COURT-I

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

APPEAL NO. 146 OF 2017

Dated: 16th April, 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of :

Rajasthan Renewable Energy Corporation Ltd.
Through Director Technical,
E-166, Yudhisthir Marg, C-Scheme,
Jaipur – 302 001 … Appellant(s)

Vs.

1. **M/s. Shree Cement Ltd.**
   Bangur Nagar,
   Post Box No. 33,
   Beawar (RAJ.) – 305 901

2. **M/s Binani Cement Ltd.,**
   P.O. Binanigram Distt.
   Sirohi (RAJ.) – 307 031

3. **M/s Chambal Fertilisers and Chemicals Ltd.,**
   P.O. Gadepan,
   Distt – Kota - 325208

4. **M/s DCM Shriram Ltd.,**
   Shriram Nagar,
   Kota – 324 004

5. **M/s Hindustan Zinc Limited**
   Captive Power Plant,
   Chanderia Lead Zinc Smelter
   P.O. Putholi,
   Dist. Chittorgarh – 312 021

6. **M/s RSWM Ltd., Mayur Nagar,**

Lodha, Banswara (RAJ.)- 327 001

7. M/s Suzuki Spinners,
(A unit of M/s Suzuki Textile Limited)
Village: Danta Nilawari – 311 401
Tehsil-Banera, Bhilwara

8. Rajasthan Electricity Regulatory Commission
"Vidyut Vinyamak Bhawan",
Near State Motor Garage,
Sahakar Marg,
Jaipur – 302 005

… Respondent(s)

Counsel for the Appellant(s)	:	Ms. Susan Mathew
Counsel for the Respondent(s)	:	Ms. Swapna Seshadri Mr. Anand K. Gabesan Ms. Neha Garg Mr. Ashwin Ramanathan Mr. Utkarsh Singh for R-1, 3 & 4 Mr. Pallav Mongia Ms. Sakshi Shrma Mr. Kausthbh Singh Mr. Sabyasudhi Bhandari Mr. Pankaj Singh Mr. Abhinav Goyal for R-5 Mr. P. N. Bhandari for R-6 & 7 Mr. R. K. Mehta Ms. Himanshi Andley for R-8

JUDGMENT

1. This Appeal is directed against the Order dated 23.03.2017 passed by the Rajasthan Electricity Regulatory Commission (**"Respondent-Commission"**). The Appellant is Rajasthan Renewable

Energy Corporation Limited ("**RRECL"**). The facts that led to filing of the present appeal, in brief, are as under:

2. The Appellant contend that in terms of the provisions of the Electricity Act 2003 and the National Electricity Policy, the Commission enacted RERC Regulations of 2007, whereunder liability has been imposed on the end user of renewable energy to buy minimum percentage of renewable energy so that the renewable energy generators can be promoted in order to achieve the object of reducing emission of such gases which would have an impact on environment further likely to damage ozone layer resulting in global warming. REC framework came to be introduced by the Central Electricity Regulatory Commission in exercise of powers conferred upon it by virtue of Section 178 (1) and Section 66 read with Section 178(2)(y) of the Electricity Act, 2003 ("**the Act"**). This framework introduced issuance of Renewable Energy Certificates for renewable energy generation by virtue of Regulations of 2010. The Appellant is the duly appointed State Agency for ensuring the promotion and compliance of renewable energy obligation in terms of RPO Regulations issued by the Commission from time to time.

3. Pursuant to the provisions of CERC Regulations of 2010, the State Commission framed the RERC (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations of 2010 ("**Regulations of 2010**"). These Regulations according to the Appellant enlarged the scope of purchase of renewable energy.

4. It is not in dispute that these RERC RPO Regulations of 2007 and 2010 became subject matter of challenge before the Rajasthan High Court in WP No. 2850 of 2007. An interim stay was also granted. Meanwhile, the Respondent-Commission framed RERC (Renewable Energy Obligation) (1st Amendment) Regulations of 2011. However, on 31.08.2012, the Division Bench of the Rajasthan High Court ultimately dismissed the petition, upholding the validity of the Regulations of 2007 and 2010. Therefore, the stake holders are liable to fulfil the obligations imposed under the Regulations is the stand of the Appellant.

5. In terms of directions of the Respondent-Commission, the Appellant issued various letters to obligated entities including the Respondents to comply with RPO compliance. Though there were SLPs against the orders of the High Court of Rajasthan, ultimately, on 31.05.2015 Hon'ble Apex Court upheld the validity of the Regulations of

2007 as well as 2010. Therefore, the Appellant was directed by the Respondent-Commission to ensure the RPO compliance by obligated entities in the State of Rajasthan. The Appellant issued demand notices calling upon the obligated entities including the Respondents to fulfil the obligation by meeting shortfall/deficit, if any, in the RPO Obligations either by purchasing renewable energy or by purchasing RE Certificates on or before 31.12.2015.

6. When certain entities did not comply with the RE obligation, the Appellant filed the petitions in question before the State Commission complaining that the obligated entities including the Respondents and others are defaulting in complying with the RPO obligations, who are co-generating entities through Waste Heat Recovery for the periods between 01.04.2007 to 22.12.2010 and between 23.12.2010 to 31.03.2015.

7. On merits, the Respondent-Commission held that the Captive Power Plant generating electricity through Waste Heat Recovery cannot be fastened with RPO liability under Section 86(1)(e) of the Act. Aggrieved by the same, the Appellant is before this Tribunal contending that the Commission erred in opining that the co-generators are totally

excluded from meeting the renewable RPO obligation, which would frustrate the very purpose of the object of RERC (Renewable Energy Obligation) (2nd Amendment) Regulations of 2014. In terms of the 2014 Regulations, it specifies the percentage of Solar RE obligation to be fulfilled by obligated entities, which includes captive power plants, therefore it would become mandatory even for co-generators to fulfil Solar RE obligation. It is further contended that the Commission failed to understand that captive power plants also fall within the ambit of obligated entities. As a matter of fact, RERC RPO Regulations of 2014 bifurcates the RPO under two heads: (1) Solar and (2) Non Solar. Though Captive Power Plants generating energy from Non Solar renewable energy sources are fulfilling the solar renewable purchase obligation by purchasing solar RECs, the co-generators are not fulfilling the said obligation. The definition of “obligated entities” under RERC RPO Regulations of 2010 is an inclusive definition, therefore the captive consumer of a captive power plant falls within the purview of obligated entity.

8. The Commission opined that the Appellant is duty bound to file the petition as per its obligations under Regulations and any person may file a complaint complaining non-compliance of Regulations under Section 142 of the Act. The powers are conferred upon the Appellant vide

Regulations. The State Agency i..e, the Appellant alone is empowered to assess the shortfall and identify defaulters. It has obligation to discharge all its functions, duties under the Regulations and cannot just act as mere agent of the Commission. The Appellant being an aggrieved person by an order made by the Appropriate Commission under the Act has preferred this appeal, therefore, its *locus standi* to file the petition and the present appeal cannot be questioned. In the RE Regulations itself, procedure is provided for compliance of solar energy purchase obligation and non solar energy purchase obligation separately. According to the Appellant, totally exempting the captive power plants generating energy through Waste Heat Recovery, the Commission has given preferential treatment to those generators over the captive power plants generating energy through non-solar energy sources. This is against the objectives of Electricity Act and National Electricity Policy. The waiver is given to the Respondents opining that the generation from Waste Heat Recovery generation plants is in excess of the total RPO required to be complied by the captive power plants. Therefore, the Appellant is before this Tribunal.

9. As against this, the Respondents contend that the Appellant was constituted as State Agency for accreditation and recommending the renewable energy projects for registration and also to undertake such

functions as may be specified under Clause(e) of sub-section(1) of Section 86 of the Act. The complaint of the Appellant as a petitioner before the State Commission was that action should be taken against defaulting obligated entities for shortfall in meeting renewable purchase obligations. According to the Respondents, the Commission by impugned order was justified in opining that captive power plants generating electricity through Waste Heat Recovery cannot be fastened with RPO liability. According to the Respondents, the Appellant has no *locus standi* to file the present appeal since it is State Agency for accreditation and recommending renewable energy purchase in terms of Regulations of 2007. Its duty is to ensure that RPO obligations have been complied with and also to collect various information from time to time with respect to various entities, who have to comply with RPO obligations. It has to function under the directions of the Commission and has to act in consonance with the rules and regulations laid down by Central Agency.

10. The Appellant has to act within the four corners of the Regulations and cannot cross over these regulations. Therefore, the Appellant ought not to have filed this appeal against the order of the Commission, which in fact amounts to seeking permission to act beyond the directions of the Commission by challenging the order of the Commission. Section

86(1)(e) of the Act makes it abundantly clear that the Commission has to determine the manner in which co-generation and generation of electricity from renewable source has to be promoted. The Commission is justified in opining that there is no obligation on the part of the captive generating plant to comply with RPO obligations. So called distinction relied upon by the Appellant that is solar and non solar entities, was also the contention before the State Commission, which was not accepted by the State Commission. Therefore, according to the Respondents, the amendment brought to the regulations cannot be acted upon.

11. With these arguments at our command, we proceed to analyse the facts and give our opinion on merits of the appeal.

12. According to the Appellants, in spite of Clause(e) of sub-section(1) of Section 86 of the Act, in the light of distinction made between solar and non solar entities and so also amendment brought to Regulation 4 of the State Regulations, which created RPO obligations on various entities clearly bring the Respondent captive generating plants within the compliance of RPO obligations. The amended Regulation (4), which replaced the earlier regulation, reads as under:

"Amendment in Regulation 4:

The Regulation 4 of the Principal Regulations shall be replaced as under:

4. ***Renewable Purchase Obligation***

Every 'Óbligated Entity' shall procure electricity generated from renewable energy sources as defined in these Regulations as per purchase obligation specified as under:

(a) Distribution licensees:
Renewable Purchase Obligation in respect of Solar, Wind and Biomass energy shall be as per RERC (Power purchase & procurement process of distribution licensee) Regulations, 2004as amended from time to time.
(b) Captive consumers of CPP/Open Access consumers:
Renewable Purchase obligation in respect of CPP/Open Access consumers shall be as per RERC (Renewable Energy Obligation) Regulations, 2007 as amended from time to time."

13. It is not in dispute that in terms of these regulations brought by RERC, the Appellant is the State Agency, which has obligation to audit the information of obligated entities furnished to it for the assessment year in terms of the regulations.

14. The issue before us is "*whether the Respondent Captive Generating Plants are obligated entities who have to comply with RPO in terms of Regulations?*"

15. Section 86(1)(e) reads as under:

> *"(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;"*

16. By a Judgment dated 2nd January 2019 passed in Appeal No.278 of 2015 and batch, the coordinate bench of this Tribunal has opined that the consumers meeting electricity consumption from captive co-generation plant in excess of the total specified RPO from waste heat technology does not have any obligation to procure electricity from other renewable source of electricity separately from solar or non solar. This Tribunal in the above appeals by referring to various judgments of the Tribunal and the Apex Court finally opined as stated above. Therefore, by virtue of this Judgment an entity which is to be promoted in terms of Section 86(1)(e) of the Act cannot be fastened with renewable purchase obligation under the said provision as long as the consumption is in excess of renewable purchase obligation. Therefore, there can be no additional purchase obligation placed on such entities.

17. Following the judgment of the co-ordinate Bench in the above stated appeals, this Bench in its Judgment dated 09th April, 2019 in Appeal Nos. 322 & 333 of 2016 has also opined that the captive consumers having co-generating plants cannot be fastened with the obligation to procure electricity from renewable sources or to purchase renewable energy certificates in order to comply with the obligation. The relevant portion of the Judgment in Appeal No. 322 & 333 of 2016 read as under:

> *"25. They heavily rely upon decision of the co-ordinate Bench of this Tribunal in* ***JSW Energy Steel Limited vs. Tamil Nadu Electricity Regulatory Commission*** *(in Appeal No. 278 of 2015 and batch dated 2.1.2019). On perusal of this decision, we note that the controversy which arose for consideration of the Bench in those batch of Appeals is exactly the same in these Appeals. It would be just and proper to quote the issues raised in those Appeals and how they were considered by the co-ordinate Bench. The judgment in Century Rayon, the full Bench judgment in Lloyd Metals by this Tribunal as well as the Judgment of the Hon'ble Supreme Court in Hindustan Zinc Limited, are discussed at length and have answered ultimately that co-generation facilities irrespective of fuel are to be promoted in terms of Section 86(1)(e) of the Electricity Act. Therefore, they cannot be fastened with the obligation of Renewable Purchase Obligation under the same provisions of the Act."*

18. The relevant paragraphs of the Judgment of the co-ordinate Bench in Appeal No. 278 of 2015 read as under:

> *"I. Whether the appellants, co-generators are under a legal obligation to purchase power from renewable sources of energy in order to meet their Renewable Purchase Obligation?*
>
> *II. Whether the exemption granted to co-generation plants would depend on the type of fuel used by them?*
>
> *III. Whether the judgment of this Tribunal dated 26.04.2010 in Century Rayon vs. Maharashtra Electricity Regulatory Commission & Ors has been set aside in entirety or only in part by the Full Bench Judgment of this Tribunal dated 02.12.2013 in Lloyds Metal & Energy Ltd v. Maharashtra Electricity Regulatory Commission & ors.?*
>
> *IV. Whether the judgment of the Hon'ble Supreme Court in Hindustan Zinc Ltd vs. Rajasthan Electricity Regulatory Commission 2015) 12 SCC 611 would apply to the present appeals?*
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> *...*
>
> ***RE: ISSUE NOS. (I) & (II)***
>
> *Whether the appellants, co-generators are under a legal obligation to purchase power from renewable sources of energy in order to meet their Renewable Purchase Obligation?*

Whether the exemption granted to co-generation plants would depend on the type of fuel used by them?

.....

OUR CONCLUSION ON ISSUE NOS. (I) & (II)

39. *The appellants are all captive co-generators. As per section 2(12) of the Electricity Act, 2003 defines cogeneration as under:*

"Cogeneration" means a process which simultaneously produces two or more forms of useful energy (including electricity).

The State to promote generation of electricity from co-generation and renewable sources as envisaged under section 86(1)(e) of the Electricity Act, 2003 casts a specific obligation on the various State Electricity Regulatory Commissions set up under the Act to promote generation of electricity from cogeneration and renewable sources of energy. The aforesaid question arose for consideration before this Tribunal in the case of Century Rayon vs. Maharashtra Electricity Regulatory Commission & Ors. reported in 2010 SCC OnLine APTEL 37 : [2010] APTEL 37 vide judgment dated 26.04.2010 wherein paragraphs 45 & 46 of the judgment read hereunder:

"45. Summary of our conclusions is given below:-

(I) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' mean Judgment in Appeal No. 57 of 2009 cogeneration from renewable sources alone. The meaning of the term 'co- generation' has to be understood as defined in definition Section 2 (12) of the Act.

(II) As per Section 86(1)(e), there are two categories of `generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories.

(III) The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86 (1)(e).

(IV) The clear meaning of the words contained in Section 86(1)(e) is that both are different and both are required to be promoted and as such the fastening of liability on one in preference to the other is totally contrary to the legislative interest.

(V) Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by State Commission through the suitable methods and suitable directions, in view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.

(VI) The intention of the legislature is to clearly promote cogeneration in this industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone.

46. In view of the above conclusions, we are of the considered opinion that the finding rendered by the Commission suffers from infirmity. Therefore, the same is liable to be set side. Accordingly, the same is set aside. Appeal is allowed in terms of the above conclusions as well as the findings referred to in aforesaid paras

16,17,22 and 44. 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. No costs." *[Emphasis supplied]*

40. *It is manifest on the face of the judgment, as stated supra, the Captive consumers having cogenerating plants cannot be fastened with the obligation to procure electricity from renewable energy sources, as that would defeat the object of section 86(1)(e) of the Electricity Act, 2003 and cogenerating plants have to be treated at par with renewable energy generating plants for the purpose of RPO obligations. It is pertinent to note that the aforesaid judgment has been consistently followed by this Tribunal in several cases e.g. Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission in Appeal No. 54 of 2012 dated 30.01.2013 reported in 2013 SCC OnLine APTEL 23 : [2013] APTEL 74 (Para 5, paras 38 to 40, which reads hereunder:*

"5. In the light of the rival contentions, the following question may arise for consideration: "Whether the Appellant, the co-generator is under a legal obligation to purchase power from the renewable sources of energy for meeting the Renewable Purchase Obligation of its captive load?"

…. …. ….

38. As laid down by this Tribunal in Century Rayon case, we reiterate that the mere use of fossil fuel would not make cogeneration plant as a conventional plant. The State Commission cannot give its own interpretation on this aspect which is not available in the Regulations and which is against the ratio and the interpretation of provision given in the judgement by this Tribunal.

39. We feel anguished to remark that unfortunately, the State Commission has not followed the judicial propriety by ignoring the well laid principles contained in the judgement of this Tribunal, which is binding on the authority.

40. Summary of our findings: i) This Tribunal in its judgment in Appeal No.57 of 2009 has specifically observed that the intention of the legislature is to clearly promote the cogeneration also irrespective of the nature of the fuel used and fastening of the obligation on the cogenerator would defeat the object of Section 86(1)(e). The Tribunal also mentioned in the above judgment that the conclusion in Appeal No.57 of 2009 of being generic in nature, would apply to all the co-generation based captive consumers who may be using any fuel. Therefore, reasoning given by the State Commission for distinguishing the judgment of this Tribunal, which is binding on the State Commission, is wrong.

ii) The definition of the obligated entity would not cover a case where a person is consuming power from co-generation plant. iii) The State Commission by the impugned order, in order to remove difficulties faced by the obligated entities, has clarified that the obligation in respect of co-generation can be met from solar and nonsolar sources but the solar and non-solar purchase obligation has to be met mandatorily by the obligated entities and consuming electricity only from the co-generation sources shall not relieve any obligated entity. When such relaxation has been made, the same relaxation must have been allowed in respect of consumers meeting electricity consumption from captive Co-generation Plant in excess of the total RCPO Obligations. Failure to do so would amount to violation of Section 86(1)(e) of the electricity Act, which provides that both cogeneration as well as generation of electricity from renewable source of energy must be encouraged as per the finding of this Tribunal in Appeal No.57 of 2009. Unfortunately the

State Commission has failed to follow the judgment given by this Tribunal in Century Rayon case." [Emphasis supplied]

Therefore, in view of the aforesaid judgment, this Tribunal consistently followed and position reiterated by this Tribunal in the above judgments. In spite of consistent view taken by this Tribunal, the Respondent/State Regulatory Commission has failed to take judicial note and appreciate the matter and on contrary, proceeded to pass the impugned Order without evaluation of the material available on records and the case made out by the Appellant. We are of the considered view that the Respondent/State Regulatory Commission has failed to consider the same and on contrary has passed the impugned order. Therefore, the impugned order passed by the Respondent/State Regulatory Commission is liable to be set aside on this ground. ***Hence, we answered these issues in favour of the Appellants****.*

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RE: ISSUE NO. (III)

Whether the judgment of this Tribunal dated 26.04.2010 in Century Rayon vs. Maharashtra Electricity Regulatory Commission & Ors has been set aside in entirety or only in part by the Full Bench Judgment of this Tribunal dated 02.12.2013 in Lloyds Metal & Energy Ltd v. Maharashtra Electricity Regulatory Commission & ors.?

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OUR CONCLUSION ON ISSUE NO. (III)

43. *It is pertinent to note that the order of reference to the Full Bench dated 23.09.2013 in the case of Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission & Ors.*

order dated 23.09.2013 makes it clear that the limited question for reference to the Full Bench is as follows:

"Whether the distribution licensee could be fastened with the obligation to purchase a percentage of its consumption from co-generation irrespective of the fuel used under Section 86(1)(e) of the Act 2003.

Registry is directed to get the Administrative Order from the Chairperson to post it before the Full Bench for re-examination of the interpretation given in the Century Rayon Case on this question."

The Full Bench of this Tribunal vide its order dated 02.12.2013 in the case of Lloyds Metal & Energy Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors., after thoughtful consideration of all the relevant material available on records, answered the question as referred for consideration which read thus:

"This important aspect has not been considered in the Century Rayon judgment, where in this Tribunal had held that the Sate commission has to promote both co-generation as well as generation of electricity from renewable sources of energy. Accordingly, we feel that the State Commission could promote the fossil fuel based co-generation by any other measures such as facilitate sale of electricity from such sources, grid connectivity, etc. by the State Commission could not compel the Distribution Licensee to procure electricity from fossil fuel based co-generation against the purchase obligation to be specified under Section 86(1)(e) of the Electricity Act, 2003." [Emphasis supplied]

It is evident that only paragraph 45(II) of the judgment in Century Rayon Case has been set aside by the Full Bench judgment in Lloyds Metal Case and not the Century Rayon judgment in its entirety. The effect of this being that the distribution licensee could not be compelled to procure electricity from fossil fuel based co-generation against its renewable purchase obligation. However, it has no effect on the finding in Century Rayon Case that a cogeneration based captive power plant cannot be fastened with Renewable Purchase Obligation irrespective of the nature of the fuel used for such cogeneration.

44. *It is, further, fortified by the fact that this Tribunal has in India Glycols Case dated 01.10.2014, much after the judgment of the Full Bench in Lloyds Metal case, continued to rely on Century Rayon case in so far as the question whether cogeneration based captive power plant can at all be fastened with renewable Purchase Obligation is concerned as held in para 10, 20 to 23 which read as under:*

"10. The only issue that arise for our consideration is whether cogeneration 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?

....

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." *[Emphasis supplied]*

In view of the aforementioned facts and circumstances, we are of the considered view that the reasoning assigned by the Respondent/State Regulatory Commission cannot be sustainable; hence, it is liable to be vitiated. Therefore, answered the issue No. (III) in favour of the Appellants.

...

RE: ISSUE NO. (IV)

Whether the judgment of the Hon'ble Supreme Court in Hindustan Zinc Ltd vs. Rajasthan Electricity Regulatory Commission 2015) 12 SCC 611 would apply to the present appeals?

OUR CONCLUSION ON ISSUE NO. (IV)

***51**. In the case of Hindustan Zinc Ltd. vs. Rajasthan Electricity Regulatory Commission (2015) 12 SCC 611, wherein the validity of the Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) Regulations, 2007 and Rajasthan Electricity Regulatory Commission (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010, has been questioned which imposed renewable energy obligation on captive gencos and open access consumers. It is significant to note that, the Hon'ble Apex Court was not considering the case of co-generation plants, as rightly pointed out by the learned counsel for the Appellants, is involved*

in the present appeals before this Tribunal. Therefore the said judgment is not applicable to the facts and circumstances of the instant appeals as the appellants are not questioning the correctness of the Regulations and are merely claiming exemption therefrom as envisaged under Section 86(1)(e) of the Electricity Act, 2003. It is also rightly pointed out by the learned counsel for the Appellants that, this Tribunal has consistently held that co-generation plants are exempted from these regulations by virtue of the special status granted to them in the light of Section 86(1)(e) of the Electricity Act, 2003. It is not in dispute that this Tribunal has proceeded to hold that even where the Regulations provide for the imposition of the Renewable Purchase Obligation on co-generation, the Regulations need to be read down in view of the interpretation of Section 86(1)(e) of the Electricity Act, 2003.

***52**. The above contention is further fortified by the fact that, Rajasthan Electricity Regulatory Commission has itself vide its Order dated 23.03.2017 in Petition Nos. RERC/839/16 and RERC/840/16 in para 15(xi) wherein considered that, "Various Special Leave Petitions (SLPs) were filed before the Hon'ble Supreme Court of India challenging the order dated 31.08.2012 of Hon'ble Division Bench of Rajasthan High Court and the Hon'ble Supreme Court of India vide order dated 13.05.2015 upheld the validity of the RPO Regulations, 2007 and RPO Compliance Regulations, 2010." Further, it referred in para 15(xxi) that, "In view of the judgments passed by the Hon'ble Supreme Court of India, Hon'ble High Court of Rajasthan and the Hon'ble APTEL upholding the validity of the Regulations of 2007 & 2010 and the directions issued by this Commission, it is, therefore, requested that the completed data regarding the Energy Generation and*

RPO Compliance may be ordered to be submitted to the Petitioner for assessment of RE Surcharge and after assessment of the shortfall, the Respondents be directed to pay the RE Surcharge assessed on the basis of the shortfall in RPO Compliance for the period 23.03.2007 to 22.12.2010" and also followed the well settled position of law and consistently followed is that there cannot be RPO being imposed on co-generation facilities wherein they discussed and considered the judgment of this Tribunal i.e. Century Rayon, Emami Paper Mills Ltd, Vedanta Aluminium Ltd, Hindalco Industries Ltd, India Glycols Ltd and observed that, as per the above judgment, it is a settled position of law that an entity which is to be promoted in terms of section 86(1)(e) of the Electricity Act, 2003 cannot be fastened with renewable purchase obligation under the same provision. Further, consumer meeting electricity consumption from captive co-generation plant in excess of the total specified RPO from waste heat technology does not have any obligation to procure electricity from other renewable source of electricity separately from solar or non-solar. Above position is followed by the various State Electricity Regulatory Commissions in the country. The Rajasthan Electricity Regulatory Commission has also considered Section 81(1)f) of the Electricity Act, 2003 and also taken note of the judgment of this Tribunal passed in Century Rayon vs Maharashtra Electricity Regulatory Commission & Ors in Appeal No. 57 of 2009 dated 26.04.2010, which reads as under:

"Summary of our conclusions is given below:-

(I) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' means cogeneration from renewable sources alone. The meaning of the term 'co-

generation' has to be understood as defined in definition Section 2 (12) of the Act.

(II) As per Section 86(1)(e), there are two categories of `generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories.

(III) The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86 (1)(e).

(IV) The clear meaning of the words contained in Section 86(1)(e) is that both are different and both are required to be promoted and as such the fastening of liability on one in preference to the other is totally contrary to the legislative interest.

(V) Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by State Commission through the suitable methods and suitable directions, in view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.

(VI) The intention of the legislature is to clearly promote cogeneration in this industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone."

[Emphasis supplied]

The Rajasthan Electricity Regulatory Commission has also considered the judgment of this Tribunal, as stated supra, in cases of Emami Paper Mills Ltd; Vedanta Aluminum Ltd; Hindalco Industries Ltd.and India Glycols Ltd; and held that:

"In view of the settled legal position, Commission is of the considered view that no RPO liability shall be fastened on such generators who generate electricity through Waste Heat Recovery for their own purpose and consume it, subject to the condition that generation from Waste Heat Recovery generation plant is in excess of the total RPO required to be complied by the CPP. If generation is lesser than the requirement to the extent of shortfall general rule applies. So far as distinction tried to be made by RREC between solar and non-solar for the purpose of compliance, in the Commission's view does not merit acceptance. Once Captive Power Plant generating electricity through Waste Heat Recovery, cannot be fastened with RPO liability under Section 86 (1) (e), there is no question of imposition of solar RPO also as the same falls in the category of Renewable Energy."

[Emphasis supplied]

***53**. It is rightly pointed out by the counsel for the Appellant that, the judgment of the Hon'ble Apex Court actually covered co-generators as well has got some substance and it is highly unlikely that the Rajasthan Electricity Regulatory Commission, whose Regulations were under challenge before the Hon'ble Apex Court, would itself grant relief to the co-generators before it relying on the judgment of this Tribunal in Century Rayon case. Therefore, we hold that a co-generation facility irrespective of fuel is to be promoted in terms of section 86(1)(e) of the Electricity Act, 2003; an entity which is to be promoted in terms of section 86(1)(e) of*

the Electricity Act, 2003 cannot be fastened with renewable purchase obligation under the same provision; and as long as the co-generation is in excess of the renewable purchase obligation, there can be no additional purchase obligation placed on such entities.

***54**. In view of the facts and circumstances, as stated supra, we hold that, the Appellants herein, being co-generation plants, are not under a legal obligation to purchase power from renewable sources of energy in order to meet their Renewable Purchase obligation in the interest of justice and equity."*

19. In the light of the above discussion and earlier judgments of this Tribunal on the very point, we are of the opinion that in order to understand the RPO obligations one has to understand Section 86(1)(e) of the Act. From reading of the above section, it is clear that both the co-generation and renewable energy have to be promoted in terms of Section 86(1)(e) of the Act. As long as captive consumers consume energy from co-generating unit beyond the RPO obligations, there is no obligation to purchase RE Certificates or consume renewable energy, separately. We also opine that once the entities comply with the obligations under Section 86(1)(e) of the Act in terms of philosophy in the above judgments, by making a distinction between solar and non solar captive consumers of captive generating plants cannot be asked separately to comply with the obligations by purchasing RECs.

Accordingly, we are of the opinion that the Appeal deserves to be dismissed and is dismissed. The pending IAs, if any, shall stand disposed of.

20. There shall be no order as to costs.

S.D. Dubey
[Technical Member]

Justice Manjula Chellur
[Chairperson]

REPORTABLE/~~NON-REPORTABALE~~