactments. - (1) *Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.*

(2) *Where before the Fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then reference in any Central Act or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.”*

In view of the Section 8 of the Act 1897, where one reference of the Act 1910 is given in the Act of 1948, it shall be deemed to the reference to the provisions re-enacted. Therefore, in the definition Clause 4(b) in place of “Indian Electricity Act 1910”, Electricity Act 2003 is required to be read. Therefore, by 4th proviso to Section 14, the D.V.C is licensee now, under the Act of 2003, consequently, the D.V.C who was recovering the Electricity Duty from it's consumer, after coming into force of 4th proviso to Section 14 of the Act of 2003 can recover the Electricity Duty from it's consumers as licensee. Once in Indian Electricity Act, 2003, the D.V.C. has been made deemed licensee, it is “licensee” for all purposes and only exception is that it need not to obtain licence under the Act of 2003 by virtue of fourth proviso to Section 4. The D.V.C. also got the right to transmit or distribute or can undertake trading in electricity for which the D.V.C. is authorized under the D.V.C. Act also. D.V.C. being licensee under the Act of 2003, it fall in the definition of licensee under Section 2(d) of the Act of 1948. Section 2(d) of the State Act of 1948 and

with the repeal of the Act of 1910 and coming into force of the Act of 2003, licensee under the Act of 2003 became licensee under the Act of 1948.

44. The petitioners' other contention was that the petitioners are not liable for the Surcharge.

45. In our opinion, the Surcharge is leviable under Section 3A and it is leviable upon every licensee "or any other person other than the licensee, who is liable to pay duty under Section 4". Sub-section (2) of Section 3A clearly provides notwithstanding anything to the contrary contained in the Act of 1948, no licensee or any other person, who is liable to pay surcharge shall be entitled to collect the amount of surcharge as such from the consumer. Therefore, the consumers have been excluded from the liability to pay surcharge under Section 3A, therefore, it is held that the writ petitioners are not liable to pay surcharge even to Damodar Valley Corporation. Since Section 3A is very specific and it provides that notwithstanding anything contained in the Act of 1948, no licensee or person who is required to pay surcharge shall be entitled to collect the amount of surcharge from the consumer, therefore, it is held that the DVC is not entitled to demand and collect surcharge from its consumers.

46. Now we, after holding so, may now consider the challenge to the Act of 2011 and its retrospective operation. On the question of validity of the retrospective operation of the Amendment Act of 2011, learned counsel for the petitioners submitted that sub Section 3 of the Section 1 has empowered the State Government for fixing the different dates for coming into force of different provisions of the Act and therefore, intention of the legislature was very clear that these dates will be future dates, otherwise the legislature itself could have provided in the Amendment

Act, 2011 itself that the amendments will come into force with immediate effect or retrospectively. Learned counsel for the petitioners relied upon the judgment of the Supreme Court delivered in **2004(8) SCC 1, 1987(64) SCC 42, and 1995 SCC 338**. Further contention of learned counsel for the writ petitioners was that the notification has been issued in delegated legislative power and it is not the notification issued by the legislature itself. The provision of any Act cannot be made retrospectively operative by delegation of power. Learned counsel for the petitioners also submitted that if these provisions are made operative from the back date, it will result into penal consequences and in fact will make the entire settled position changed as well as will result into such a chaotic situation which will be even beyond the control of the State Government.

47. We have examined the Act of 2011 as well Act of 1948 and the Rules of 1949. Radical changes have been made in the Act of 1948 by the Amendment Act of 2011. A comparative chart submitted by the counsel for the petitioners is very useful :-

Challenge to Jharkhand Electricity Duty(Amendment) Act,2011

48. During pendency of these writ petitions, after the order of remand passed by the Hon'ble Supreme Court dated 30th April, 2008, the State Government enacted Jharkhand Electricity (Amendment) Act, 2011 and thereafter, by notification dated 28th June, 2011 made the following sections operative with retrospective effect.

Sections 2 and 3 of the Amendment Act have been made retrospective from 10th June, 2003; Section 5 effective from 15th November, 2000 and Sections 4 & 6 to be effective from the date of publication of the Act of 2011. Therefore, in

substance Section 2,3, 4, 5 and 6 have been made operative retrospectively.

49. By this amendment, definition of the consumer given under the Act of 1948 has been amended . In sub-sections (1), (2),(3),(4) and (4a), the words “ or any other person, who is liable to pay electricity duty” has been added. There are amendments also but for the purposes of deciding the controversy between the parties, these amendments in Section 4 are relevant because of the reason that all the petitioners are admittedly obtaining the electricity from the respondent- Damodar Valley Corporation and their contention is that they are not the licencees, assessees or even consumers of the State Government under the Bihar Electricity Duty Act, 1948.

50. We have already held that the writ petitioners who are obtaining the electricity from the DVC for their own use and who are not covered by sub-section(4) and sub-section(4a) are neither licensee nor assessee nor consumer under the Act of 1948, but because of this Amendment of 2011 and because of making the above provisions operative retrospectively , all the consumers in the State of Jharkhand, irrespective of source from where they are getting the electricity, are liable to pay electricity duty. This position is not only disputed by the State Government, but it has been admitted specifically that because of the amendment referred above, all consumers have been directly made liable to pay electricity duty to the State Government. The State, who has not filed the detailed reply and relied upon the reply filed by the applications for amendment of the writ petitions to challenge the Act of 2011 and retrospectivity of the above provisions, submitted that as per

Section 3 of the Act of 1948, both seller and consumer are liable to pay the electricity duty because the language of sub-section(1) of Section 3 is very clear, which has levied the electricity duty on the units of energy consumed or sold. It is submitted that Section 3 is charging Section and its validity has been upheld by the Hon'ble Supreme Court and, therefore, liability of the seller and consumer of electricity is simultaneous upon both. By amendment, the State has only provided that the State may recover the electricity duty directly from the consumers instead of recovering the electricity duty from the licensee or person who generates energy for his own use or for the use of his employees or partly for such use or partly for sale and realise from those persons who obtains electricity for sale , partly for his own use or partly for sale, bulk supply of energy generated by a licensee or other person . It is submitted that so far as the power of the State Government in enacting the law for the electricity duty is concerned, that is not under challenge. It is submitted that sub-clause(iii) of Section 1 of the Amendment Act of 2011, empowers the State Government to notify the effective dates of the coming into operation of the Sections of the Act of 2011. Therefore, the state government has made these provisions operative retrospectively.

51. It will be worthwhile to mention here that when the matter was pending before the Hon'ble Supreme Court, the Hon'ble Supreme Court found that the Electricity Act of 2003 has been enacted and that subsequent event is also required to be examined and Hon'ble supreme Court observed that “what needs to be decided is whether the said company or the Damodar Valley Corporation is the assessee under the 1948 Act particularly in view of the

provisions of Section 14 of the said 2003 Act; the effect of 2003 Act on the registration certificate issued earlier under the Bihar Electricity Act, 1948 and the interpretation of 1948 Act, the 1949 Rules in juxta position to the Electricity Act, 2003". Then Hon'ble Supreme Court observed that "these questions were not raised and, therefore, not gone into by the High Court. however, they are of considerable public importance hence we have to remit this matter for consideration in accordance with law". The Hon'ble Supreme Court, since has directed this Court to examine the effect of the Act of 2003 and during consideration of issue, the State Government has enacted the Amendment Act of 2011 and amended the Electricity Duty Act, 1948, which has material bearing on the issue , therefore, this Court allowed the amendment after hearing the parties to avoid further litigation.

52. The parties addressed on the question of the validity of the Act of 1948 as well as on the question of validity of the Notification dated 28th June, 2011 , which we are dealing with hereinafter.

53. The petitioners since are not liable to pay electricity duty under the Act of 1948 and Rules of 1949, therefore, the petitioners can challenge the Act of 2011 and Notification dated 28th June, 2011 making the Sections 2,3,4,5 and 6 operative retrospectively , on the ground that by this amendment, the State has made the petitioners liable to pay electricity duty.

54. To understand this issue, it will be appropriate to examine the provisions of levy of electricity duty and its recovery before amendment of 2011 and after amendment of 2011. Section 3 has not been amended and the electricity duty is leviable on the units of energy consumed or sold. Therefore, as per the charging Section, the electricity duty was the liability of the consumer as well as seller . However, to make it clear that how the recovery of electricity duty will be effected in a situation when

simultaneous liability has been created to pay electricity duty by sub-section(1) of Section 3 of the Act of 1948 upon the seller and consumer, Section 4 has been enacted. As per unamended Section 4(1), the licensee was liable to pay the electricity duty to the Government every month, on the units of energy consumed by him or sold by him to the consumer. Therefore, the consumer automatically became liable to pay the electricity duty to the licensee and the licensee who are collecting the electricity duty was required to pay the State Government. Since as per Rule 11, where there is a series of transfers of the same energy, the duty payable shall be levied only at the last point in such series of transfers and, therefore, by Sectional 4(1), power was given to the licensee to recover the electricity duty from the consumer. As per unamended sub-section(4) of Section-4 , every person including the department of the State Government, other than a licensee, who generates energy for his own use or for the use of his employees, or partly for such use and partly for sale, were to pay the electricity duty every month to the State Government and as per sub-section (4a) of Section 4 , every person other than a licensee who obtains, for sale or partly for his own use and partly for sale, bulk supply of energy generated by a licensee or other person, were made liable to pay electricity duty on the units of the energy consumed by him or his employees or sold by him. The validity of Section 3 as well as 4 have already been upheld by the Hon'ble Supreme Court and that issue we have already discussed.

55. In sum and substance, there was a procedure by which a Scheme was prescribed under Section 4 of the Act of 1948 that when the liability to pay electricity duty is simultaneous upon the seller and consumer, then how this should be realized by the State Government. This procedure was followed since 1948. Because of this procedure, there were a few persons or companies were the assesseees in the

definition of sub clause(b) of Rule 2 of the Bihar State Electricity Duty Rules,1949. The persons, who were liable to pay electricity duty to the Government under the Act of 1948 and because of this are assessee, are very few in numbers, rather say negligible number as compared to the total consumers. As per Rule 3 of the Rules of 1949, every assessee is required to obtain registration from the concerned authority by submitting application in form-I appended to the Rules. Such person is granted certificate of registration. Chapter-III of the Rules of 1949 provides the payment of duty and submission of return and every assessee is required to pay the electricity duty by submitting appropriate Chalan in the Government treasury and he is required to submit the return also under Rule-9 to the appropriate authority of the Circle or sub-circle in Form III. For every assessee, assessment order is required to be passed under Chapter-IV of the Rules of 1949 and under Rule 14, the appeal is provided against the order of assessment. As per Section 8 of the Act of 1948, any licensee or other person who is liable to pay duty under the Act of 1948 if fails to keep books of account or to submit returns as required by section 5; or intentionally obstructs an Inspecting Officer appointed under section 6, in the performance of his duties or the exercise of his powers under this Act and the rules made thereunder, is liable to be punished with a fine which may extend to one thousand rupees. Therefore, any person, who becomes liable to pay electricity duty under the Act of 1948 he has to follow the procedure of keeping books of account and is bound to submit return, as required by Section 5 and in default thereof, there is a penal provision of fine.

56. As we have already noticed that a few of the persons or companies were the assessee under the Act of 1948 and Rules framed therein i.e. Rules of 1949. The above procedure which was in operation since more than half century has been changed. Consequence thereof, is that the

position which was made clear and workable by Section 4 of the unamended Act of 1948 had been changed and because of this change every consumer (numbers, in lacs) who were paying the electricity duty for the unit consumed by them through the licensee or any other person, who was liable under the Act of 1948 to pay electricity duty to the Government will now have independent liability to pay the electricity duty to the State Government under the Act of 1948. Because of this amendment, in fact, absolutely arbitrary power has been given to the State Government to raise demand of the electricity duty against either consumer or seller of the electricity. The State failed to justify this change made by the Amendment in sub-section(1) and sub-section(2) of Section 4 of the Act of 1948. This also created total confusion that by the licensee, who has been given power to recover the electricity duty from the consumer shall continue to raise bill of the electricity duty against the consumer and recover it from the consumer. Therefore, another confusion is that whether the State Government will recover the electricity duty directly from about fifteen lakhs consumers of the electricity in the State of Jharkhand or will recover the electricity duty of these persons from and through the licensee or the person who are liable to pay electricity duty and are assessee.

57. Learned counsel for the State could not justify the change made by the Amendment Act, 2011. It appears that amendments have been made without knowing the consequence. The State Government was getting full electricity duty from all consumers in channelised form through a few assessees only then why amendments have been made to create total unworkable situation is not explained as well as it also has not been explained how the State Government will meet with this chaotic situation which we are referring hereinbelow.

58. Because of these amendments by adding words "*or any other*

person, who is liable to pay electricity duty” , is in Section 4 and it's sub sections, according to the State itself all consumers became liable to pay the electricity duty directly to the State Government under the Act of 1948 instead of paying the electricity duty to persons who sale electricity to the petty consumers. Now after amendment, all consumers who are about fifteen lakhs in the State of Jharkhand are required to submit application for registration under Rule 3 of the Rules of 1949 and obtain a certificate of registration under Rule 4 and are required to pay the electricity duty within two calender months of the month to which duty relates by depositing in the Government treasury along with requisite Challan. Not only this but every petty consumer is also required to submit a return under Rule 9 and furnish absolutely unnecessary details, as required under Form no.III, which includes details of the units generated, units purchased in bulk, units loss in transmission or transformation, balance available for consumption or for sale, units of energy on which duty is not leviabale under Rule-11 for the units consumed in metered premises or unmetered premises . Further, details of the units sold in metered premises, unmetered premises, then every consumer is required to claim deduction in respect of meter premises under sub-section(2) of Section 3 by giving statutory details and disclosing the net units in respect of metered premised chargeable to duty and gross amount of duty payable on net units in respect of metered premises, chargeable to duty etc. etc.

59. The learned counsel for the petitioners vehemently submitted that the State cannot give effect to this amendment as it is wholly unworkable and will create chaotic situation as well as it will be unnecessary burdening to the public for no reason. By this amendment, the State is not achieving anything because without any amendment the State was getting the full electricity duty.

There is force in the submission of the learned counsel for the petitioners and State could not answer why chaotic situation will not be , if the amendment referred above are given effect to and every person, having been given a single bulb connection, is required to obtain certificate of registration and obtain the assessment in every two months. How these Officers will handle millions of returns and pass the assessment orders is also unexplained.

60. In addition to above, even assuming for the sake of argument that the State has power to amend Sections retrospectively and this power has been vested in the Government (not in any legislative power but in delegative power), even then making these provisions operative retrospectively cannot be justified as this will result into penal consequences for the public at large, who had not committed any wrong and by retrospective operation, the act which has not been done and which was not required by any law, will be a wrong, resulting into penal consequences.

61. Section 4 has been made operative retrospectively i.e. from the date of publication of the Jharkhand Electricity Duty(Amendment)Act, 2011. The Jharkhand Electricity Duty(Amendment)Act was published in the Gazette on 24th June, 2011, the retrospective effect was given by Notification dated 28th June, 2011. Therefore, from 24th June, 2011, every consumers of the electricity was required to obtain the registration and submit return under the Rules of 1949 ; whereas Section 2 i.e. the definition Section under the Amendment Act, 2011 has been made retrospective from 10th June, 2003. Therefore, from 10th June, 2003 , the persons who are not the consumer, they have been made consumer from 10th June, 2003. By making Section 3 of the Amendment Act retrospectively operative, new definitions have been given to the Actual user of power, captive generating plant, Company, Duty, Government,

Industrial Unit, Mines, Month, Notification, Person, Premises, Prescribed Authority, State, Supply, Unit and they also have been made operative from 10th June, 2003. The purpose of these retrospective operative provisions have not been explained that what object has been sought to be achieved by making it retrospective from the earlier date. Section 5 of the Amendment Act has been operative retrospectively from 15th November, 2000 and by Section -5, Section 4 of the Act of 1948 has been amended and by this retrospective operative, every consumers of the electricity became liable to pay electricity duty to the State Government under the Act of 1948 from 15th November, 2000 and from 15th November, 2000 he is required to obtain certificate of registration under the Rules of 1949 and became liable to maintain books of account from 15th November, 2000 because of amendment of 2011. How effect to this amendment can be given from back date is not known to the State Government and amendment entails penal consequence under Section 8 of the Act of 1948.

62. In totality, the Amendment Act of 2011 , so far making it operative retrospectively, is without any aim and object and without any nexus with the object which can be achieved. However, what object is to be achieved from this Amendment Act of 2011 is not explained by the State Government, which has been changed by the respondents and which appears will create only chaotic situation, unworkable and will give absolutely arbitrary power to the State Government and the licensee to demand electricity duty from the petty consumers. Therefore, the amendment made in Section 4 by the Act of 2011 is declared ultravires to the Article 14 of the Constitution of India as by this amendment, the State has vested itself with the arbitrary power to demand electricity duty either from the seller or the consumer and because of the reason that the said amendment are wholly unworkable and further it will create

chaotic situation, which cannot be handed even by the State Government of obtaining millions of applications for registration under Rules of 1949 and passing assessment order for million persons in the State of Jharkhand. Therefore, the Amendment made in Section 4 is ultravires. For rest of the amendments, the petitioners could not have any grievance because their grievance is only because of the reason that the petitioners who were not liable to pay electricity duty to the State Government under the Act of 1948 shall be liable to pay electricity duty to the State Government directly as well as to the Damodar Valley Corporation under the Act of 1948; whereas they were paying the electricity duty to the Damodar Valley Corporation under the contract and DVC was paying electricity duty to the State Government. Therefore, we are not deciding legality and validity of the other provisions of the Act of 2011.

63. At this juncture, we may observe that Damodar Valley corporation has been included in the definition of licensee by the Amendment Act of 2011, who is already a deemed licensee under the Act of 2003 and we have already held that DVC was not licensee under the unamended Act of 1948, but by virtue of the inclusion of the licensees, who has obtained license under Part-2 of the Indian Electricity Act, 1910 is required to be read with the help of Section 8 of the General Clauses Act, 1897 to be Electricity Act, 2003 . Therefore, otherwise also the DVC is licensee after the Act of 2003. The DVC has not challenged the validity of the Act or provisions of this inclusion in the definition of licensee. Therefore, also other provisions are not required to be dealt with.

64. In view of the above, it is held that:

(I) Damodar Valley Corporation was not the licensee under the Bihar Electricity Duty Act, 1948 and Rules of 1949;

- (II) The Damodar Valley Corporation was the assessee and covered under the definition of the assessee given in Rule 2(b) of the Rules of 1949;.
- (III) The petitioner Companies are neither licensees nor assesses but obtained the registration under the Chapter-II of the Bihar Electricity Duty Rules, 1949. Their registration are of no use. They may have obtained the registration under misconception of law or wrong advice but that will not make them the assessee registered under the Rules of 1949;
- (IV) The State Government has no right to recover the electricity duty from the writ petitioners who are consumers of the Damodar Valley Corporation and who are obtaining the electricity from DVC for their own use;
- (V) The petitioners cannot be subjected to assessment and reassessment for the electricity duty. Therefore, any proceeding of assessment order, reassessment or opening of assessment, which is pending, is quashed. The bills or demand raised by the State Government against these petitioners for electricity duty is also quashed.
- (VI) After coming into force of Electricity Act, 2003, the DVC is deemed licensee and because of the Act of 2003, the petitioners' status has not changed to assessee from non-assessee.
- (VII) Section-5 of the Jharkhand Electricity Duty(Amendment)Act, 2011 amending Section 4 of the Act of 1948 is declared to be arbitrary as it gives

power to the State Government to choose and pick up either of seller or consumer of the electricity for payment of electricity duty and Section 5 of the Act of 2011 amending Section 4 of the Act of 1948 is wholly unworkable and may create chaotic situation, made against the public interest, therefore, declared to be ultravires and illegal.

65. The petitioners are not liable to pay surcharge to the Damodar Valley corporation.

66. Challenge to the rest of the provisions of the Act of 2011 is left open. The writ petitions are allowed accordingly, in terms of the points mentioned above. However, none of the petitioners, if has paid electricity duty to the State, shall be entitled to recover it from the State.

No order as to cost.

(Prakash Tatia, C.J.)

Jaya Roy,J:- I agree

(Jaya Roy, J.)