

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL No. 241 OF 2021 & IA No. 949 of 2023,
IA Nos. 371 & 381 of 2024**

Date: 19th July, 2024

Present: Hon'ble Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

IN THE MATTER OF:

M/s. Porwal Auto Components Ltd.

Through its Managing Director

Shri Devendra Porwal

Plot No. 209, Sector 1, Pithampur Industrial Area,

District Dhar, M.P.

...Appellant

Vs

(1) **Madhya Pradesh Electricity Regulatory Commission**

Through its Commission Secretary,

5th Floor, Metro Plaza,

Arera Colony, Bittan Market,

Bhopal (M.P) Pin- 462 016.

(2) **MP Power Management Company Ltd.**

Through its Managing Director,

CoF Block, Shakti Bhawan,

Rampur, Jabalpur (M.P) Pin- 482 008.

(3) **MP Paschim Kshetra Vidyut Vitram Company Ltd.**

Through its Managing Director

GHP Compound, Polo Ground,

Indore (M.P), Pin- 452 001.

...Respondents

Counsel for the Appellant(s) : Mrs. Bhakti Vyas
Ms. Anuradha Mishra

Counsel for the Respondent(s) : Mr. Shlok Chandra

Ms. Mansie Jain
Mr. Nimit Saigal for R-1

Mr. Nitin Gaur
Mr. Ashish Madan
Mr. Vikas Upadhyay for R-2&3

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. This Appeal has been filed by M/s. Porwal Auto Components Ltd. challenging the order dated 03.05.2021 in Petition No. 50 of 2019 passed by the Madhya Pradesh Electricity Regulatory Commission (in short "MPERC" or "State Commission") assailing the levy of additional surcharge on the Captive Power Plant (in short "CPP")/ Captive User.

Description of the Parties:

2. The Appellant, M/s. Porwal Auto Components Ltd. is a manufacturer of steel castings and forgings, having setup its own CPP.

3. The Respondent No.1 is the Madhya Pradesh Electricity Regulatory Commission, which is the Appropriate Commission under the Electricity Act 2003 for the purpose of determining the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail within the state of Madhya Pradesh (in short "MP").

4. The Respondent No. 2, Madhya Pradesh Power Management Company Ltd. (in short "MPPMCL") is the holding company for the procurement/ sale of power on behalf of all the DISCOMS of MP and acts as a Nodal Agency.

5. The Respondent No. 3, Madhya Pradesh Paschim Kshetra Vidhyut Vitran Company Ltd. is an electricity supply company in MP looking after supply in western region of the state.

Factual Matrix of the Case

6. The Appellant has established two solar PV CPPs, which were commissioned on 27/12/2013 and 08/11/2017, respectively, for use of 100% power for captive use under the GoMP Solar Policy 2012 and as per the provisions of section 9(2) of the Electricity Act, 2003 (in short "Act"), through open access for the transmission of power generated at Village Kadodia, Tehsil Tarana, Dist. Ujjain to its industrial unit at Plot No. 209, sector-1 Pithampur District Dhar.

7. The power generated from its CPP is self-consumed by the Appellant under open access from the date of commissioning of the plant, paying additional surcharge, wheeling charges, etc. as notified from time to time, in particular the Appellant has been made to pay the additional charges for the period November 2017 to January 2020 under the 7th amendment to MPERC (Cogeneration & Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulation, 2010.

8. The Appellant against the connected load of 3000 KVA at 33 kV and consumption of 3,64,70,300 kwh units, only consumed 1,42,61,329 units from the CPPs, and paid all fixed charges and tariff as per retail supply tariff order for 2017-18, 18-19 and 19-20, respectively.

9. The Respondent No.3 started levying of additional surcharge on the Appellant for the power generated at the Captive Generating Plant from November 2017 to January 2020, which was challenged by the Appellant vide letter dated 12/01/2018 addressed to Respondent No.3 against such levy of additional surcharge, however, the same was refuted by the Respondent and continued with the imposition of additional surcharge on wheeling, which accounts to an amount of Rs.1,00,84,651/- inter-alia recovered from the Appellant.

10. The Appellant again vide letter dated 04/03/2019 represented against the levy of additional surcharge, however, without any resolution, being aggrieved by the action of the Respondent No. 2, the Appellant had preferred a Petition being Petition No 50/2019 before the MPERC, which was dismissed vide order dated 03/05/2021 by the State Commission.

11. Hence, the present Appeal challenging the decision of the Respondents for recovering the additional surcharge from the Appellant on the quantum of power consumed by Appellant from its CPP despite the fact that there was no reduction in the contract demand in the power from Discom.

Submissions of Appellant

12. The Appellant submitted that levy of additional surcharge comes into play only in cases where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, whereas in the present case the Respondent has failed to appreciate that the question of permit and supply does not arise to the extent of self-consumption by captive users of Captive power plants, further, submitted that the respondent has failed to appreciate

the provisions of Section 9 of the Act wherein the power plants have been given the right to carry electricity from generating plant to the destination of their own use, therefore, the question of permit and supply does not arise to the extent of self-consumption by captive users of CPPs, section 9 and section 42 of the Act are reproduced hereunder:

“Section 9. Captive generation.-

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

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

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

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

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

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

42. *Duties of distribution licensees and open access.- (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.*

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission: Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all

consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

(6) Any consumer, who is aggrieved by non redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

(7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

(8) *The provisions of sub-sections (5), (6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections.”*

13. Further, argued that the Respondents have not disputed the fact that the Appellant is a captive user and the electricity generated through its CPPs is used for its self-consumption, thus, the short question involved herein is whether the captive consumers/captive users are liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003 or not.

14. It is his submission that Respondents have misinterpreted the 7th amendment wherein it is mentioned that clause 12.2 shall be applicable as per provisions envisaged under Section 42, the Proviso to Section 42 itself exempts the levying of surcharge to a person who has established a CPP for carrying the electricity to the destination for its own use, and in the present case also the Petitioner has developed, *inter-alia*, is carrying electricity to the destination for its own use.

15. The Appellant contended that the captioned Appeal is squarely covered by the judgment passed by the Supreme Court in Civil Appeal no 5074 and 5075 and subsequently, by this Tribunal's judgment in Appeal No198/2021 and RP/11/2022, the Supreme Court vide judgment dated 10.12.2021 in Civil Appeal nos. 5074-5075 of 2019 titled **MSEDCL v/s JSW** decided, *inter-alia*, has observed as under:

"However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the

person - distribution licensee of his area of supply. So far as captive consumers/captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. **Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003.** In the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. **Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.**

14. Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. As far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 42(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. **Therefore, it is to be held that such captive**

consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003".

16. Subsequently, this Tribunal has also decided the issue in the light of the Supreme Court judgment, this Tribunal vide judgment dated 29/11/2022 in Appeal 198/2021 (***Ultratech Cement Ltd versus Madhya Pradesh Electricity Regulatory***) and in RP/11/2022 dated 6/1/2023 has considered the regulations of the Madhya Pradesh Electricity Regulatory Commission.

Submissions of Respondent No. 1, the State Commission

17. The State Commission submitted that at the time of passing of the Impugned Order the Supreme Court judgment in Maharashtra State Electricity Distribution Co. Ltd. v. M/s JSW Steel Limited & Ors had not been passed.

18. The State Commission rightly submitted that the Respondent Commission by way of the Impugned Order inter alia defacto and de jure correctly determined that additional surcharge is leviable on the Appellant on the basis of the applicable law as on 03.05.2021.

19. **On being asked whether the case of the Appellant is squarely covered by the Supreme Judgment, the State Commission prefers to argue the case subject to laws governing at the time of passing of the Impugned Order.**

20. **We find it an unsatisfactory response, as the issue asked was whether the present case is completely covered by the said judgment or**

not, as the judgment was rendered based on the provisions of the Act, which neither have been amended or repealed since passing of the judgment.

21. The State Commission submitted that Appellant by way of the present appeal contends that captive generation and consumption of electricity does not fall under the scope of section 42(4) of the Electricity Act, 2003, however, the same was rejected by the Respondent Commission after giving due consideration, and placed before us the relevant excerpts from the Impugned Order, relying upon the said observation, further, stated that it is crystal clear that a captive generating plant means a power plant set up by any person to “generate” electricity primarily for his own use, further, “generate” means to produce electricity from a generating station “*for the purpose of giving supply to any premises or enabling a supply to be so given*”, the Respondent Commission, therefore, rightly held that generation of electricity by a captive generating plant would be for the purpose of “giving supply” of electricity to any premises, including for own use, thus, the Appellant, being a consumer of the distribution licensee, “*receives supply of electricity from a person other than the distribution licensee of his area of supply*”, i.e., from its captive generating plant, and thereby, the Appellant falls under the scope of section 42(4) of the Electricity Act.

22. Also submitted that the Appellant consumes electricity from its captive generating plant through a dedicated transmission line, which is nothing but a “supply” line for point-to-point transmitting of electricity, relying upon Supreme Court judgment, accordingly, submitted that there is “supply” of electricity from the captive generating plant to the load centre, even though the sale of electricity may not be happening.

23. Reliance was also placed on Regulations notified by the State Commission, the same will be dealt with in common along with contentions of Respondent No. 2 &3.

24. We decide, accordingly, that the arguments of the State Commission are rejected as devoid of merit.

Submissions of Respondent No. 2 & 3

25. The Respondents submitted that in the State of Madhya Pradesh, the MPERC has issued the MPERC (Terms and Conditions for Intra -State Open Access in Madhya Pradesh) Regulations, 2005 ('Open Access Regulations 2005'), these Regulations Regulating the open access in the State of Madhya Pradesh is applicable to the all generating companies including the captive generating plant, further, added that the term 'generating company' includes captive generating plant, in other words as per Regulations applicable in the State of Madhya Pradesh there is no difference in the Generating Company and Captive Generating plant and as per provisions of the aforesaid Regulations such consumption from other source is subject to the payment of additional surcharge.

26. Subsequently, MPERC has notified the MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2021 (**Open Access Regulations 2021**) on 17.12.2021, the said Regulations contain similar terms and condition as was there in the Open Access Regulations 2005.

27. Separately, referred MPERC (Co-generation and Generation of electricity from Renewable Sources of Energy) (Revision -I) Regulations ,2010

(**Renewable Regulations 2010**), in the light of 7th amendment made therein, the relevant extracts prior to and 7th amendment are extracted as under:

i) Prior to 7th amendment

“12.2 Wheeling charges, Cross Subsidy surcharge and applicable surcharge on Wheeling charges shall be applicable as decided by the Commission from time to time. Captive Consumers and Open Access Consumers shall be exempted from payment of Open Access Charges in respect of energy procured from Renewable Sources of Energy.”

ii) After 7th amendment

“12.2 Wheeling charges, Cross Subsidy charge, additional surcharge on the wheeling charges and such other charges, if any, under section 42 of the Electricity Act, 2003 shall be applicable at the rate as decided by the Commission in its retail supply tariff order.”

28. Further, argued that it is explicitly clear from the above mentioned seventh amendment to MPERC Renewable Regulations, 2010 that the exemption from payment of open access charges provided to Captive and Open Access Consumers prior to the said amendment has been withdrawn and it has been provided in the seventh amendment that the open access charges if any, under Section 42 of the Act shall be applicable in terms of retail supply tariff order issued by the this Commission, the validity and legality of the aforesaid amendment (Writ Petition No.9870/2018) was challenged before the High Court of Madhya Pradesh Bench at Indore but the same has been upheld by the High Court.

29. **The submission of the Respondents is flawed, as the phrase used in the amended Regulations is “if any, under section 42 of the Act”, which has been settled by the Supreme Court that the CPPs are not liable to pay an additional surcharge.**

30. Further, informed that the State Commission, thereafter, notified the 8th amendment to Renewable Regulations 2010 on 17.12.2019, and with regard to the levy of additional surcharge, the Regulation 12B (iv) of the said Regulation provides as under:

“12B (iv) The RE captive consumer of Renewable Energy based Captive Generating Plant shall not be liable to pay cross subsidy surcharge, wheeling charge and additional surcharge but it shall be liable to bear the losses for carrying the generated electricity from its plant to the destination for its own use or for the use of its captive user as defined by the Act or the rules made thereunder.

Provided that the captive user shall not bear the losses in case the captive consumption is being done without using the distribution and/or transmission system of the Distribution and/or Transmission Licensee as the case may be;

Provided further that in case of supply of power to a consumer or to a person other than captive users, such consumer or person shall pay all open access charges including cross-subsidy surcharge, additional surcharge and wheeling charges as determined by the Commission and shall bear the losses.”

31. In view of the aforesaid Regulation, submitted that the Regulations provide an exemption from the wheeling charges as well as additional surcharge., however, added that the MPERC, on 12.11.2021 notified the

Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of electricity from renewable sources of energy) Regulations 2021 (**Renewable Regulations 2021**), the provisions of the Regulation 11.2(d) of the said Regulations is reproduced as under:

11.2(d)The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under.

32. Thus, submitted that the aforesaid Renewable Regulations 2021 specifically provide for the captive consumers to be liable to pay wheeling charges as well as an additional surcharge, the Appellant being the ‘captive consumer’ of the ‘Renewable Energy based captive Generating Plant’ is liable to pay an additional surcharge under the aforesaid Regulations.

33. **We reiterate the decision of the Supreme Court that an additional surcharge is not applicable on “captive consumers”/ CPPs under section 42 of the Act, accordingly, reading the Regulation which provides that “it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003” along with the Supreme Court judgment, the CPPs / captive user is not liable to pay additional surcharge.**

34. Therefore, reliance on **PTC India Limited v Central Electricity Regulatory Commission, (2010) 4 Supreme Court Cases 603**, is flawed.

35. Further, the contention that the “Regulations making power” cannot be challenged before this Tribunal is out of context, as no such powers have been challenged vide this appeal, accordingly, the reliance on various Court judgments is irrelevant.

Our Observations & Conclusion

36. It is important to note again the aforesaid Supreme Court judgment in Civil Appeal nos. 5074-5075 of 2019 titled **MSEDCL v/s JSW** for clarity, as under:

“13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of additional surcharge on the charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee arising out of his obligation to supply. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he

has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature. **However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person - distribution licensee of his area of supply.** So far as captive consumers/captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. **Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003.** In the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. **Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.**

14. Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and

*dedicated transmission lines. As far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 42(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. **Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003**.*

37. The Supreme Court has held that:

- i) ***sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person - distribution licensee of his area of supply,***
- ii) *So far as captive consumers/captive users are concerned, no such permission of the State Commission is required,*
- iii) ***Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003,***
- iv) *Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves.*

38. And thereafter concluded that “*Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers*

defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003".

39. It is important to note here that the Supreme Court in the aforesaid judgment has categorically ruled that CPPs/Captive Consumers/Captive Users are exempted from paying additional surcharge under the provisions of the Act, with specific reference to sections 9 and 42(4).

40. The decision of the Supreme Court is a binding principle, any argument, contrary to it, cannot stand on legal principles.

41. The State Commission argued that the CPPs are covered by 42(4) as there is a supply from a third party i.e. CPP to Captive User and no supply from the Discom.

42. We find no merit in such submission, as the CPP is owned by the Captive user and the electricity generated is self-consumed, thus, there is no question of supply, as supply is defined as *"2(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;"* and self-consumption in terms of the definition cannot be covered under "supply" as self-consumption or captive use does not involve the sale of electricity.

43. The whole argument and written submission of Respondent No. 1 is based on an incorrect interpretation of the provisions of the Act, the Supreme Court after considering the mandate of the Act has rendered the ruling that CPPs/Captive Users/Captive Consumers are exempted from paying additional surcharge.

44. The oral and written submissions of the State Commission were taken on record and considered in the light of the aforesaid judgments of the Supreme Court and of this Tribunal and found to be contrary to the said judgments.

45. Further, from the reading of the above referred Regulation 11.2(d)- “it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003”, along with the above judgment, the additional surcharge is not applicable on CPPs/ captive users/Captive Consumers, additionally any subordinate legislation cannot be contrary to the principle law, the judgement of the Supreme Court has been passed only after examining the principle law in the Electricity Act, 2003.

46. It is also noted that the issue herein is identical to the referred batch of appeals titled Ultratech Cement Ltd vs MPERC (appeal nos. 198 of 2021, 202 of 2021, 204 of 2021, 337 of 2021, and 295 of 2021), i.e. whether *additional surcharge* on the charges of wheeling can be levied by a distribution licensee on a captive user receiving supply of electricity from its own *Captive Generating Plant* (“CGP”) in terms of section 42(4) of the Electricity Act, 2003.

47. This Tribunal in its aforesaid judgment dated 29.11.2022 has held as under:

“7. Sub-section (4) of section 42, however, also authorizes the Commission to levy an additional surcharge on the charges of wheeling against such consumers as seek to avail supply of electricity from sources other than the distribution licensee of the area, the justification being that such additional surcharge is necessary to enable the distribution licensee “to meet” its “fixed cost”, arising out of its “obligation to supply”.

10. The facts found in the orders under challenge in first three captioned appeals (nos.198/2021, 202/2021 and 204/2021), are set out in para nos.20/21/25 respectively by the State Commission in identical language (quoted from order impugned in appeal no.198/2021) as under:

“20. In the present case, the petitioner without availing open access is receiving supply of electricity from a person (captive power plant) other than the distribution licensee of his area of supply. The petitioner is receiving supply of electricity from its captive power plant to its manufacturing unit through dedicated line. As provided in Section 42(4) of the Electricity Act 2003, the petitioner who was having Contract Demand of 24,000 KVA to 5,000 KVA is permitted by the Commission to avail open access as per provisions under MPERC (Terms and Conditions for intra-state Open Access in Madhya Pradesh) Regulations, 2005. Further, as provided in Section 42(4), such a consumer or class of consumers who is/are permitted to avail open access by the State Commission to receive supply of electricity from a person other than the distribution licensee of his area of supply, shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.”

12. The captive generation and use is statutorily permitted. The State Commission is not right in proceeding on the premise that this

requires permission to be taken from the regulatory authority, right to open access for carrying electricity by the captive user to the destination of own use having been granted by the law. It is not correct to treat a captive user as a consumer availing supply from another person. The captive user owns the captive power plant and, therefore, is carrying his own electricity elsewhere and, thus, cannot be treated, to that extent, as a procurer of electricity from another person within the mischief of subsection (4) of section 42. A captive user thus forms a class distinct from a “consumer”, as defined by section 2(15) which reads as under:

“ "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;”

13. *A captive user does not seek or receive supply of electricity for his use from a licensee or the government or by any other person engaged in such business of supply of electricity to the public. The expression “captive user” is defined by the explanation appended to Rule 3 of the Electricity Rules, 2005, simply as “the end user of electricity generated in a captive generating plant (CGP).”*

14. *This tribunal, by its judgment dated 27.03.2019, in the matter of JSW Steel Ltd. v. Maharashtra Electricity Regulatory*

Commission (appeal no.311/2018) and Sai Wardha Power Generation Limited v. Maharashtra Electricity Regulatory Commission (appeal no.315/2018), reported as 2019 SCC OnLine APTEL 57, had held that captive consumers are not liable to pay additional surcharge to the distribution licensee. The appellants had pressed for relief on similar lines before the State Commission placing reliance on the said decision of this tribunal. By the time the matters came up for consideration before the State Commission, the judgment dated 27.03.2019 had come up for challenge before Hon'ble Supreme Court by civil appeal nos. 5074-5075/2019. The Supreme Court, by an interim order passed on 01.07.2019 in the said civil appeals, had been pleased to stay the operation and implementation of the judgment dated 27.03.2019 of this tribunal. Referring to the said stay, the State Commission declined to follow the view taken by this Tribunal in the judgment dated 27.03.2019.

17. It is pointed out that the State Commission has been following the dictum in MSEDCL v. JSW Steel (supra), one illustration being the order dated 20.04.2022 in the matter of M/s. Grasim Industries Ltd. v. The Managing Director, M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd. (petition no.49 of 2021 & IA No. 08 of 2021), on facts identical to those found in the three above-captioned appeals, the decision being as under:

“22. In view of foregoing observations and in light of the above-mentioned judgment of Hon'ble Supreme Court, it is held the Additional Surcharge is not applicable on captive use by Petitioner under Section 42(4) of the Electricity Act 2003 on the quantum of power consumed for manufacturing unit from

its 52 MW onsite Captive Power Plant. With the aforesaid observations and findings, the subject petition along with IA No.08 of 2021 stands disposed of.”

18. As noted above, the State Commission, upon factual enquiry, has concluded that the appellant Ultratech is receiving supply of electricity from its captive power plants to its manufacturing units named Vikram, Dhar and Maihar, which are subject matter of the first three above-captioned appeals, “through dedicated line”. There being no evidence noticed of any use of the transmission system of the distribution licensee or, for that matter, of transmission licensee, in such respect, the ruling of Supreme Court in MSEDCL v. JSW Steel (supra) squarely applies and the levy and demand by the distribution licensee of additional surcharge on charges of wheeling under section 42(4) of Electricity Act, 2003, can not be justified or upheld. We hold accordingly. In these circumstances, the first three captioned appeals must succeed, the orders of the State Commission to the contrary being consequentially set aside.”

48. Subsequently, this Tribunal vide judgment dated 06.01.2023 passed in RP No. 10 of 2022 and RP No. 11 of 2022 has held as under:

“II.JUDGEMENT OF THE SUPREME COURT, IN MSEDCL VS. JSW STEEL, ON THE LIABILITY OF CAPTIVE CONSUMERS TO PAY ADDITIONAL SURCHARGE:

*The question which arose for consideration before the Supreme Court, in **MSEDCL Vs. JSW STEEL**, was “whether captive consumers/captive users were liable to pay additional*

surcharge under Section 42(4) of the Electricity Act, 2003". In considering this question, the Supreme Court, after considering the scope of Section 42(4) and upon taking note of the definition of a consumer under Section 2(15) of the Act, observed:-----

*It is clear from the afore-extracted portion of the Judgement of the Supreme Court, in **MSEDCL Vs. JSW STEEL**, that all captive consumers/captive users were held to fall outside the scope of the definition of the consumers under Section 2(15) of the Act, and all of them were held not liable to pay additional surcharge under Section 42(2) of the Act as they formed a separate class distinct from the consumers as defined under Section 2(15) of the Act.*

*We agree with the submission of Mr. Amit Kapur, Learned Counsel for the Review-Petitioners, that the Supreme Court, in **MSEDCL Vs. JSW STEEL**, has held that all captive users/captive consumers, who receive power exclusive from their Captive Generation Plants, are not liable to pay, and the distribution licensees are not entitled to levy on them, additional surcharge under Section 42(4) of the Act. It was not necessary, therefore, to have an inquiry to be caused by the Commission.*

III. OTHER CONTENTIONS:

*In the light of law declared by the Supreme Court, in **MSEDCL Vs. JSW STEEL** which is binding on this Tribunal under Article 141 of the Constitution of India, it would be wholly inappropriate for us to again examine the statutory provisions, on which reliance has been placed by Shri Vikas Upadhyaya, Learned Counsel for the second respondent.*

*Mr. Amit Kapur, Learned Counsel for the Review-Petitioners, would also draw our attention to the Review Petition filed before the Supreme Court by MSEDCL, against the judgment in **MSEDCL Vs. JSW STEEL**, in support of his submission that all the contentions now raised before us by Shri Vikas Upadhyaya, learned counsel for the second respondent, find place in the said Review Petition; and the Supreme Court, by its order dated 22.02.2022, had rejected the said review petition. On the other hand, Shri Vikas Upadhyaya, learned counsel for the second respondent, would contend that the Supreme Court did not examine any of the contentions raised by MSEDCL, in the Review Petition, on its merits; and had only rejected the said Review Petition holding that the Order under review did not suffer from any error apparent on the face of record. We see no reason to delve on this aspect since the law declared by the Supreme Court, in **MSEDCL Vs. JSW STEEL**, is binding on this Tribunal.*

V. CONCLUSION

We also make it clear that the appeals are allowed only on the ground that the Appellants, who are captive consumers/ captive users of electricity generated by their Captive Generation Plants, are not liable to pay additional surcharge under Section 42(4) of the Act, and not on any of the other questions which fell for consideration before, and was decided by, the Commission.”

49. In the light of the above judgments, the present case is squarely covered by the law laid down by the Supreme Court and this Tribunal, the CPPs/ captive

users are not liable to pay any additional surcharge under section 42(4) of the Act.

50. In view of the above, the captioned Appeal has merit and is allowed in favour of the Appellant.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 241 of 2021 filed by M/s. Porwal Auto Components Limited has merit and is allowed, the Impugned Order dated 03.05.2021 passed by MPERC in Petition No. 50 of 2019 is set-aside.

The Appellant company is not liable to pay any additional surcharge for the period November 2017 to January 2020, inter-alia, in case any such amount is paid, the same shall be refunded by the Respondent Discom within three months from the date of this order along with carrying cost.

The Captioned Appeal and IAs, if any are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 19th DAY OF JULY, 2024.

**(Virender Bhat)
Judicial Member**

**(Sandesh Kumar Sharma)
Technical Member**

PR/MKJ