

(2014) 12 CHH CK 0004
In the Chhattisgarh High Court
Case No : Writ Petition (C) No. 1889 of 2013

Jayaswal Neco Industries Ltd.

APPELLANT

Vs

State of Chhattisgarh

RESPONDENT

Date of Decision : 05-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 227
General Clauses Act, 1897 — Section 3(25), 3(26)
Transfer of Property Act, 1882 — Section 105, 108, 3

Citation : AIR 2015 Chh 22

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Kishore Bhaduri, H.S. Patel and Rahul Pandey, Advocate for the Appellant; A.S. Kachhwaha, Additional Advocate General, Advocate for the Respondent

Judgement

Sanjay K. Agrawal, J.

1. The pivotal question that falls to be determined in this writ petition is whether the petitioner company being lessee of Biomass Power Plant is not liable to pay the electricity duty under Section 3 of Chhattisgarh Electricity Duty Act, 1949 (hereinafter called as "ED Act, 1949") on consumption of electrical energy on the ground that lesser company (MUUL) is exempted from payment of electricity duty by the State of Chhattisgarh/respondent herein in exercise of power conferred under Section 3-B of the ED Act, 1949?

2. The core facts, in nutshell, required for judging legality, validity and correctness of the order dated 22.08.2012 (Annexure P/4) as well as demand notice dated 26.03.2013 (Annexure P/6) are stated as under:

2.1 M/s. Maa Usha Urja Limited (for short, MUUL) i.e., a company registered under the provisions of Indian Companies Act, 1956 situated at village Girodh, Dharsiwan, District Raipur, installed Power Plant of 7.5 MW for producing power from non-conventional sources like Biomass (Rice husk) and is a new industrial

unit as defined in new industrial policy 2004-09.

2.2 The respondent/State in exercise of power conferred under the provisions of Section 3-B of the ED Act, 1949 read with industrial policy, 2004-09, exempted the said company "MUUL" from payment of electricity duty on its own consumption and sale to the third party for a period of fifteen years commencing from 07.03.2007 to 06.03.2022 subject to conditions mentioned in exemption certificate issued on 29.12.2011 (Annexure P/3). The said industrial unit was commissioned on 07.03.2007.

2.3 The petitioner herein is a company engaged in business of manufacturing of steel and its ancillary products. It is case of the petitioner that "MUUL" entered into an lease agreement on 04.01.2007 (Annexure P/2) with the petitioner for leasing out the Biomass Based Power Plant on payment of necessary rent for operation and after grant of lease, petitioner company operated the power plant from March-2007 to June-2012 and paid rent for operating the said power plant. It is further pleaded by the petitioner that MUUL still remains the Legal owner of the said power plant. The said company MUUL has been exempted from payment of electricity duty for a period of 15 years by order-cum-certificate dated 29.12.2011, thus, there does not exist any occasion for the respondents/State of Chhattisgarh to charge electricity duty upon the petitioner. It is further submitted that petitioner had acquired 31.33 percent shares for the purpose of declaring its power plant a captive generation plant which is permissible under Rule 3 of the Electricity Rules, 2005 (for short, the Rules, 2005) and actually the primary liability to pay such, electricity duty etc. under the relevant provisions of law lies upon the exemptee company (MUUL) from payment of electricity duty.

2.4 It was also pleaded on behalf of the petitioner, that he was surprised to receive the order dated 22.08.2012 (Annexure/4) requiring petitioner to pay electricity duty of Rs. 9,68,59,029/- stating that petition company has taken the said power plant on lease from the said MUUL, which was replied by petitioner company stating that petitioner company has been taken to operate the electrical power plant generator on lease, however, the ownership and title over the said power plant remained with MUUL and since the MUUL enjoys the complete exemption from payment of electricity duty, therefore, no such liability of payment of electricity duty can be fastened upon the petitioner for the period from March, 2007 to June, 2012, and therefore order dated 22.08.2012 (Annexure P/4) as well as demand notice (Annexure P/6) be withdrawn and proceedings be closed.

3. Invoking the extra ordinary jurisdiction of this Court, under Article 226/ 227 of the Constitution of India, the petitioner herein, in the above-stated back ground filed the instant writ petition questioning the order dated 22.08.2012 (Annexure P/4) as well as demand notice dated 26.03.2013 (Annexure P/6) passed by respondent/State inter alia stating that petitioner company is not liable to make payment of the electricity duty as he is only a lessee of the electrical power plant, MUUL being the lesser company is exempted from payment of electricity

duty and the petitioner is not a producer of electricity within the meaning Section 2(di) of the ED Act, 1949, therefore no liability can be fastened upon him and as such order directing recovery of 9,68,58,029/- (annexure P/4) and demand notice (Annexure P/6) deserves to be quashed and by issuance of appropriate writ it be declared that petitioner company is not liable to make payment of electricity duty for the relevant period.

4. On rule being issued, the State of Chhattisgarh/respondent filed its counter affidavit stating inter alia that MUUL being newly industrial unit was granted exemption from the electricity duty for the period of fifteen years under the industrial policy, 2004-09. It was further pleaded that in notification dated 31.10.2001 and 08.04.2002 it has clearly been provided that exemption from electricity duty would be available only if the "MUUL" (exempted company from payment of electricity duty) consumes the electricity either for its own purpose or sell it to third party with permission of the State Government, but in the instant case, the entire electricity produced was consumed by the petitioner for its own purpose and petitioner company is neither a high tension consumer of State Electricity Board nor any permission to sell has obtained from the State Government and therefore, exemption granted to the MUUL is not available to the petitioner. It is also averred that in the information supplied in the Form "G" under Rules, 1949 submitted by MUUL and by the petitioner company, the petitioner company has been shown to be producer informing that entire electricity generated has been used by the petitioner for his own purpose since the date of its commissioning that is from March-2007 to June-2012, and as such, MUUL is not entitled for exemption and the petitioner being the "producer" within the meaning of Section 3 of the ED Act, 1949, is liable to make payment of all the electricity duty and therefore, the petition deserves to be dismissed.

5. Thereafter the petitioner filed its rejoinder taking a stand for the first time that MUUL has been selling the electricity to the petitioner company in normal course of its business and petitioner has been purchasing electricity from MUUL from the date of its commencement of the electricity as MUUL is a captive power plant of petitioner as petitioner company holds 31.33% share in MUUL.

6. The respondent/State has filed an application for taking document on record and also filed a copy of audit objection raised by Accountant General in order to support its stand taken in the counter affidavit that, the petitioner company has taken the electrical power plant owned by MUUL on lease and consuming its entire electrical energy as the petitioner company is neither high tension consumer of the State Government and at no point of permission from the State Government has been obtained. The respondent/State has filed copy of monitoring report and copy of Form-G for period of March-2007 to June-2012 which has been taken on record by order dated 13.11.2014.

7. Appearing for the petitioner, Mr. Kishore Bhaduri learned counsel, while attacking and criticizing the order in question would submit as under:-

(i) That M/s. MUUL is a separate legal entity registered under the provisions of Indian Companies Act, 1956 and new industrial unit in terms of industrial policy 2004-2009.

(ii) The petitioner company is company registered under the provisions of Indian Companies Act, 1956 different from MUUL and has only 31.33 % shares in the said company for the purpose of declaring its power plant as a captive generation plant of petitioner company.

(iii) That the M/s. MUUL being a new industrial unit (2004-2009) has established power plant of 7.5 MW for producing power from non-conventional sources like Biomass (Rice husk) been granted exemption from payment of electricity duty vide certificate dated 29.12.2011 (Annexure P/3) on its own consumption and sell to the third party for a period commencing from 07.03.2007 to 06.03.2022 for a period of 15 years subject to condition mentioned therein.

(iv) That the petitioner company has entered into operating lease agreement with MUUL (lesser) and taken on lease 7.5 MW Biomass Based Power Plant duly installed and complete in all respect for a period of 11 months from the date of commissioning of the plant on payment of 30 lacs per month and said operating lease is still subsisting between the petitioner and MUUL.

(v) That the petitioner is only a operational lessee of the Biomass Based Power Plant and lesser is responsible for the payment of all taxes including electricity duty on the leased Electrical Power Plant.

(vi) That petitioner is not a "producer" within the meaning of Section 2(di) of the Chhattisgarh Electricity Duty Act, 1949 (herein after called as ED, Act, 1949) and the liability to pay electricity duty if any, is upon the lesser (MUUL) who is exempted from the payment of electricity duty by order of the State Government dated 29.12.2011 (Annexure P/3) and therefore the order fastening liability upon the petitioner company by order dated 22.08.2012 (Annexure P/4) and demand notice (Annexure P/6) deserves to be quashed being illegal, without jurisdiction and without authority of law.

8. Appearing for the respondents/State, Mr. A.S. Kachhawaha learned Additional Advocate General, while countering the submission made on behalf of petitioner would submit as under:-

(i) That the petitioner company having taken the Biomass Power Plant of the MUUL on lease, is generating electrical energy is a "producer" within the meaning of Section 2(di) of the ED Act, 1949.

(ii) That petitioner company being "producer" though as lessee having consumed the electricity so generated from the aforesaid power plant for its own purpose is liable to make payment of the electricity duty under Section 3 of the ED Act, 1949 and rules made thereunder.

(iii) That the petitioner company having generated the electrical energy from said

power plant as a "producer" and consumed for its own purpose is apparent from the return duly submitted in accordance with Section 6 of ED Act, 1949 read with Rule 7 of the Chhattisgarh Electricity Duty Rules, 1949 for the relevant period in shape of Form-G declaring himself as a producer of the electrical energy of the Biomass Power Plant held on lease from lesser (MUUL) which is statutory document under the provisions of Act, 1949 read with ED Rules, 1949.

(iv) That the exemption from payment of electricity duty was granted to MUUL being the new industrial unit as defined in Industrial Policy 2004-2009 subject to certain conditions incorporate therein which clearly provide that MUUL had to consume the power produced from its own purpose and sell to third party was permissible only with the permission of the Government and that too to a person who is high tension consumer of the Chhattisgarh Electricity Board in terms of notification dated 08.04.2002 as in the instant case the petitioner company himself has generated electrical energy by taking the power plant on lease and consumed the entire energy for its own purpose and taxable event under Section 3 of the ED Act, 1949 would be consumption of electrical energy and not upon the generation of electrical energy, therefore the liability to make payment of the electricity duty has rightly been fastened upon the petitioner company.

9. Replying the submission made by the learned Additional Advocate General, Mr. Bhaduri learned counsel for petitioner would submit by way of rejoinder, that the submission of Form-G consolidately by the petitioner company for the period August-2009 to June-2012 of all the generator including the power plant held on lease from MUUL by the petitioner company would not bring the petitioner company within the definition of "producer" as defined in Section 2(di) of ED Act, 1949 and as such the petitioner company being the lessee of the Biomass Based Power Plant held by MUUL, the liability to pay the electricity duty would remain with MUUL being the lesser and therefore petitioner cannot be made liable to make payment of the electricity duty.

10. I have heard the learned counsels appearing for the parties and considered their rival submissions made therein and gone through the order impugned and available records with utmost circumspection.

11. After hearing the learned counsel for the parties and upon perusal of the record, the question of law involved and formulated in the opening paragraph of this judgment is divided in following two question for sake of convenience:-.

Question No. 1: whether the exemption from payment of electricity granted to the MUUL being a new industrial unit on consumption/sell of electrical energy would be available to the petitioner company as a lessee and he would not be liable to make payment of electricity duty?

Question No. 2: whether petitioner company being the lessee of the electrical power plant is not a "producer" within the meaning of Section 2(di) of the ED Act, 1949 and not liable to make payment of the electricity duty under Section 3 of the ED Act, 1949 on the consumption of electricity for its own purpose?

Answer to question No. 1

12. The Madhya Pradesh Electricity Duty Act, 1949 was enacted as an anti-inflationary measure to provide for the levy of duty on sale or consumption of electrical energy and in order to augment the revenue of the Province for meeting essential expenditure, it is considered advisable to levy a duty on the sale of electrical energy. Section 2(di) defines the producer means "Producer means, subject to such rules as may be made by the State Government for registration of generators, a person who generates electrical energy at a voltage exceeding hundred volts and, in the event of generation of electrical energy by a hire of generator, the owner of generator shall be deemed to be the producer."

13. Section 3 of the Act, 1949 provides levy of duty on sale or consumption of electrical energy, which reads as under:

"(1) subject to the exceptions specified in Section 3A, every distributor of electrical energy and every producer shall pay every month to the State Govt. at the prescribed time and in the prescribed manner a duty calculated at the rates specified in the Table below on the units of electrical energy sold or supplied to a consumer or consumed by himself for his own purposes or for purposes of his township or colony, during the preceding month."

14. Section 3A of the Act, 1949 is exception to Rule 3, whereas Section 3B is power of the State Government to exempt the industrial establishment or any industries from payment of electricity duty. Section 3B of the Act, 1949 reads as under:

"Where the State Government is of the opinion that-

(i) in order to encourage the establishment of any particular industry or class of industries in the state; or

(ii) having regard to the particular circumstances of any industry or class of industries; or

(iii) in order to extend facilities to such persons or class of persons and for purposes as the State Government may, by notification, specify;

it is necessary or expedient so to do in public interest, it may, by notification and subject to such conditions, if any, as it may specify in the notification, (a) exempt from payment of duty in whole or in part "

15. The State has promulgated its industrial policy, 2004-09 w.e.f. 01.11.2004. Clause 4 of said policy defines new industrial unit i.e., all such industrial units, which has commenced commercial production between 1st November, 2004 and 31st October, 2009.

16. Paragraph-3 of Industrial Policy, 2004-09 relates to exemption from electricity duty. It provides that exemption from payment of electricity duty will be given only to the new industries as per details given in the policy to the small

industry, medium-large industry and mega project. Thus, the State Government in exercise of powers conferred under Section 3B of the Act, 1949, read with industrial policy, 2004-09, by order dated 29.12.2011 (Annexure P/3) exempted said company MUUL from payment of electricity duty to the electrical energy generated by said company which has to be consumed by the said company for its own purpose and on sell to the third party, relevant extract of the certificate (Annexure P/3) states as under:

17. The Respondent/State Government thereafter issued an exemption certificate on the same day in which condition has been incorporated that in violation of any conditions of the industrial policy, the eligibility of exemption granted would come to an end automatically. It was specifically provided that the exemptee company (MUUL) would be required to supply particulars of the electricity produced and consumed month wise in Form-G to the competent authority. Relevant part of order states as under:-

18. The State Government has promulgated its Energy policy on 31.10.2001; paragraph-6 of said policy relates to promotion of production of electrical energy from non-conventional sources, provides that power production from non-conventional sources like Biomass shall be allowed to be used by that company itself and sell to third party can be made after obtaining permission from State Government. Detailed notification was issued on 08.04.2002 providing that company producing electrical energy from non-conventional sources like Biomass can use it for its own purpose and can sell to third party, with the permission from the State Government only to high tension consumer of the state electricity board. Paragraph - 3 of said notification is reproduced herein for ready reference:-

19. The aforesaid narration of the fact would clearly show that MUUL to whom the exemption from payment of electricity duty was granted was required to consume the electrical energy produced from his power plant for its own purpose and in case of more electricity production than its consumption, that company can sell it out to high tension consumer of state electricity board after obtaining permission from the State Government as provided in notification dated 08.04.2002. Here in the instant case, MUUL has leased its entire power plant to the petitioner company vide agreement dated 04.01.2007 (Annexure P/2) and thereafter electricity produced in the said power plant was not used or consumed by MUUL for his own purpose and entire electrical energy produced from the said power plant was consumed by the petitioner company himself. Nothing has been brought on record by the petitioner, that MUUL has consumed the electrical power generated for its own purpose as the exemption from payment of electricity duty was granted to MUUL on consumption for its own purpose or sale to third party thus, conditions incorporated in the certificate granting exemption has been observed in its complete breach.

20. It is well settled law that for availing benefits under an exemption notification, the conditions have to be strictly complied with. It is also well settled

law that conditional exemption can be granted and if the exemption is available on certain conditions, such conditions have to be strictly complied with.

20A. In Case of State of Rajasthan and Another Vs. J.K. Udaipur Udyog Ltd. and Another, , the term "exemption" has been defined by their Lordships of the Supreme Court and it has been held as under:-

"25. An exemption is by definition a freedom from an obligation which the exemptee is otherwise liable to discharge. It is a privilege granting an advantage not available to others. An exemption granted under a statutory provision in a fiscal statute has been held to be a concession granted by the State Government so that the beneficiaries of such concession are not required to pay the tax or duty they are otherwise liable to pay under such statute. The recipient of a concession has no legally enforceable right against the Government to grant of a concession except to enjoy the benefits of the concession during the period of its grant. This right to enjoy is a defeasible one in the sense that it may be taken away in exercise of the very power under which the exemption was granted."

20B. In The Grasim Industries Ltd. and Another Vs. State of Madhya Pradesh and Another, , relying upon Union of India and others Vs. M/s. Wood Papers Ltd. and another, , their Lordships of the Supreme Court held as under:-

"5?????????It is settled position of law that exemption notification particularly in a fiscal matter has to be strictly construed and the person claiming its benefit is obliged to satisfy the Court that his claim was covered by the exemption notification. The notification has to be read in its entirety and not in parts."

20C. In a decision reported in State of Jharkhand and Others Vs. Ambay Cements and Another, . It has been held by the Supreme Court that exemption provision in the statute should be construed strictly and has expressed their opinion as under:-

"24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.

25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is

mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein."

20D. Likewise in a decision reported in *Eagle Flask Industries Limited Vs. The Commissioner of Central Excise, Pune*, , their Lordships of the Supreme Court clearly held that in order to avail the benefit under exemption notification, conditions have to be strictly complied with paragraph 6 of the report states as under:-

"6. We find that Notification No. 11/88 deals with exemption from operation of Rule 174 to exempted goods. The notification has been issued in exercise of powers conferred by Rule 174-A of the Rules. Inter alia, it is stated therein that, where the goods are chargeable to nil rate of duty or exempted from the whole of duty of excise leviable thereon, the goods are exempted from the operation of Rule 174 of the Rules. The goods are specified in the Schedule to the Central Excise Tariff Act, 1985 (in short "the Tariff Act"). The proviso makes it clear that where goods are chargeable to nil rate of duty or where the exemption from the whole of the duty of excise leviable is granted on any of the six categories enumerated, the manufacturer is required to make a declaration and give an undertaking, as specified in the form annexed while claiming exemption for the first time under this notification and thereafter before the 15th day of April of each financial year. As found by the forums below, including CEGAT, factually, the declaration and the undertaking were not submitted by the appellants. This is not an empty formality. It is the foundation for availing the benefits under the notification. It cannot be said that they are mere procedural requirements, with no consequences attached for non-observance. The consequences are denial of benefits under the notification. For availing benefits under an exemption notification, the conditions have to be strictly complied with. Therefore, CEGAT endorsed the view that the exemption from operation of Rule 174, was not available to the appellants. On the facts found, the view is on terra firma. We find no merit in this appeal, which is, accordingly, dismissed."

21. If the facts of present case are examined in the light of aforesaid principles of law laid down by their Lordships of Supreme Court, it is quite vivid that MUUL was granted exemption subject to compliance of certain conditions laid down in certificate dated 29.12.2011 (Annexure P/3) and industrial policy, 2004-09. Therefore, MUUL could have availed the benefit of exemption (if any) only upon compliance of said conditions i.e., by consuming himself the electrical energy so generated for its own purpose, and sell to high tension consumer of state electricity board was permissible only after permission of State Government.

22. In the present case, MUUL did not fulfill the requisite conditions as laid down in the exemption certificate as it has neither consumed electrical energy for its own purpose nor sold the same to a third party i.e., high tension consumer of state electricity board after permission of State Government and it has simply leased out the Electrical Power Plant to the petitioner company to generate the electrical energy and to consume the electrical energy so generated from the

said power plant, which is not even a high tension consumer of board and the it is the petitioner company who have not only generated electrical energy, but also consumed the electricity so generated for its own purpose. MUUL submitted necessary information in Form-G as required for the period commencing from March-2007 to July-2009 as per exemption certificate (Annexure P/3 to demonstrate as per conditions set out in the order exempting from payment of electricity duty, indicating that entire electricity generated from the said plant was consumed by petitioner company. The aforesaid facts would clearly show that MUUL was not entitled to claim any exemption from payment of electricity duty and the respondent-State has rightly saddled the liability upon the present petitioner to make payment of electricity duty for the relevant period. This question is answered accordingly.

23. Answer to question No. 2

The question No. 2 formulated states as under:-

(whether petitioner company being the lessee of the electrical power plant is not a producer within the meaning of Section 2(di) of the ED Act, 1949 and is not liable to make payment of the electricity duty under Section 3 of the ED Act, 1949?)

23.1 In order to answer this question firstly it would proper to notice the nature of the lease entered into between the petitioner and the MUUL, brought on record as Annexure P/2, which is an agreement for leasing of 7.5 MW Biomass Based Power Plant entered into on 04.01.2007 between the two companies prior to its commissioning. It provides that keeping in view the power requirement of the petitioner company, MUUL wishes to offer the said power plant on operational lease basis to the petitioner company, duly installed and complete in all respect as defined in Annexure No. 1 attached with the lease agreement. It also provides that the ownership of the power plant vests with the lesser for all the times and the lease charges for the plant shall be Rs. 30 lacs per month. The relevant extract of the lease deed are as under:-

"agrees to take on Lease (Operational Lease) from Lessor 7.5 MW Biomass Based Power Plant duly installed and complete in all respect, more specifically defined in Annexure No. 1 situated at Siltara Growth Center, Siltara, Raipur--493 111, for a period of Eleven Months (hereinafter referred to as said term) from the date of commissioning of the plant.

ARTICLE 3

OWNERSHIP

- a. That the owner of the plant stated in Annexure-1 vests with the Lessor for all times.
- b. Upon expiry of the operational lease period the plant and equipment will be handed over to the lessor as has been provided to the Lessee on the

commissioning of the Agreement.

ARTICLE 5

LEASE RENTAL PAYMENT

a. Lessee shall during the said term of this Operational Lease Agreement punctually pay to Lessor the Lease charges at the rate set out below plus the taxes, duties, levies etc. as applicable. The payment of Lease charges shall commence from the date of successful commissioning of the Plant and as agreed between the Lessor and Lessee.

b. Lease charges for the Plant shall be Rs. 30.00 Lacs (Rupees Thirty Lacs only) per month. All payments shall be made by Lessee to Lessor without any deduction or abatement whatsoever, except for penalty and bonus clause as defined in Annexure-II of this Lease Agreement.

c. Lease charges will be reviewed after a period of two years from the start of commercial operation of the plant or three years from the date of the agreement whichever is earlier, and if felt necessary and mutually agreed upon will be revised."

24. From a plain and careful perusal of the aforesaid terms of the lease agreement would show that MUUL has leased out its duly installed 7.5 MW Biomass Based Power Plant to the petitioner company on Rs. 30 Lacs per month and after the grant of lease it is for the petitioner company to generate electrical energy from the said plant, though as a lessee but, it is the petitioner company who generated electrical energy from the said power plant held by the petitioner as a lessee.

25. At this stage, it would be appropriate to notice definition of lease and immovable property as defined in the Transfer of Property Act. Section 105 of the Transfer of Property Act, 1882 defines lease of immovable property as under:

"105. Lease defined:- A lease of immovable property is a transfer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity , in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms."

Para 1 of Section 3 of the Transfer of Property Act, 1882 defines immovable property as under:

"3. Interpretation clause:- In this Act, unless there is something repugnant in the subject or context,

"immovable property" does not include standing timber growing crops or grass;"

26. The definition of immovable property given in Section 3 para 1 of the Act is in negative. According to the definition given in Section 3(26) of the General Clause

Act, "immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." Thus the expression immovable property comprehends all that would be real property and every interest in immovable property arising out of the land will be immovable property for the purpose of Section 105 of the Transfer of Property Act, 1882.

27. According to Section 105 of the Transfer of Property Act, 1882 lease of immovable property is transfer of right to enjoy such immovable property. The "right to enjoy immovable property" provided in the aforesaid provision would mean, that the right to enjoy the property in which the property can be enjoyed by the lessee, in accordance with Section 108 of the Transfer of Property Act, 1882 which regulates the rights and liabilities of the lesser and lessee of the immovable property.

28. Way back in the year 1979 their Lordships of the Supreme Court in case of Sri Tarkeshwar Sio Thakur Jiu Vs. Dar Dass Dey and Co. and Others, , while considering the meaning of right to enjoy the immovable property held, that right to carry on mineral operation and extract specified mineral is a immovable property by stating as under:-

"35. A right to carry on mining operations in land to extract a specified mineral and to remove and appropriate that mineral, is a "right to enjoy immovable property" within the meaning of Section 105; more so, when--as in the instant case--it is coupled with a right to be in its exclusive khas possession for a specified period. The "right to enjoy immovable property" spoken of in Section 105, means the right to enjoy the property in the manner in which that property can be enjoyed. If the subject-matter of the lease is mineral land or a sand-mine, as in the case before us, it can only be enjoyed and occupied by the lessee by working it, as indicated in Section 108, Transfer of Property Act, which regulates the rights and liabilities of lessors and lessees of immovable property.

38. The discussion will not be complete without noticing, the decision of the Patna High Court in CIT Bihar and Orissa v. Kumar Kamaksha Narain Singh which is in point. In that case, after an exhaustive survey of all the decisions on the subject, (including some of those which have been cited before us) a Full Bench consisting of three eminent Judges, held that coal-mining settlements whereby certain rights of entering upon the land of the settler, sinking shafts etc. and winning and taking away the coal are granted in consideration of receiving a salami and annual sums computed on the amount of coal raised and the amount of coke manufactured, subject always to a minimum annual sum which was always payable irrespective of what coal was raised or coke manufactured, were not "a sale of coal", but could be regarded as "leases" within the meaning of Section 105 read with Section 108, Transfer of Property Act, or within the legal acceptance of the term "lease" in this country. This decision of the High Court was affirmed by the Judicial Committee, and the appeal filed by Kumar Kamaksha was dismissed."

28A. In *Triveni Engineering and Industries Ltd. and Another Vs. Commissioner of Central Excise and Another*, , in which their Lordships of the Supreme Court has held that installation of turbo alternator on platform constructed on land would be immovable property. Paragraph 14 of the report states as under:-

"14. There can be no doubt that if an article is an immovable property, it cannot be termed as "excisable goods" for purposes of the Act. From a combined reading of the definition of "immovable property" in Section 3 of the Transfer of Property Act, Section 3(25) of the General Clauses Act, it is evident that in an immovable property there is neither mobility nor marketability as understood in the excise law. Whether an article is permanently fastened to anything attached to the earth requires determination of both the intention as well as the factum of fastening to anything attached to the earth. And this has to be ascertained from the facts and circumstances of each case."

28B. The principle laid down in the aforesaid case (*Triveni Engineering and Industries Limited*) has been reiterated and followed by their Lordships of Supreme Court in case of *T.T.G. Industries Ltd., Madras Vs. Collector of Central Excise, Raipur*, .

28C. Extremely recently in case of *Shaha Ratansi Khimji and Sons Vs. Proposed Kumbhar Sons Hotel P. Ltd.*, their Lordships of the Supreme Court had on occasion to consider the provision contained in Section 105 of the Transfer of Property Act and it was held that, by way of lease right and interest is created in immovable property and it stands transferred in favour of lessee:-

"22. Immoveable property means landed property and may include structures embedded in the earth such as walls or buildings for the permanent beneficial enjoyment. A lease of immoveable property is a transfer of right to enjoy such property in consideration of price paid as per Section 105 of the Transfer of Property Act. By way of lease, a right and interest is created which stands transferred in favour of the lessee. The immoveable property, thereafter, only can be reverted back on determination of such right and interest in accordance with the provision of the Transfer of Property Act. Therefore, once the right of lease is transferred in favour of the lessee, the destruction of a house/building constructed on the lease property does not determine the tenancy rights of occupant which is incidental to the contract of the lease which continues to exist between the parties."

29. Thus it is quite vivid that the subject matter of the lease entered into between the petitioner company and MUUL is an "lease of immovable property", by which right and interest in 7.5 MW Biomass Based Power Plant fully installed has been created in favour of petitioner (lessee) subject to payment of 30 Lacs per month by the petitioner company to MUUL irrespective of the extent of electricity to be generated by the petitioner company to which the petitioner has a right to enjoy the said immovable property (Electrical Power Plant) in the manner in which he likes.

30. The petitioner in his rejoinder filed and during the course of hearing has stressed upon the fact that the respondent/State in paragraph twelve of the return has admitted that entire electricity has been generated by MUUL; and therefore MUUL is producer and petitioner company is not producer, replying to which learned counsel for State submits that MUUL has given the entire power plant on lease to the petitioner company and therefore petitioner company has generated the electrical energy from the power plant held by MUUL and given on lease to the petitioner company and as such it cannot be said that State has admitted that "MUUL" is a producer and petitioner company is not a producer.

31. At this stage, it would be opposite to consider the submission of learned counsel for petitioner that the petitioner being only a lessee is not a "producer" within the meaning of Section 2(di) of ED Act, 1949 needs consideration. Section 2(di) of ED Act, 1949 provides as under:-

"Producer means, subject to such rules as may be made by the State Government for registration of generators, a person who generates electrical energy at a voltage exceeding hundred volts and, in the event of generation of electrical energy by a hire of generator, the owner of generator shall be deemed to be the producer."

A plain and close perusal of definition of producer would show that following two categories of persons have been held to be the producer for the purpose of payment of electricity duty-

? a person who generates electrical energy at a voltage exceeding hundred volts;

? in the event of generation of electrical energy by a hire of generator, the owner of generator shall be deemed to be the producer.

32. In view of the discussion made in foregoing paragraphs, that the petitioner being a lessee of immovable property that is Biomass Based Power Plant of the MUUL on monthly basis generated electrical energy by enjoying the property as provided in Section 105 of the Transfer of Property Act by operating the power plant in the manner he liked and on generation of the electrical energy, the MUUL had no control at all on leased property and it is only the petitioner company exclusively to regulate the generation of the power from the leased plant upon grant of lease by the lesser to him and therefore, in the considered opinion of this Court the petitioner company would clearly fall within the meaning of "producer" as defined Section 2(di) of the ED Act, 1949 and in light of this finding it cannot be concluded that respondent/State has admitted the fact that "MUUL" is producer.

33. The determination of said question brings me to next point to be adverted is which is taxable event, whether generation of electrical energy or consumption of electrical energy/sale of electrical energy. Section 3 of the ED Act, 1949 is a charging provision. It provides for levy of duty on sale or consumption of electrical energy, which reads as under:

"(1) subject to the exceptions specified in Section 3A, every distributor of electrical energy and every producer shall pay every month to the State Govt, at the prescribed time and in the prescribed manner a duty calculated at the rates specified in the Table below on the units of electrical energy sold or supplied to a consumer or consumed by himself for his own purposes or for purposes of his township or colony, during the preceding month."

34. From a careful perusal of the charging provision for electricity duty as contained in Section 3 of the ED Act, 1949 would show that every distributor and every producer of electrical energy is required to pay electricity duty at the rate prescribed and specified in the Table below on the units of electrical energy in following cases:

(i) Sell or supply to the consumer, or

(ii) Consumption by himself for his own purpose or for the purpose of his township or colony etc as the case may be;

Thus the taxing event would be the sell or consumption by the producer or the distributor as the case may be.

35. (i) The constitutional validity of Section 3 of Central Province and Berar Electricity Duty Act, 1959 as amended by Madhya Pradesh Taxation Law (Amendment) Act, 1956 came to be considered before the Division Bench of the Madhya Pradesh High Court in case of J.C. Mills Vs. State of M.P., , in which it has been held, that the producer is one who generates electrical energy, whether for his own consumption or for supplying to others. Paragraph five of the report states as under:

"5. The point to note is that under the amended Act it is not merely "a distributor" that is liable, but a producer also. To make the matter still clearer the statute has defined "producer" as one who generates electrical energy, whether for his own consumption or for supplying the others. Conversely, the "consumer" is one, who used up power produced by another and bought by him, or produced by himself for his own consumption. In the latter event, the producer is himself the consumer a very common happening in every walk of life, including the use of electrical power."

(ii) In the later part of paragraph five, their Lordship aptly held as under:

"Where it comes from is altogether immaterial for this purpose. It may come from power plant owned by the consumer himself, or it may come from a power plant, owned by somebody else, in which latter event, the consumer may be paying a price. While taxing the consumer for the electrical energy supplied to him for consumption, the State is not concerned with the place of its origin."

(iii) The aforesaid decision of the Madhya Pradesh High Court was assailed before the Supreme Court The Jiyajeerao Cotton Mills Ltd. Vs. State of Madhya Pradesh, . The Constitution Bench considering Section 3A of the C.P. Berar

Electricity Duty Act as amended by Act No. 7 of 1956 (Section 3A of that Act which is *pari materia* provision to Section 3 of the ED Act, 1949) it has been held that the generation of the electrical energy by the producer is not the taxable event but its sell or consumption would be taxing event, the relevant paragraph states as under:

"6. It is difficult to see the levy of duty upon consumption of electrical energy can be regarded as duty of excise falling within Entry 84 of List 1. Under that Entry what is permitted to Parliament is levy of duty of excise on manufacture or production of goods (other than those excepted expressly by that entry). The Taxable event faith respect to a duty of excise is "manufacture" or "production." Here the taxable event is not production or generation of electrical energy but its consumption. If a producer generates electrical energy and stores. It up, he would not be required to pay any duty under the Act. It is only when he sells it or consumes it that he would be rendered liable to pay the duty prescribed by the Act. The Central Provinces and Berar Electricity Act was enacted under Entry 48-B of List 11 of the Government of India Act, 1935."

36. The principle of law laid down by the Constitution Bench of the Supreme Court in aforesaid case, is the that taxing event under Section 3 of the ED Act, 1949 would be on consumption of electricity for its own purpose or sale of the electrical energy and production or generation would not be the taxable event. If the facts of the present case are examined in light of principles of law laid down therein, it would be apparent that the petitioner in the writ petition filed simply averred that petitioner company has taken the electrical power plant on lease and as such ownership of the power plant remained with the lesser company (MUUL) therefore, he is not liable to pay the electricity duty. That, petitioner's argument that he being the lessee of said power plant is not liable to pay electricity duty and lesser company is liable to pay electricity duty as ownership vests with him, deserves to be rejected as taxing event is not the generation or production of electrical energy, but it is consumption or sell of the electricity so generated, is the that event which is liable to be taxed under Section 3 of ED Act, 1949. Petitioner did not take any stand with regard to consumption of electrical energy that, it was consumed by himself for his own purpose after production as the petition is blissfully silent about it and, when the State filed its counter affidavit clearly stating that the petitioner has consumed the entire electricity so generated for its own purpose, then only the petitioner in its rejoinder filed on 18.06.2014 came out with a stand that the petitioner has been purchasing electricity from the MUUL from the date of its commencement and MUUL has been selling the electricity to the petitioner in its normal course of business. The said plea of the petitioner company that "MUUL" sold the electrical energy so generated is neither available to the petitioner, nor it is borne out from the record. The petitioner company having demonstrably generated the electrical energy by taking the power plant on lease which is an lease of immovable property, and he being the "producer" within the meaning of Section 2(di) of the ED Act, 1949, the question of "sell" by "MUUL" to petitioner doesn't arise at all.

But the fact remains that the entire electricity generated in the said power plant has been consumed by the petitioner company for its own purpose and as per Section 3 of the ED Act, 1949, the taxing event would be not the production/generation of the electrical energy, but the its sell or its consumption would be the taxable event and thus the petitioner company having consumed it for his own purpose would be liable to pay the electricity duty.

37. Section 6 of the ED Act, 1949 provides for keeping of accounts and records and furnishing returns by every distributor and producer of electrical energy. Section 6 of the Act as under:

"6. Keeping of accounts and records and furnishing returns:- Every distributor of electrical energy (and every producer) shall keep in such form such books, accounts and records, and furnish such returns at such times and to such authorities as may be prescribed."

38. The erstwhile State of Madhya Pradesh in exercise of power conferred under Rule 9(d) of the ED Act, 1949 read with Section 6 of the Act has framed the rules statutory nicknamed as the Madhya Pradesh Electricity Duty Rules, 1949 providing for submission of returns by the distributor and the producer of the electrical energy in prescribed form. The said rule is also applicable in the State of Chhattisgarh. Rule 7 of said Rules, 1949 provides as under:

"7. Submission of returns-Every distributor of electrical energy any every producer shall submit to the Electrical Inspector-

(i) along with the treasury receipt sent under rule 3, a return for each month in Form-G.

(ii) at end of each financial year a return in Forms "H", "J" and "K" not later than 15th day of the second month following the last day of said financial year".

39. Thus a conjoint reading of Section 6 of the Act read with Rule 7 of the ED Rule, 1949 would show that every distributor and producer is required to submit return in the Form-G to the electrical inspector, the total number of unit generated and the total number of unit sold or supplied to the consumer or consumed to the himself, duly certified by the distributor or producer as the case may be. The object of legislature behind enacting such a provision is to keep records of the electrical energy generated by the producer or the distributor in order to levy payment of electricity duty to be paid in compliance with provisions contained in Section 3 of ED Act, 1949 and rules made thereunder. The statutory information so supplied after generation of electrical energy by the distributor or producer shall be taken to be correct depicting true account of the electrical energy generated and consumed or sold unless its correctness is contradicted either by the producer or distributor or by the electrical inspector, as the case may be.

40. The respondent/State has filed the copy of Form-G submitted from March-2007 to June-2012. A bare perusal of the aforesaid form would show that

Form-G as required under the Rules of 1949 was submitted by MUUL from March-2007 to July-2009, in which the said MUUL Company had shown the petitioner company to be the producer of electrical energy of his power plant on the basis of lease and said power generated from the leased power plant has been shown to be consumed by petitioner company M/s. Jayaswal Neco Industries Limited. The correctness of the "G" form submitted for the relevant period has not been disputed by petitioner, except to submit that would not make the petitioner company "producer" within the meaning of Section 2(di) of the ED Act, 1949 as petition is a merely a lessee of electrical power plant. A sample copy of the "G" form alongwith electric generation report submitted by the MUUL for the month of March-2007 is reproduced here for the ready reference:

(i) Electric Generation Report

MAA USHA URJA LTD.

Siltara Growth Centre, Siltara, Raipur (C.G.) INDIA Ph.: 0771-5050714, 5093321-24 Fax: 0771-5093320

Ref: MUUL/PP/SPN/G-R/2007/

Date: 10.04.2007

The Chief Electrical Inspector 36/437, Byron Bazar, Phauvara Chowk, Near Govt. Chhattisgarh College Raipur 492001

Subject: Electric Generation report of MUUL-Power Plant Siltara, Raipur for the month of March-2007.

Dear Sir,

Enclosed please find the duly filled up proforma "G" for detailed Electric Generation report of MUUL Power Plant, Siltara Raipur for the month of Month-2007.

This is for your kind information and record please.

Thanking you, Yours faithfully For MAA USHA URJA Ltd.,

Sd/- (S.P. Naik) Sr. G.M. (E & P)

CC to: DE (Safety), 3/7889, Civil Lines Raipur.

41. Thereafter, from the month of August-2009 to June-2012 petitioner company submitted the "G" form as required under the rules and shown himself to be the producer, from the said Biomass Power Plant and has shown to consume the entire electrical power so generated for its own purpose. A copy of Form-G alongwith.

JAYASWAL NECO INDUSTRIES LTD. STEEL PLANT DIVISION

Siltara Growth Centre, Bilaspur Road, Raipur, Chhattisgarh-493111

Ref: JNL/SPD/SPN/G-R/2009/08

Date: 22.09.2009

The Chief Electrical Inspector 36/437, Byron Bazar, Phauvara Chowk, Near Govt. Chhattisgarh College Raipur 492001

Subject: Electric Generation report of our Steel Plant Divn. Siltara, Raipur for the month of August-2009.

Dear Sir,

Enclosed please find the duly filled up proforma "G" for detailed Electric Generation report of our Steel Plant Division, Siltara Raipur for the month of August-2009.

Note:- MUUL - PP has been taken on lease by JNIL and units used by JNIL as per CPP regulation.

This is for your kind information and record please.

Thanking you, Yours faithfully For Jayaswal Neco Industries Ltd.,

Sd/- (S.P. Naik) Sr. G.M. (E & P)

CC to: DE (Safety), 3/7889, Civil Lines Raipur.

42. The aforesaid statutory information required under the Rules of 1949 submitted right from March-2007 to March-2012 firstly by the MUUL and thereafter by petitioner company would clearly demonstrate that the both the companies had unmistakable terms unequivocally stated while submitting statutory information under the rules framed under the Act of 1949, that it is only and only the petitioner company who is the "producer" of the said electrical energy and the entire electrical energy has been consumed by the petitioner company (M/s. Jayaswal Neco Industries Limited) for its own purpose and therefore in the considered opinion of this court it is the petitioner company who would be liable to pay the electricity duty having consumed the entire electrical energy so produced for its own purpose under Section 3 of the Act. Thus this question is answered accordingly.

43. On the basis of aforesaid analysis it is held that the petitioner M/s. Jayaswal Neco Industries Limited being the lessee of the electrical power plant owned by M/s. Maa Usha Urja Limited is a "producer" within the meaning of Section 2(di) of Chhattisgarh Electricity Duty Act, 1949 and is liable to pay electricity duty under Section 3 of the Act as consumed the entire electrical energy for its own

purpose, and it is further held that exemption granted by the State Government from payment of electricity duty to the MUUL is not available to the petitioner company as the MUUL has not consumed the electrical energy for its own purpose as it has leased out the power plant to the petitioner company and who has generated the electrical energy.

44. As a fall-out and consequence of aforesaid discussion the writ petition filed by the petitioner questioning the demand notice dated 26.03.2013 (Annexure P/6) and order of recovery dated 22.08.2012 (Annexure P/4) passed by respondent No. 2 demanding Rs. 9,68,59.029/- deserves to be dismissed, being sans merit and sequitur to that writ petition is dismissed. No order as to cost(s).