

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NOS. 112, 130 AND 136 OF 2014

Dated: 1st October, 2014

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

IN THE MATTER OF

APPEAL NO. 112 OF 2014

India Glycols Limited,
Plot No. 2-B, Sector – 126,
Noida – 201304 (U.P.)
Through its Vice President
Mr. R.S. Yadav (HR & Administration) Appellant

VERSUS

Uttarakhand Electricity Regulatory Commission (UERC),
1st Floor of Institution of Engineers (I) Building,
Near ISBT, Majra, Dehradun-248006 Respondent

APPEAL NO. 130 OF 2014

M/s Century Pulp & Paper,
A Unit of Century Textiles & Industries Ltd.,
Ghanshyam Dham, P.O. Lalkua-262402
Distt. Nainital, Uttarakhand,
Through Authorized Signatory
Sh. Jai Prakash Narain Appellant

VERSUS

Uttarakhand Electricity Regulatory Commission (UERC),
1st Floor of Institution of Engineers (I) Building,
Near ISBT, Majra,
Dehradun-248006 Respondent

Counsel for the Appellant(s) ... Mr. M.L. Lahoty
Ms. Gargi Bhatta Bharali

Counsel for the Respondent(s) ... Mr. Buddy A. Ranganadhan

APPEAL NO. 136 OF 2014

Birla Tyres (Prop. Kesoram Industries),
Having its Registered Office at Birla Building,
7th Floor, (9/1, R.N. Mukherjee Road,
Kolkatta-7000001

.... Appellant

VERSUS

1. Uttarakhand Renewable Energy
Development Agency (UREDA),
Urja Park Campus, Industrial Area,
Patel Nagar, Dehradun, 248001
Through Secretary

2. Uttarakhand Electricity Regulatory Commission (UERC),
Vidyut Niyamak Bhawan
Near I.S.B.T., Majra,
Dehradun-248171
Through its Secretary

.... Respondents

Counsel for the Appellant(s) ...

Mr. Prashanto Chandra Sen
Ms. Raj Kumari Banger

Counsel for the Respondent(s)

... Mr. Pradeep Misra
Mr. Suraj Singh
Mr. Manoj Kumar Sharma for -R-1

Mr. Buddy A. Ranganadhan for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The Appeal No. 112 of 2014 has been filed by India Glycols Limited, a Co-generation based Captive Power Plant (CPP), under Section 111 of the Electricity Act, 2003, against the order, dated 13.3.2014 (in short, the **Impugned Order**), passed by the Uttarakhand Electricity Regulatory Commission (in short, the **State Commission**), whereby the State Commission has asked the Appellant to procure Renewable Energy (RE) power and thereby fulfill its Renewable Power Obligations (RPOs) of FYs 2011-12, 2012-13 and 2013-14 (upto 27.12.2013). The impugned order relates to the suo-motu proceedings initiated by the State Commission in the matter of findings that the majority of the obligated entities (Open

Access Consumers) in the State had not complied with the provisions specified under UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generation Stations) Regulations, 2010 and UERC (Compliance of Renewable Purchase Obligation) Regulations, 2010 (hereinafter referred to as “**REC Regulations, 2010**”).

2. The Appeal No. 130 of 2014 has been filed by M/s Century Pulp & Paper, a Co-generation based Captive Power Plant (CPP), under Section 111 of the Electricity Act, 2003, against the order, dated 10.4.2014 (in short, the **Impugned Order in suo-motu proceedings**), passed by the Uttarakhand Electricity Regulatory Commission (in short, the **State Commission**), whereby the State Commission has asked the Appellant to procure Renewable Energy power and thereby fulfill its Renewable Power Obligations (RPOs) of FYs 2011-12, 2012-13 and 2013-14 (upto 27.12.2013).

3. The Appeal No. 136 of 2014 has been filed by Birla Tyres (Prop. Kesoram Industries), a Co-generation based Captive Power Plant (CPP), under Section 111 of the Electricity Act, 2003, against the same order, dated 10.4.2014 (in short, the **Impugned Order**), passed by the Uttarakhand Electricity Regulatory Commission (in short, the **State Commission**), whereby the State Commission has asked the Appellant to procure Renewable Energy power and thereby fulfill its Renewable Power Obligations (RPOs) of FYs 2011-12, 2012-13 and 2013-14 (upto 27.12.2013).

4. Since, the issues involved in all these three Appeals are the same and impugned orders in Appeal Nos. 130 of 2014 and 136 of 2014 are the same and, further, though the date of the impugned order in Appeal No. 112 of 2014 is different, but the issues involved are the same, all these Appeals

have been heard together and are now being decided by this common judgment.

5. The background facts related to the impugned orders in the aforesaid three Appeals are that the State Commission on the non-compliance of the 'Obligated Entities' Open Access consumers of the RE Regulations, 2010 and REC Regulations, 2010, issued show cause notice to the co-generators including the Appellants for submission of their reply in the matter of non-making compliance of their Renewable Power Obligation (RPO) and also non-compliance of the aforesaid Regulations. The State Commission held hearing, wherein the co-generators expressed their willingness to procure renewable energy and/or Renewable Energy Certificates (RECs) in accordance with the Regulations. The State Commission, vide order, dated 31.7.2013, specifically directed that the 'Obligated Entities', who did not supply reply to the show cause notice, were directed to show-cause and explain reasons for failure in submitting their reply. The 'Obligated Entities' having shortfall in meeting the RPOs were directed to seek approval of the State Commission for carry forward of the unmet RPO. The 'Obligated Entities' who did not submit the statements required under UERC (Compliance of RPO) Regulations, 2010 to URDA, were directed to submit as to why the reports or statements were not sent within the time specified under the RPO Regulations, 2010 of the State. The reply to the notices or submissions made by the co-generators, as stated above, were considered by the State Commission and the State Commission observed that non-compliance by the co-generators was by and large due to lack of awareness of rules and regulations. Those co-generators, who expressed their willingness to make compliances by way of procurement of renewable energy based power or purchasing Renewable Energy Certificates (RECs) and some co-generators had in fact already procured RECs so as to ensure compliance of their RPO, the State Commission took a lenient view and refrained itself from taking any action against them for non-compliance of RE Regulations, 2010 and REC Regulations, 2010 treating it as the first instance of non-compliance by the 'Obligated Entities'

6. The reply to show cause notices was also sent by each of the Appellants, just then each of the Appellants filed the petition before the State Commission claiming that they, being a co-generation plant, were under no obligation to make purchase of RECs under REC Regulations, 2010 and they are not liable to comply with the RPO as the definition of 'Obligated Entity' excludes such consumers in accordance with the UERC (Compliance of Renewable Purchase Obligation)(First Amendment) Regulations, 2013. The State Commission, by the impugned orders, has rejected the petition of the each Appellant holding and clarifying that all the captive power plants were covered under the ambit of 'Obligated Entity' since earlier UERC (Tariff and other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008 (effective from 1.4.2008) and they continue to remain 'Obligated Entity' even in the later regulations applicable for further control periods namely; UERC (Tariff and other Terms for Supply of Electricity from Renewable Energy Sources and Non-fossil Fuel based Co-generation Stations) Regulations, 2010 and UERC (Tariff and other Terms for Supply of Electricity from Renewable Energy Sources and Non-fossil Fuel based Co-generation Stations) Regulations, 2013. The State Commission in the impugned order has also observed that RPO enforcement mechanism was laid down by the State Commission through Notification of separate Regulations, namely; UERC (Compliance of RPO) Regulations, 2010 (w.e.f. November, 2010) and the aforesaid amendments to RPO Regulations, 2010 have recently come into force w.e.f. 28.12.2013 absolving co-generation based Captive Power Plant from such obligation, 2013 amendment of the Regulations has been applied prospectively and hence, all the Co-generation Captive Power Plant as per prevalent definition 'Obligated Entity' are required to make RPO compliance in accordance with the provision of the Regulations for the period from FY 2011-12 upto 27.12.2013 namely; a day prior to the applicability of the amendment of Regulations, 2013. The impugned order has further directed that such 'Obligated Entities' are allowed carrying forward of unmet RPO of FY 2011-

12 and 2012-13 to FY 2013-14 (upto 27.12.2013) with the direction to either make procurement of renewable energy power from non-solar as well as from solar sources and/or to purchase equivalent RECs so as to meet the shortfall in compliance of the previous year along with current financial year (upto 27.12.2013) in accordance with the Regulations latest by 31.3.2014 and submit compliance status by 10.4.2013. It has further been provided in the impugned order that failure to ensure compliance by the Obligated entities of RE Regulations, 2010 and REC Regulations, 2010 would attract penal action under Section 142 of the Electricity Act, 2003 and the Regulations.

7. Each of the Appellants filed a petition before the State Commission claiming that the Appellant being a Co-generation Plant, was under no obligation to make purchases of Renewable Energy Certificates under the REC Regulations, 2010. The State Commission, thereafter, enacted the UERC (Compliance of Renewable Purchase Obligation) Regulations, 2013, which is effective from 28.12.2013, in which, it was specified that Co-generation based Captive Power Plant would not be considered as '**Obligated Entity**'. The said petitions have been rejected by the impugned orders of the State Commission.

8. The main grievance of the Appellants in the instant Appeals is that the State Commission has wrongly rejected the petitions of the Appellants to be exempted from the obligation of RPO in the light of UERC (Compliance of Renewable Purchase Obligation) (First Amendment) Regulations, 2013, dated 28.12.2013, which is contrary to the law laid down by this Appellate Tribunal in its judgment, dated 26.4.2010, in Appeal No. 57 of 2009, in the case of Century Rayon vs. MERC.

9. The relevant facts giving rise to these Appeals are stated as under:

- (a) that M/s India Glycols Limited, the Appellant of Appeal No. 112 of 2014, has a plant in Kashipur, Uttarakhand manufacturing

various industrial chemicals, it has set up Captive Co-generation Power Plant of the capacity of 27.2 MW based on coal, biogas and slop (bio-mass) as fuel.

- (b) that M/s Century Pulp & Paper, is a unit of Century Textiles & Industries Ltd., situated in Lalkua, Dist. Nainigal, Uttarakhand, Appellant of Appeal No. 130 of 2014, has set up a Captive Co-generation Power Plant of the capacity of 86.8 MW based on coal/biomass (black liquor, pith) as fuel.
- (c) that M/s Birla Tyres, the Appellant of Appeal No. 136 of 2014 is a Co-generation Plant, generating and consuming electricity from renewable energy sources i.e. biomass and for this purpose, has a 7.5 MW generating plant based on non-conventional energy sources and also 7.5 MWH coal based generating plant.
- (d) that Uttarakhand Energy Regulatory Commission (UERC) is the sole respondent herein, who is entrusted with the statutory powers and functions under the Electricity Act, 2003.
- (e) that this Appellant Tribunal in its judgment, dated 26.4.2010, in Appeal No. 57 of 2009, in the case of Century Rayon vs. MERC has interpreted Section 86(1)(e) of the Electricity Act, 2003 and held:

“The Appellant is a co-generator. It produces energy more efficiently as compared to conventional power plants which is to be treated at par with the electricity from the renewable source of generation. When such being the case, the fastening of obligation on the co-generator to procure electricity from renewable energy producer would defeat the object of section 86(1)(e). These two categories of generators namely: (i) Co-generators and (ii) generators of electricity through renewable sources of energy are required to sell the electricity to any person as may be directed by the State Commission. Any obligation for purchase of electricity from these two sources can be imposed only on the distribution licensee and not on the captive consumers who are generating electricity through co-generation irrespective of the fuel used”. [Para 16] It has further been held in Para 46, while concluding, we must make it clear that the Appeal being generic in nature, our conclusions in this Appeal will be equally applicable to all co-generation based captive consumers who may be using any fuel. We order accordingly.”

- (f) that despite Century Rayon case being decided on 26.4.2010, the State Commission had amended the REC Regulations, 2010 only on 28.12.2013 when the petitions of the Appellants relating to Show Cause Notices issued to them claiming that each of the Appellants being co-generation plant was under no obligation to make purchases of Renewable Energy Certificates were pending.
- (h) that the State Commission on 3.11.2010, issued a Notification formulating UERC (Compliance of Renewable Purchase Obligation) Regulations, 2010, stipulating that every 'Obligated Entity' has to purchase a minimum percentage of its total electricity requirement from Renewable Energy Sources during each financial year and that a specified percentage of the total Renewable Purchase Obligation (RPO) will be from solar energy. In default penal provisions were made applicable.
- (i) that on 8.3.2013, the State Commission issued a Show Cause Notice and asked each of the Appellants to explain why penal action should not be taken against them under the provisions of Section 142/146 of the Electricity Act, 2003 for non-compliance of the aforesaid Regulations.
- (j) that the Appellants responding to the aforesaid notices, conveyed to the State Commission that they had been complying with the obligations under the Regulations by purchasing the power through open access and the Appellants being a co-generation based captive power plant, the requirement of purchase of the renewable energy was not obligated.
- (k) that the State Commission passed the impugned orders against 40 industrial consumers which included the Appellants holding that each of the units was 'Obligated Entity' as defined vide Regulation 2.1(1) and they were not complying with the provision of UERC Regulations, 2010, hence, all of them were

directed to submit Affidavits stating the reasons for such non-compliance.

- (l) that in August, 2013, on the protest from the Appellants, the matter was revisited by the State Commission and then a draft Notification was circulated inviting comments of the stakeholders. The most of the comments received by the State Commission were relating to the judgment, dated 26.4.2010, of this Appellate Tribunal in Appeal No. 57 of 2009 in Century Rayon vs. MERC, wherein this Appellate Tribunal held that ‘fastening of the obligation on the co-generator to produce electricity from renewable energy would defeat the object of the Section 86(1)(e) of the Electricity Act”. Following the judgment of this Appellate Tribunal in Century Rayon, the necessary Amendments in the principal Regulations became imperative to ensure the compliance of the said direction, dated 26.4.2010 of this Appellate Tribunal and was finally carried out by issuance of the Notification on 20.12.2013.
- (m) that during the pendency of the aforesaid Amendment, the Appellant of Appeal No. 112 of 2014, on 12.8.2013, clarified that it did not purchase the renewable energy.
- (n) that on 20.12.2013, finally, the Amendment was introduced in the principal UERC (Compliance of RPO) Regulations, 2010 inter-alia amending the definition of ‘Obligated Entity’ and clarified that it would exclude co-generation based captive power plants.
- (o) that the impugned order was passed by the State Commission against several units including the Appellants stating that the Amendments have prospectively changed the provisions of Principal State RPO Regulations, 2010 and hence the obligation of the Appellants for the period from FY 2011-12 upto 27.12.2013 would not be affected and they would be obliged to comply with the same.

(p) that the decision, dated 26.4.2010 of this Appellate Tribunal was affirmed and reiterated in the later decision, dated 10.4.2013, passed by this Appellate Tribunal in Appeal No. 125 of 2012 in the case of M/s Hindalco Industries Ltd. vs. UPERC wherein this Appellate Tribunal had to specifically reprimand the U.P. State Commission when it fastened Renewable Purchase Obligation (RPO) even on the captive consumers based on co-generation observing that action of the State Commission is not only against the mandate of Section 86(1)(e) of the Electricity Act, 2003 but also against the judicial discipline in not following the binding decision, dated 26.4.2010 of this Appellate Tribunal in Century Rayon case.

10. The **only issue** that arise for our consideration is **whether co-generation based captive power plant can at all be fastened with Renewable Purchase Obligation (RPO) and whether the Notification, dated 3.11.2010, could have at all fastened on each of the Appellants**, in defiance of the statutory mandate of Section 86(1)(e) of the Electricity Act, 2003 as also ignoring the decision dated 26.4.2010 of this Appellate Tribunal in Century Rayon case?

11. We have heard Mr. M.L. Lahoty, the learned counsel for the Appellant-Petitioner and Mr. Buddy A. Ranganadhan, the learned counsel for the Respondent in Appeal Nos. 112 and 130 of 2014 and Mr. Prashanto Chandra Sen, the learned counsel for the Appellant-Petitioner and Mr. Pradeep Misra, the learned counsel for the Respondent No.1 and Mr. Buddy A. Ranganadhan, the learned counsel for the Respondent No.2 in Appeal No. 136 of 2014. We have deeply gone through the evidence and other material available on record including the impugned order and written arguments filed by the rival parties.

12. The following submissions have been made on behalf of the Appellants:

- (a) that this issue is no more res-integra having been extensively deliberated upon and settled by this Appellate Tribunal in its judgment, dated 26.4.2010, in Century Rayon vs. MERC, in Appeal No. 57 of 2009, which decision has been reaffirmed in succeeding decisions, dated 10.4.2013 in Hindalco Industries vs. UPERC (Appeal No. 125 of 2012), dated 30.1.2013 in Emami Paper Mills Ltd. vs. OERC (Appeal No. 54 of 2012), and judgment, dated 31.1.2013 in Vedanta Aluminium Ltd. vs. OERC (Appeal No. 59 of 2012).
- (b) that this Appellate Tribunal in Century Rayon case declared that *“the conclusion in this Appeal will be equally applicable to co-generation based captive consumers who may be using any fuel.”*
- (c) that no Regulation can prevail upon the substantive provision of any Statute, consequently, the principal Regulations, dated 3.11.2010, in no case could have abrogated the Section 86(1)(e) of the Electricity Act, 2003. After realization of this anomaly, the same was rectified by the amending the Principal (RPO) Regulations, 2010 on 20.12.2013. Thus, amending Regulation would be effective from the date of the principal Regulation. The impugned order intending to give effect to 3.11.2010, would be legally unsustainable as the Regulations are repugnant to Section 86(1)(e) of the Electricity Act, 2003.
- (d) that the State Commission’s objects and reasons specifically state that the amending Regulations are clarificatory and discussed in details the infirmities in the principal Regulations and also referred the decision of this Appellate Tribunal in Century Rayon case as reason for amendment. It has been issued after taking cognizance of the difficulties and hardships faced by the Appellants and other identically situated co-generation based captive power plants and, therefore, the Amendment has been carried out to mitigate the said

hardships. It is obvious that its applicability has to be from the date of the principal Regulations.

- (e) that the Amended Notification merely being curative and intended to remove the unintended consequences, therefore, it is deemed to exist/operate w.e.f. the date of the principal Regulations, i.e. 3.11.2010.
- (f) that the Hon'ble Supreme Court in CIT vs. Alcon Extrusion (2010) 1 SCC 489 in paras 18 and 21 held that a clarificatory law, being curative in nature, would be given effect to and applied from the date of the original statute and not from the date of issuance of the clarificatory amendment. The Hon'ble Supreme Court in CIT vs. Gold Coin Health Food Pvt. Ltd. (2008) 9 SCC 622 held that *It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.*
- (g) that the Hon'ble Supreme Court in Vishal Agarwal vs. Chhattisgarh State Electricity Board (2014) 3 SCC 696 and in Asstt. Electrical Engineer vs. Satyendra Rai (2014) 4 SCC 513 has held that the amendment brought in is clarificatory in nature, if the Statement of Object and Reasons are considered and that it would take into its ambit even the pending matters and in that sense it would be retrospective amendment.
- (h) that despite the UERC (Compliance of RPO)(First Amendment) Regulations, 2013, dated 20.12.2013, and being aware of the Century Rayon judgment, dated 26.4.2010 of this Appellate Tribunal, the State Commission could have exercised, suo-motu, power to relax the applicability of the provisions of REC Regulations, 2010, as amended under Regulation 17 therein. The State Commission had no jurisdiction to impose such obligation for purchase of renewable sources of energy after the decision in Century Rayon case by this Appellate Tribunal. Despite the law being amended, the State Commission did not

relax the applicability of ‘Obligated Entity’ in the previous financial years and pass the impugned order ignoring the relevant provisions.

13. **Per-contra**, the following submissions have been made on behalf of the Respondent-State Commission:

- (a) that “Obligated Entity” as defined in the UERC (Renewable Purchase Obligation) Regulations, 2010 means the distribution licensee, captive user and open excess consumer in the State, which is mandated to fulfill renewable purchase obligation under these Regulations.
- (b) that under the “Obligated Entity” captive users were also liable to comply with the RPO as specified in the UERC (Tariff and other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2010 and UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2013. Further, exclusion of co-generation based captive user was not provided neither in model regulations issued by Forum of Regulator (FOR) nor any of the regulations of the State Commission.
- (c) that all the Appellant, as stipulated under the Regulations, had submitted their RPO Statements in respect of FY 2011-12 to the State Agency. Moreover, some Appellants again submitted their RPO Statements for FY 2012-13 to the State Agency showing the view of the Appellants that being “Obligated entity”, they need to comply with the regulations as they had submitted RPO Statements in accordance with the regulations.
- (d) that the State Commission, vide Notification, dated 28.12.2013, issued the amendment to RPO Regulations, 2010 for the purpose of complying with this Appellate Tribunal’s judgment, dated 26.4.2010, in Appeal No. 57 of 2009, in the case of

Century Rayon vs. MERC, wherein the co-generation based captive consumers were excluded from the purview of 'Obligated entity'. However, for period prior to the amendment, the State Commission has treated all the captive users as an obligated entity in accordance with the RPO Regulations, 2010.

- (e) that issuance of Show Cause Notices to the 'Obligated entities' including the Appellants was within the jurisdiction of the State Commission as provided under Regulation 5.1, 5.2 and 5.3 of the RPO Regulations, 2010.
- (f) that the State Commission on finding that 'Obligated entities' were not complying with the regulations, issued show-cause-notices to Open Access consumers as well as to Captive Users vide letters, dated 8.3.2013 & 12.3.2013, seeking explanations for non-compliance of RPO Regulations, 2010 and RE Regulations, 2010 exercising powers under Section 142 of the Electricity Act, 2003.
- (g) that the State Commission during hearing in the matter of non-compliance of RE Regulations and RPO Regulations, 2010, directed those Open Access consumers or captive users having shortfall in RPO compliance to seek approval of the Commission for carrying forward of unmet RPO and also for submission of explanation for non-compliance of the regulations. The majority of the "Obligated entities" submitted that they were not aware of the rules & regulations in the matter, expressing their willingness to make compliance with RPO in accordance with Regulations.
- (h) that the State Commission, while considering the first instance of non-compliance of the regulations, took a lenient view in the matter and did not initiate any action against them. Accordingly, vide order, dated 13.3.2014 (impugned order in Appeal No. 112 of 2014), in respect of Open Access consumers & subsequently vide order, dated 10.4.2014 (impugned order in

Appeal Nos. 130 & 136 of 2014) in respect of Captive User allowed carry forward of unmet RPO compliances of previous years to be met along with the requisite RPO compliance for FY 2013-14.

- (i) that the State Commission, in accordance with the judgment, dated 26.4.2010, passed by this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs. MERC, revised the definition of “Obligated entity” by amending the Principal RPO Regulations, 2010 and notifying UERC (Compliance of Renewable Purchase Obligation) (First Amendment) Regulations, 2013, which came into force on 28.12.2013. Accordingly, co-generation based Captive Power Plants were excluded from the definition of “Obligated entity” and absolved from RPO compliance only w.e.f. 28.12.2013 when the provisions of subordinate legislation became effective in the State of Uttarakhand.
- (j) that the Hon’ble Supreme Court in the case of State of Madhya Pradesh vs Tikamdas (1975) 2 SCC 100 had held that subordinate legislation cannot be given retrospective effect unless specifically so authorized under the parent statute. The Hon’ble Supreme Court had observed as under:
- “There is no doubt that unlike legislation made by a sovereign legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the Rule-making power in the concerned statute expressly or by necessary implication confers power in this behalf.”*
- (k) that this Appellate Tribunal, in its judgment, dated 12.7.2010, in Appeal No. 179 of 2009 has also observed that *“The Electricity Act, 2003 under which regulations are being framed by the respective Commissions does not permit the Commission to make regulations which may apply retrospectively.”*

Accordingly, any Regulation cannot be made applicable retrospectively, hence, the amendment Regulation was

applicable from the date of notification and prior to this, the Principal Regulations were in force.

- (l) that in accordance with the Principal RPO Regulations, 2010, all the captive users were considered as “Obligated entity” till the issuance of RPO (Amendment) Regulations, 2013, thereafter, co-generation based captive users have been excluded and absolved from Renewable Purchase Obligation w.e.f. 28.12.2013.
- (m) that the contention of the Appellants that UERC (Compliance of Renewable Purchase Obligation) (Amendment) Regulations, 2013 are merely clarificatory of the Principal Regulations, is wrong because by the said Amendment, the State Commission has not only amended the definition of “Obligated entity” but also amended other regulations such as Regulation 8.1 stipulating eligibility criteria for issuance of Certificate. The amendments to the regulations have been notified following the due procedures as provided under Electricity Act, 2003.
- (n) that the amended Regulations would be applicable only from the date of notification. Accordingly, UERC (Compliance of Renewable Purchase Obligation) (First Amendment) Regulations, 2013, notified almost 3 years after the notification of the Principal Regulations, 2010 cannot be made applicable retrospectively, and the enforceability of the same can have prospective effect only. Since the provision of compliance of RPO by Captive User (irrespective of methodology/type of fuel in use) was existing prior to applicability of the UERC (Compliance of Renewable Purchase Obligation) (First Amendment) Regulations, 2013, therefore, co-generation based captive users have been directed by the impugned order to make compliances of RPO for the period mentioned in the impugned order in accordance with the Principal un-amended RPO Regulations, 2010.

- (o) that, in obedience to the judgment, dated 26.4.2010, of this Appellate Tribunal in Appeal No. 57 of 2009, the State Commission vide amendment Regulations, 2013, has revised the definition of 'Obliged entity' by excluding co-generation based captive users from RPO Obligation, hence, amendment Regulations, 2013 cannot be made applicable retrospectively but, they have been made applicable w.e.f. the date of notification i.e. 27.12.2013. Hence, the allegation of defiance of the ruling of this Appellate Tribunal, dated 26.4.2010, raised by the Appellants, is wrong.
- (p) that the notification of draft RPO Regulations, 2010 was issued on 2.7.2010 inviting comments/objections by 27.7.2010. Moreover, no reference had been received from any of the stakeholders in respect of compliance of this Appellate Tribunal's judgment, dated 26.4.2010 during the proceedings of finalization and notification of RPO Regulations, 2010, hence, all Captive Users were considered as 'Obligated entity' and none of the Captive Users made representation giving reference of this Appellate Tribunal's judgment, dated 26.4.2010, seeking amendment in the definition of 'Obligated entity' until show-cause notices, dated 8.3.2013, and 12.3.2013 issued by the State Commission for non-compliance of RE Regulations, 2010 and RPO Regulations, 2010.

14. We have carefully considered the rival submissions made by the parties on the issue whether co-generation based captive power plant can be fastened with Renewable Purchase Obligation (RPO) under the State Principal Regulations namely; UERC (Compliance of RPO) Regulations, 2010, even after the judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs MERC whereby, this Appellate Tribunal while interpreting the provisions of Section 86(1)(e) of the Electricity Act, 2003 had excluded the co-generation based captive power plants/captive users from the definition of 'Obligated entity', which

judgment has been enforced or complied with by the State Commission by amending the said definition of 'Obligated entity' as existed in the Principal Regulations, 2010 by enacting UERC (Compliance of RPO) (First Amendment) Regulations, 2013.

15. The following facts are undisputed in the instant matter:

- (a) that this Appellate Tribunal in its judgment, dated 26.4.2010, in Appeal No. 57 of 2009 in the case of Century Rayon vs MERC while interpreting Section 86(1)(e) of the Electricity Act, 2003 held that the said judgment will be equally applicable to all co-generation based captive users, who may be using any fuel. Thus, the co-generation based captive consumers/users were excluded from the definition 'Obligated entity' and exempted from the obligation of purchasing RPO or procuring RE power by this Appellate Tribunal.
- (b) that the learned State Commission on finding that non-compliance of the obligated entities (open access consumers) of the RE Regulations, 2010 and REC Regulations, 2010, issued show-cause-notices to the co-generators including the Appellants, requiring their reply for non-compliance of their Renewable Purchase Obligation and also for non-compliance of the Principal State Regulations, 2010. The Appellants gave reply to show cause notices and also filed the petitions stating that the Appellants, being co-generation captive power plants, were under no obligation to make purchases of Renewable Energy Certificates under the Principal Regulations, 2010 and by the impugned order, dated 13.3.2014, all the petitions of the Appellants have been dismissed and the State Commission has asked the Appellants to procure renewable energy power and thereby fulfill their renewable power obligations for FY 2011-12, 2012-13 and 2013-14 (up to 27.12.2013). The Principal Regulations of 2010 were amended by the State Commission regarding the definition of 'obligated entity' specifically

excluding the co-generation based captive power plants/users from “Obligated entity” by introducing Amendment Regulations, 2013 w.e.f. 28.12.2013.

- (c) that the leaned State Commission, after the judgment of this Appellate Tribunal, dated 26.4.2010, in the aforesaid Appeal No. 57 of 2009 in Century Rayon case, has issued a Notification on 3.11.2010 formulating the UERC (Compliance of RPO) Regulations, 2010 (Principal Regulations) stipulating that every “Obligated entity” has to purchase a minimum percentage of its total requirement from renewable energy sources during the financial year and the specified percentage of total renewable purchase obligation will be from solar energy.
- (d) that the Appellants, responding to the afore-stated show cause notices, conveyed to the State Commission during the hearing of the show cause notices and also the petitions filed by the Appellants that they were under no obligation to purchase renewable energy or renewable energy certificates as they were co-generation based captive power users.
- (e) that when the Appellants pointed to the fact that they were under no obligation to procure renewable energy or purchase renewable energy certificates, the State Commission in August, 2013 revisited the matter and gone through the judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in Century Rayon case.
- (f) that during the pendency of the various petitions filed by the Appellants challenging the show cause notices issued by the State Commission, referred to above, the State Commission on 20.12.2013, finally introduced the amendment in the Principal Regulations namely; UERC (Compliance of RPO) Regulations, 2010, inter-alia, amending the definition of ‘Obligated entity’ and clarified that the said definition ‘Obligated entity’ would exclude co-generation based captive power plants. The said

amendment of 2013 by the State Commission was made effective from 28.12.2013.

- (g) that after amendment in the definition 'Obligated entity' in UERC (Compliance RPO) Regulations, 2010 by the amendment of 2013, the State Commission by the impugned orders, dismissed the petitions filed by the Appellants, asking them to procure renewable energy power and fulfill their renewable power obligation for the previous period i.e. FY 2011-12, 2012-13 and 2013-14 (upto 27.12.2013).

16. The main contention advanced on behalf of the Respondent Commission regarding issuance of amendment Notification of 2013 for amending the definition of 'Obligated entity' then existing in the Principal State Regulations, 2010 after more than 3 years of the judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in Century Rayon case, is that when the Notification of draft RPO Regulations, 2010 was issued on 2.7.2010 for submission of comments/objections on the same latest by 27.10.2010, no reference regarding the judgment, dated 26.4.2010, had been received from any of the stakeholders during the proceedings on finalization and notification of RPO Regulations, 2010. Accordingly, all the captive users were considered as "Obligated entity" till such time when the amendment to the definition of "Obligated entity" existing in RPO Regulations, 2010 was notified by State Amendment Regulations, 2013. Since, none of the captive users made representation in respect of the definition of "Obligated entity" until show cause notices, dated 8.3.2013 and 12.3.2013, were issued by the State Commission, as stated above, the impugned order has been passed relying on the old definition of "Obligated entity" as existed in the State RPO Principal Regulations namely; State RPO Regulations, 2010. This fact has been candidly admitted during hearing of the Appeals before us on behalf of the State Commission inviting our attention to the UERC (Compliance of RPO) (First Amendment) Regulations, 2013, Notification, dated 20.12.2013, and also to the object and reasons for introducing the said amendment in the

definition of “Obligated entity” as was then existing in the principal Regulations, 2010. It has been candidly admitted on behalf of the State Commission that the amendment in the definition of “Obligated entity” then existing in the Principal Regulations, 2010 i.e. UERC (Compliance of RPO) Regulations, 2010 had to be introduced by the State Commission Amendment, 2013 for compliance of the judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in Century Rayon case.

17. Thus, it is clearly established from the submissions and arguments on behalf of the State Commission that the definition of ‘obligated entity’ had to be amended by introducing/enacting UERC (Compliance of RPO) (First Amendment) Regulations, 2013 in order to give effect to the judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in Century Rayon case, and accordingly, in the amended definition of ‘obligated entity’, the co-generation based captive power plants have been excluded. As a consequence of the State Regulations Amendment of 2013, the co-generation based captive power plants/captive users have been excluded from the obligation of procuring renewable energy or purchasing Renewable Energy Certificates (RECs) since 28.12.2013 as the amendment of 2013 has been enforced on 28.12.2013.

18. The learned State Commission is expected and supposed to be fully aware of the law laid down by this Appellate Tribunal in the different matters relating to Electricity Act and the State Regulations as the same are available on the website of this Appellate Tribunal and also in the Energy Law Reports because then only the State Commission or the Central Commission will be in a better position to understand the complexity and interpret different methodology or terms legal and judicial and also will be in a position to elucidate or interpret the same whenever the occasion comes to them for the same purpose. The judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs MERC was pronounced in April, 2010, and the learned State Commission, even after the availability of the judgment,

dated 26.4.2010 of this Appellate Tribunal, did not consider the same while finalizing the Notification of Principal Regulations, 2010 namely; UERC (Compliance of RPO) Regulations, 2010 and being unnoticed of our judgment, dated 26.4.2010, also the interpretation made therein remained unnoticed by the State Commission. Consequently, the Principal Regulations, 2010 were notified and given effect to. Not only this, the learned State Commission remained quite unaware or oblivious of this important judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal no. 57 of 2009 for a long time and the State Commission issued show-cause-notices to the co-generators including Appellants in March, 2013 requiring them to reply for non-compliance of their RPO and also to non-compliance of the RPO Regulations as required under the Principal Regulations of 2010. When reply to show cause notices was conversed by the co-generators including Appellants and the various petitions were filed on behalf of the Appellants before the State Commission, then only, the said position of law laid down in the judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs. MERC, came to the knowledge of the State Commission. The learned State Commission then amended the Principal RPO Regulations, 2010 by introducing/enacting an amendment in 2013 excluding and exempting the co-generation based captive power plants/captive users from the definition of 'Obligated entity' and consequently, the Appellants have been held entitled to exemption from procuring renewable energy or purchasing Renewable Energy Certificates towards fulfillment of the RPOs from 28.12.2013 onwards.

19. If the learned State Commission was quite unaware of the judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in Century Rayon case, and when the same judgment came to the notice of the State Commission, and it undertook the exercise of making necessary amendment in the Principal RPO Regulations, 2010, then the State Commission should have considered the submissions raised by the Appellants-petitioners in their respective petitions, and after considering

the ratio of the judgment, dated 26.4.2010, of this Appellate Tribunal to pass suitable orders in the said petitions of the Appellants. The learned State Commission, in its wisdom, without taking pain of going into the interpretation and law laid down by this Appellate Tribunal in its judgment, dated 26.4.2010, in Appeal No. 57 of 2009, passed the impugned order, asking the Appellants to procure renewable energy power and fulfill their renewable purchase obligations of FYs 2011-12, 2012-13 and 2013-14 (upto 27.12.2013). If the State Commission was virtually facing some difficulty in implementing the judgment, dated 26.4.2010 of this Appellate Tribunal and it has introduced the relevant amendment for the purpose of changing the definition of 'Obligated entity', the State Commission was competent enough to exercise *Power to Relax* in order to give effect to the judgment, dated 26.4.2010 of this Appellate Tribunal, in the meanwhile, till the State Regulations Amendment, 2013 were to be enforced and this would have been just, judicial and judicious approach of the State Commission in exempting the Appellants-petitioners from the aforesaid obligation.

20. In view of the above considerations and analysis, we note that the impugned order passed by the State Commission suffers from the vice of illegality and the same is against the legal proposition laid down by this Appellate Tribunal in its judgment, dated 26.4.2010, in Appeal No. 57 of 2009 in the case of Century Rayon vs MERC. The approach of the State Commission in passing the impugned orders appears to be quite illegal, invalid and unjust, which cannot be appreciated by this Appellate Tribunal by any stretch of imagination.

21. Consequently, we observe that the impugned orders, dated 13.3.2014 (subject matter in Appeal No. 112 of 2014) and, dated 10.4.2014 (subject matter in Appeal Nos. 130 and 136 of 2014), suffer from illegality and perversity. We find force in the submissions of the Appellants and they are entitled to the relief claimed by them before the State Commission in the form of filing reply to show cause notices and also by filing petitions. The

findings recorded by the State Commission in the impugned order, are illegal, perverse and are based on improper and erroneous appreciation of the facts and law. The approach adopted by the State Commission is also not appreciable as the State Commission should have exercised its *power to relax* in order to implement the judgment, dated 26.4.2010, passed by this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs. MERC, and also to give relief to the Appellants-petitioners. All the findings recorded by the State Commission in the impugned orders, so far as the Appellants-petitioners are concerned, are hereby set-aside and the impugned orders are liable to be quashed. **Accordingly, in view of the above findings and observations, the issue is decided in favour of the Appellant and against the Respondent.**

22. We further observe and make it clear that each of the Appellants, who filed the petitions before the State Commission, claiming that each of the them being a co-generation based captive power plant/captive user was under no obligation to make purchases of Renewable Energy Certificates under the Principal Regulations, 2010, is entitled to the benefit of the judgment, dated 26.4.2010, passed by this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs. MERC, and they are accordingly, exempted from the obligation of procuring renewable energy and fulfilling their renewable energy obligation for FYs 2011-12, 2012-13 and 2013-14 (upto 27.12.2013).

23. **SUMMARY OF OUR FINDINGS**

The Co-generation based Captive Power Plant/Captive user cannot be fastened with renewable purchase obligation as provided under UERC (Compliance of RPO) Regulations, 2010, as subsequently, amended by UERC (Compliance of RPO) (First Amendment) Regulations, 2013. The judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs. MERC, whereby the provisions of Section 86(1)(e) of the Electricity Act, 2003 were interpreted and in compliance of which the learned State Commission has amended the

definition 'Obligated entity' as was then existing in UERC (Compliance of RPO) Regulations, 2010 by UERC (Compliance of RPO) (First Amendment) Regulations, 2013, shall be held to be applicable from the date of the judgment itself. Though, in compliance of the said judgment, dated 26.4.2010, the Regulations were amended in the year 2013 by the State Commission. It was a fit case where the State Commission should have exercised its *power to relax* according to its own Regulations in order to give effect to the judgment, dated 26.4.2010, passed by this Appellate Tribunal in Appeal No. 57 of 2009, in the case of Century Rayon vs. MERC in letter and spirit, in order to give relief to the Co-generation based Captive Power Plants/Captive users entitled to it.

24. The State Commission should have granted relief and exempted the Co-generation based Captive Power Plants/Captive users as per the judgment, dated 26.4.2010, of this Appellate Tribunal in Appeal No. 57 of 2009, immediately on coming to the knowledge of the same and without waiting for the amendment of the relevant State RPO Regulations, 2010 (Principal Regulations). The State Commission has, since amended the required Regulations dealing with the definition of 'Obligated entity' by introducing or enacting UERC (Compliance of RPO) (First Amendment) Regulations, 2013, it was incumbent upon the State Commission to consider the submissions of the Appellants and other like co-generation based Captive Power Plants/Captive users and to grant relief to them. Since, the State Commission has failed in its duty to do the same; we are constrained to rectify the illegality committed by the State Commission without remanding the matter and again burden the State Commission with the same exercise.

25. Consequently, all the three Appeals, being Appeal Nos. 112 of 2014, 130 of 2014 and 136 of 2014, are hereby allowed and the impugned orders, dated 13.3.2014 (in Appeal No. 112 of 2014) and, dated 10.4.2014 (in Appeal Nos. 130 and 136 of 2014) passed by the Uttarakhand Electricity Regulatory Commission, are hereby set-aside.

26. We further order that the relief granted herein shall be applicable to all Co-generation based Captive Power Plants/Captive users as they are also covered by the newly amended definition of 'Obligated entity' and shall not be confined to the Appellants before us.

27. The State Commission is hereby directed to act upon this judgment positively within three months from the date of communication of this judgment. No order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 1ST DAY OF OCTOBER, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ **REPORTABLE/NON-REPORTABLE**

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