COURT-I

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 311 OF 2018 & IA Nos. 1531, 1468 & 1467 of 2018
IN
APPEAL NO. 315 OF 2018 & IA Nos. 1523 & 1522 of 2018

Dated: 27th March, 2019

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

APPEAL NO. 311 OF 2018 &
IA Nos. 1531, 1468 & 1467 of 2018

In the matter of:

IN THE MATTER OF:

1. M/s JSW Steel Ltd.
JSW Centre, Bandra Kurla Complex,
Bandra (E) Mumbai-400051

2. M/s JSW Energy Ltd.
JSW Centre, Bandra Kurla Complex,
Bandra (E) Mumbai-400051

3. M/s JSW Steel Coated Products Limited
JSW Centre, BandraKurla Complex,
Bandra (E) Mumbai-400051

4. M/s Amba River Coke Limited,
JSW Centre, BandraKurla Complex, Bandra (E) Mumbai-400051

5. M/s JSW Cement Limited
JSW Centre, BandraKurla Complex,
Bandra (E) Mumbai-400051

… Appellants

Versus

1. The Secretary, Maharashtra Electricity Regulatory Commission, World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai-400005)

2. Managing Director, Maharashtra State Electricity Distribution Company Limited, G-9, Prakashgad, Anand Kanekar Marg, Bandra (East), Mumbai – 400 051) … Respondents

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Aman Anand
Mr. aman Dixit
Mr. Pratik Das
Mr. Amit Murjani

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Ms. Stuti Krishna for R.1

Mr. G. Saikumar
Ms. Rimali Batra
Ms. Shruti Awashti for R.2

APPEAL NO. 315 OF 2018 &
IA Nos. 1523 & 1522 of 2018

Sai Wardha Power Generation Limited, 8-2-293/82/A/431/A, Road No.22, Jubilee Hills, Hyderabad – 500 033) ….Appellant

Versus

1. Maharashtra Electricity Regulatory Commission, Through its Secretary, World Trade Centre, Centre No.1,13th Floor,Cuffe Parade, Colaba, Mumbai-400005)

2. Maharashtra State Electricity Distribution Company Limited, Through its Chairman and Managing Director, 5th Floor, Prakashgad, Bandra (East), Mumbai – 400 051) … Respondents

Counsel for the Appellant(s)	:	Mr. Anand K. Ganesan Ms. Swapna Seshadri Mr. Ashwin Ramanathan
Counsel for the Respondent(s)	:	Mr. Buddy A. Ranganadhan Ms. Stuti Krishna for R.1 Mr. G. Saikumar Ms. Rimali Batra Ms. Shruti Awashti for R.2

JUDGMENT

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. Appeal No. 311 of 2018 filed by JSW Steel Limited and others is directed against the Order 12.09.2018 passed by the Maharashtra Electricity Regulatory Commission (for short "**the State Commission/MERC/Respondent Commission**") in case No. 195 of 2017 in relation to the petition of Maharashtra State Electricity Distribution Company Limited (MSEDCL) for Mid-Term Review for truing up of ARR for FY 2015-16 and FY 2016-17, provisional truing up of ARR for the FY 2017-18 and revised projections of ARR for the FY 2018-19 and FY 2019-20.

2. The Appellants are aggrieved with the levy of additional surcharge of Rs.1.25/- per unit with effect from the date of impugned order on

captive users of Group Captive Power Plant. According to them, the scope of the proceedings before the State Commission was restricted to carrying out mid-term performance review i.e., comparison of the actual operational and financial performance vis-à-vis the approved forecast for the first two years of the control period and revised forecast of aggregate revenue requirement, expected revenue from existing tariff, expected revenue gap and proposed category-wise tariff for the next two years i.e., 3rd and 4th year of the control period. This has to be done strictly in accordance with the MERC (Multi Year Tariff) Regulations of 2015, therefore the State Commission ought not to have levied additional surcharge since it was not the subject matter of Mid-Term Review proceedings especially when the State Commission itself had held by its order dated 03.11.2016 that such levy cannot be imposed on captive consumption owning to statutory exemption under the Act.

3. They also contend that levy of additional surcharge under Section 42(4) of the Electricity Act 2003 (for short "**the Act"**) is in contravention of the provisions of the Act as the State Commission has drawn distinction between captive users and group captive users totally ignoring Rule 3 of the Electricity Rules, 2005 (for short "**2005 Rules/Rules**"). They further contend that the State Commission has totally ignored the concept of non-discriminatory open access in terms of

the Act as well as National Electricity Policy which eliminates competition and provides supply of power directly to the consumers through open access. The State Commission failed to observe that there was no conclusive and continuous demonstration of stranded capacity in terms of Tariff Policy of 2006 and open access regulations of the State Commission. Contending that the computation of additional surcharge has no nexus with the purpose for which the additional surcharge is to be levied, Appellants have sought for setting aside the impugned order dated 12.09.2018.

4. Appeal No. 315 of 2018 is filed by Sai Wardha Power Generation Limited. It also raised similar contentions as raised in Appeal No. 311 of 2018 filed by JSW Steel Limited contending 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. Appellants contend that the State Commission has failed to appreciate the provisions of Section 9 of the Act wherein the captive power plants have been given the right to carry electricity from generating plant to the destination of their own use. Therefore, the State Commission failed to appreciate that the question of permit and supply does not arise to the extent of self consumption by captive users of CPPs. They also contend

that even on facts there is no case made out for levy of additional surcharge. The State Commission erred in opining that future consumers who convert to captive use shall be liable to pay additional surcharge while the existing captive consumers are not liable to pay the additional surcharge. Finding fault with the State Commission in levying additional surcharge on captive consumers totally ignoring its own order dated 03.11.2016 in Petition No. 48 of 2016, the Appellants contend that the State Commission ought not to have taken a contrary stand without considering the objections raised by various stakeholders /interested parties during the hearing, since in the Order dated 03.11.2016, the State Commission had not decided any factual issue but restricted to the control period of FY 2016-17 to FY 2019-20 by reopening the issue. On the contrary, it interpreted the Electricity Act for the applicability of provision of levying additional surcharge for captive consumers. Therefore, according to the Appellants the impugned order deserves to be set aside since the decision of the State Commission dated 03.11.2016 was accepted by MSEDCL. With these averments the Appellants sought for setting aside the impugned order.

5. The 2nd Respondent-MSEDCL has filed reply in both the appeals taking similar stand. According to the 2nd Respondent, in none of the provisions of the Act, nowhere it specifically exempts levy of additional

surcharge on group captive power plant. The only charge which has been specifically exempted from levy is cross subsidy surcharge. Both the provisions i.e., Section 42 (2) and 42 (4) of the Act are independent provisions and they have no relevance whatsoever between the two. The statute has to be interpreted from the words appearing in the statute and there cannot be addition of meaning to the words. Section 9 (2) of the Act provides right to open access to carry electricity to the destination of its own use by the captive generating plant, which cannot be construed to mean an exemption from payment of additional surcharge. This provision cannot be read in isolation since it has to be read with the provisions of Section 9 (1) of the Act, which clearly governs the manner in which open access has to be governed.

6. 2nd Respondent contends that concept of recovery of additional surcharge has been envisaged under the National Tariff Policy and the National Electricity Policy as well as MERC (Distribution Open Access Regulations of 2016). In terms of sub-section 4 of Section 42 of the Act, the additional surcharge shall become applicable when the open access which was granted on the application of the distribution licensee in terms of power purchase commitments and continues to be stranded or there is an unavoidable obligation and incidence to pay fixed cost consequent to such contract.

7. They also refer to consultation paper on the issue of open access regulations issued by the Ministry of Power, Government of India in August 2017. It is contended that the State Commission has power to take a different legal interpretation in the Mid-Term Review than what it did take during Multi Year Tariff process. The issue of conclusively demonstrating stranded capacity to charge additional charge has already been decided in the MYT order and appeals arising out of the same are pending adjudication before this Tribunal. It is also contended that no stay was granted in the said appeals. According to the State Commission after examining the relevant provisions of the Electricity Act and Regulation 4.8 of the Distribution Open Access Regulations of 2016, the State Commission has opined that additional surcharge shall be applicable to captive users of group captive power plant in addition to open access consumers and this will apply with prospective effect and not retrospective. Contending that the contentions raised in the appeal are vague, baseless and unsupported which are against the regulatory framework, Respondents have sought for dismissal of the appeals.

8. Rejoinder came to be filed on behalf of the Appellants on the reply filed by the 2nd Respondent along with supporting documents. The Appellants re-iterated their contention that the impugned order is

completely illegal and unsustainable on every score as far as levy of additional surcharge on captive consumers of group captive scheme. They further contend that there has been a blatant breach of principles of natural justice inasmuch as public notice issued in Case No. 195 of 2017 did not put the Appellants to notice of the fact that the Respondents had proposed levy of additional surcharge on captive consumers in the petition filed for Mid-Term Review pending before the State Commission. Once again re-iterating their contention that levy of additional surcharge on captive consumption by captive users of a group captive scheme could not have been a subject matter in proceedings for Mid-Term Review in the facts of the present appeals and in the absence of stranded capacity, which is the basis for levy of additional surcharge, the whole process in the present situation is unsustainable. They further contend that the 2nd Respondent has admitted procuring power through short term contracts and also through exchange consistently for the last five years. Therefore, the 2nd Respondent has been procuring additional power to cater to the demands of its consumers. Hence the question of stranded capacity does not arise. When the 2nd Respondent is imposing load shedding in the State of Maharashtra, the question of stranded capacity (electricity) would not arise at all to levy additional surcharge.

9. In the alternative, without prejudice to their contentions they also contend that some of the Appellants are connected to voltage measures of 132/220 KV as is evident from open access bills of the Appellants which are annexed to the appeals. No distribution wheeling charges are billed to the appellants. In terms of Section 42(4) of the Act such additional surcharge is leviable on charges of wheeling. The proposition becomes clear if the provisions of Section 9, Section 39 and Section 42 (4) of the Act are read together. All the Appellants fall squarely within the provisions of Section 9(2) of the Act since they have right to carry electricity from the captive generating plant to the destination of their use using the transmission facilities of state transmission utility. Hence, distribution open access does not apply to the case of the Appellants. With these contentions, they have re-iterated their prayer for setting aside the impugned order.

10. These two sets of appeals are filed challenging the imposition of additional surcharge by the Respondent No.1- State Commission under Section 42 (4) of the Electricity Act, 2003 ("**the Act**"). Appeal No. 311 of 2018 is filed on behalf of JSW Steel Limited and others. Appeal No. 315 of 2018 is filed by Sai Wardha Power Generation Limited. The impugned order dated 12.09.2018 in both the matters was passed while

deciding Mid Term Review in Case No. 195 of 2017. The contention of the Appellants in both these appeals is that the imposition of liability to pay additional surcharge on Group Captive Users of Group Captive Power Plant is erroneous on the following grounds:

a) Contrary to the specific provisions of Section 42 (4) of the Electricity Act, 2003;
b) The scheme and objective of Electricity Act, 2003 to promote and provide for generation being de-licensed and captive generation being freely permitted;
c) Contrary to the detailed Tariff Order passed by the State Commission itself dated 03.11.2016 giving rationale and reason to hold that the captive users are not liable to pay additional surcharge; and
d) Implementation of the above Order dated 03.11.2016 by the Maharashtra State Electricity Distribution Company Limited (MSEDCL) during the period subsequent to 03.11.2016.

11. According to the Appellants as per their arguments, the tariff Order dated 03.11.2016 passed by the State Commission came to be implemented by Maharashtra State Electricity Distribution Company Limited (for short "**MSEDCL**"). In this tariff order, there has been no levy of additional surcharge on Group Captive Users in the State of

Maharashtra at any time till the impugned order. Section 42 (4) of the Act is the primary provision in this regard. This section refers to 'supply of electricity from a person other than the distribution licensee'. The word 'supply' defined in Section 2 (70) of the Act is in relation to sale of electricity to a licensee or consumer. Thus the essential condition being supply of electricity from a person to a consumer which is sale of electricity, is absent in the case of Group Captive Users, therefore, the imposition of additional surcharge is unjustified. The essential ingredient of supply being sale of electricity to a consumer, which require existence of two persons, one being seller and another being purchaser. But with reference to the case of captive user, the essential condition of sale of electricity by a person to a captive user will not fit in the situation, which requires seller and purchaser of electricity. Therefore, Section 42 (4) of the Act will not have any application.

12. They also explain what captive generating plant means. It is contended that since captive generating plant refers to use of electricity generated by the captive power plant for its own use, there is no sale of electricity by one person to another. Primarily, the case where a person who generates electricity for his own use in its own captive generating plant, is not attracted to Section 42 (4) of the Act. Captive generating plant as defined in Section 2 (8) of the Act read with Rule 3 of the

Electricity Rules of 2005 ("**the Rules"**) clearly indicate that this applies to Group Captive Users also which could be an association of persons or a society. Unless the essential ingredient of sale of electricity exists, it cannot be supply of electricity, therefore in order to attract a person with the levy of additional surcharge by applying the scope of Section 42 (4), there has to be sale of electricity. According to them, reading of Section 42 (4) itself clearly indicate that additional surcharge is not payable in respect of electricity generated by Captive Power Plant or a Group Captive Plant which is consumed by captive user or captive users, when all the terms and conditions pertaining to the generating plant and captive users satisfy the conditions envisaged in Section 2(8) of the Act and Rule 3 of the Rules. In this context, according to the Appellants, when own consumption or self consumption or consumption by captive user is spelled, it includes the circumstances where special purpose vehicle is established for captive generation, which is consumed by its equity share holders/members since their consumption has to be considered as captive use/own use. Therefore, there is no reference to 'supply' or 'sale of electricity' in Sub-Rule (1) of Rule 3 of the Rules is the stand of the Appellants. They further submit that the supply comes into picture only in the context of Sub Rule (2) of Rule 3 of the Rules dealing with a situation where the conditions to be satisfied for a captive generating unit do not exist.

13. According to the Appellants, Section 9 (1) of the Act refers to captive generation and sub-section (2) of Section 9 of the Act deals with conveyance of electricity by open access to the end user i.e., captive user. This provision also does not refer to supply of electricity, since the consumption of the electricity is for own use by captive consumers. The second proviso to Section 9 (1) providing for supply is in the context of non-captive users i..e, the balance of 49% of electricity if available to the captive generator which shall be sold to non-captive users. By virtue of amendment in the year 2007, second proviso to section 9 (1) was inserted only to enable the captive generator to supply balance 49% of the electricity to the consumer after the use of 51% of the electricity by captive users.

14. They further contend that this second proviso to Section 9 (1) is in line with National Electricity Policy, 2005, which provides for removing all controls over captive generators and further enable the captive generators to supply surplus power if available to licensees and other consumers. In this background, second proviso to Section 9 (1) of the Act was brought in the year 2007. This was never meant for dealing with captive/own consumption of electricity. Prior to the said amendment also, Sub-Section (2) of Section 9 provided a right to the captive consumers for conveyance of electricity through open access for

their own use. By virtue of second proviso to Sub-Section (1) of Section 9, no fresh or further right came to be provided to the captive consumers.

15. The Appellants also contend that the above contention is also consistent with the statement of objects and reasons for enactment of Electricity Act, 2003 since the main features of the Bill states that generation is being de-licensed and captive generation is being freely permitted subject to the condition that the Hydro power projects would need approval of the State Government and clearance from the Central Electricity Authority, which would go into the issues of dam safety and optimal utilisation of water resources. If the interpretation of the Commission in the impugned order is accepted, it would defeat the very objective under the scheme of the Act, is the contention of the Appellants.

16. They also contend that once the State Commission having held that additional surcharge as a levy is not applicable to captive users (statutorily), thereafter, the State Commission cannot hold by virtue of impugned order that the levy had been specifically exempted by it in the earlier order. If it were to be a levy/charge imposed by a statute, the

State Commission could not have exempted such levy or surcharge unless it was permissible under a statute. Therefore, the State Commission has misdirected itself on this issue in the impugned order. Further in the impugned order, the State Commission introduces the classification of original captive users and converted captive users (who subsequently switch over to GCPP mode). Once a generating plant is vested with the status of captive generating plant in terms of provisions of the Act and the Rules, such status cannot be taken away creating the classification as has been done in the impugned order, therefore, the Appellants contend that it is without jurisdiction. Section 9 (1) of the Act clearly indicates that notwithstanding anything contained in the Act a person may construct, maintain, operate a captive generating plant and dedicated transmission lines. First proviso refers to supply of electricity from such captive plant through the grid which shall be regulated in the same manner as a generating station of a generating company.

17. The word “open access” is not used in the first proviso to Section 9 (1) of the Act therefore it would mean that it relates to compliance of technical standards of connectivity to a grid.

18. According to the Appellants, the whole process has to be read as a scheme and in no manner it can be controlled either by Section 42 (2) or by Section 42 (4) of the Act. Appreciating the necessity of captive generating plant to have open access, Section 42 (2) of the Act provides introduction to open access in a phased manner. First proviso to the said section provides that open access shall be allowed on payment of surcharge in addition to charges for wheeling as may be determined by the State Commission. Captive generating plant needs open access to carry power to its end users/members, licensees, and consumers in general. While captive generating plants have necessarily to pay charges for wheeling and open access for carrying power to its end users, they are not required to pay cross-subsidy charges. As a distinction from this situation, when captive plant supplies its surplus capacity to a consumer, such consumer necessarily has to pay cross-subsidy charges. Fourth proviso to Section 42 (2) of the Act only clarifies that there cannot be levy of surcharge when the end user of captive generating plant carries electricity to the destination of its own use and not for supply to a general consumer.

19. They also contend that Sub-Section 4 of Section 42 is completely different and it does not even contemplate levy of any surcharge on captive users. As the language is clear and unambiguous even the

State Commission accepted this position in its earlier orders dated 03.11.2016 and 17.01.2018. The right of open access to the captive users of a captive generating plant to carry electricity to the destination of its own use is vested by virtue of Section 9(2) of the Act. This right cannot be controlled by the State Commission which under Section 42 (4) of the Act may permit a consumer or a class of consumers to receive electricity from a person other than the distribution licensee of its area of supply. The captive user cannot be put on the same pedestal as that of a general consumer or class of consumers who receive supply of electricity from a person other than the distribution licensee. Section 2 (8) of the Act read with Rules and Section 9 of the Act make it clear that captive user gets electricity from its own plant. The word “supply” has consciously not been used in the context of a transaction between captive generating plant and its users. Therefore, according to the Appellants Sub-Section (4) of Section 42 of the Act on the basis of its very text and language does not apply to captive generation and use. If cross subsidy surcharge is exempted from captive generation and use, there is no reason why legislature intended to impose additional surcharge. They also contend that Section 42 (2) of the Act deals with open access for conveyance of electricity while Section 42 (4) of the Act in contrast is differently worded and is conditional upon “supply” of electricity as defined in the Act.

20. It is also the contention of the Appellants that the levy of additional surcharge is “on charges of wheeling”, therefore in the absence of wheeling of power in the case between captive generating plant and captive user, there cannot be any levy of additional surcharge, therefore the impugned order is wrong for the said reason as well. The wheeling charges are for the use of the distribution system owned by the distribution licensee. The Appellants (captive users) are connected at 132/220 KV system owned by the state transmission utility and not the distribution system owned by Respondent No.2. For use of such transmission system, separate transmission charges are paid by the Appellants, therefore Section 42 (4) of the Act cannot be applied to the case of the Appellants.

21. Learned counsel for the Appellant in Appeal no. 311 of 2018 relies on the judgment of the Supreme Court in ***AP Gas Power Corporation Limited Vs. AP State Regulatory Commission and Ors.***[1] to contend that if the use of electricity is by the shareholder of a captive generating plant, it amounts to utilisation of the product by the manufacturer itself. Therefore, there is no sale, supply or distribution to the self so long as the power produced is utilised by those who are participating in the

[1] 2004 (10) SCC 511

activity of generating electricity. In the case of joint or collective venture for generation of electricity for their own captive consumption, obviously the self consumption of the power generated would be amongst those who are participating in the activity of generation and it cannot be confined to any one industry. Learned counsel also placed reliance on ***Tata Power Company Ltd. Vs. Reliance Energy***[2], where the word "supply" has been extensively discussed and further opined that the word "supply" contained in Section 9 of the Act refers to supply to consumers only and not to licensees. Therefore, the words "consumer" and "receive supply" used in Sub-Section (4) of Section 42 of the Act cannot be interpreted to include use of power by a captive user.

22. Learned counsel also contends that the Forum of Regulators consists of Chairperson of Central Commission and Chairpersons of the State Commissions. The report published in December 2017 refers to their meeting and view taken by them on additional surcharge wherein it was decided that additional surcharge shall not be levied in case open access is provided to a person who has established a captive generating plant for carrying of electricity to the destination of his own use. In the above situation, the impugned order is unjustified.

[2] 2009 (16) SCC 659

23. In alternative, the Appellants contend that so far as the impugned order referring to stranding of capacity is concerned, it is based purely on conjectures and surmises. Respondent No.2 licensee is still applying load shedding and also procuring round the clock power regularly through the exchange and also through the short term contracts. Therefore, the question of any stranded capacity does not arise in the present case. The mandatory pre-requisite for levy of any additional surcharge in terms of Regulations, there has to be conclusive demonstration of stranded capacity. If this is not satisfied, which is so in the present case, there cannot be levy of additional surcharge.

24. Learned counsel appearing for the Appellant in Appeal No. 315 of 2018 relied on the judgment dated 22.09.2009 of this Tribunal in Appeal No. 171 of 2008 in ***Kadodara Power Pvt. Ltd. Vs. Gujarat Electricity Regulatory Commission*** with reference to special purpose vehicle to contend that the deeming provisions in the Act and the Rules clearly indicate that shareholders having 26% of equity holding would be deemed as owners for the purposes of generation and captive consumption of electricity, namely, for own use. The deeming provision is for own use and not for supply of electricity. This deeming provision, being a legal fiction, according to the learned counsel, has to be carried

to its logical end with all consequences and incidents. For the proposition that full effect to the legal fiction is to be given, he placed reliance on the Judgments of the Supreme Court in ***State of A.P. Vs. Vallabhapuram Ravi[3] and American Home Products Corporation Vs. Mac Laboratories (P) Ltd.[4].***

25. Pertaining to the arguments of cross-subsidy surcharge and additional surcharge, its rationale, he places reliance on the Judgment of the Supreme Court in ***Sesa Sterlite Limited Vs. Orissa Electricity Regulatory Commission[5]*** at paragraphs 27 to 33. Without prejudice to the above submissions, the Appellant's counsel also point out that Sections 38, 39 and 40 of the Act speak about the open access in the context of Section 42 (2) of the Act but the surcharge and cross subsidy generally and not restricted to Section 42 (2) of the Act. The surcharge, therefore, would include additional surcharge under Section 42 (4) of the Act besides cross-subsidy surcharge in terms of Section 42 (2) of the Act. The additional surcharge is also in the context of reducing the power purchase cost (fixed cost) which exists in the tariff chargeable to the consumers on the supply of electricity by the distribution licensee.

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[3] 1984(4) SCC 410
[4] 1986 (1) SCC 465
[5] 2014 (8) SCC 444

26. As alternative submissions learned counsel also contend that the State Commission ought not to have determined additional surcharge in the impugned order since there was no stranded capacity being established warranting determination of additional surcharge, since Section 42 (4) of the Act is only for the purpose of meeting the fixed cost of the distribution licensee on account of its obligation to supply, in terms of Section 43 of the Act. The distribution licensee has the obligation to pay fixed cost to supply and this liability under the Power Purchase Agreement becomes burden to the distribution licensee when the power is not being purchased on account of open access consumers taking power from third parties. This pre-supposes availability of excess/surplus capacity in Power Purchase Agreements, which get stranded due to non-purchase. Unless the distribution licensee 'conclusively demonstrate' that the obligation in terms of 'existing power purchase commitments' 'has been' and 'continues to be stranded', which results in bearing unavoidable obligation of paying fixed cost, the State Commission cannot proceed to impose additional surcharge is the contention. With these submissions, they sought for allowing the appeals setting aside the impugned order.

27. Per contra, the stand of the 1st Respondent in the reply argument is as under:

The scope of MTR proceedings was to carry out performance review for first two years and revise the forecast for ARR and Tariff for next two years of the control period. Therefore the stand of the Appellants that levy of additional surcharge cannot be subject matter of MTR proceedings is incorrect. On the other hand, the Appellants are wrongly equating the true up proceeding with the MTR proceeding and the impugned order is in fact against the MYT order dated 03.11.2016 wherein the State Commission had held that levy of additional surcharge on captive consumers is against the provisions of the Act. As a matter of fact, in the impugned order, the Commission has re-produced its dispensation in MYT order and gave reasons justifying the modification for dispensation through MTR order. According to the Commission frequent change of captive users under the Group Captive Power Plants (CGPP) is creating difficulties in power planning of distribution licensees since they are unable to estimate the demand of such consumers who would shift from licensee to CGPP. Therefore, the Commission has to give different treatment to the captive consumers and group captive consumers. Since the group captive consumers are causing non-utilisation of power contracted by distribution licensee resulting in creating of stranded assets, such cost of stranded asset has to be recovered from those consumers who are responsible for it, otherwise it will be passed on to other consumers. If additional surcharge is not

recovered from such consumers, as stated above, it would result in contravention of provisions of sub-section (4) of section 42 of the Act.

28. They also contend that since the levy of additional surcharge on captive consumers is permitted, the mere fact that for certain period they were exempted from paying such additional surcharge by virtue of the order of the Commission, it cannot act as estoppel against the Commission introducing such levy of additional surcharge. Therefore, the controversial issue which has to be decided is whether charging additional surcharge is valid in law or not?

29. In the impugned order after analysing the interplay of Sections 9 and 42 of the Act, the Commission has concluded that additional surcharge is leviable on group captive consumers.

30. The contention of the Commission is that in the impugned order based on the data available for the year 2017-18, the Commission was convinced that it was a case of stranded capacity on account of open access and hence levy of additional surcharge was established. Based on the approved power purchase projections and projection of available generation capacity as outlined under Chapter – 6, it was expected to

continue the same figures for FY 2018-19 and FY 2019-20. Therefore, for the future two years of control period, the Commission worked out the rate to be charged as additional surcharge from FY 2018-19 and FY 2019-20. Thus, the Appellants are wrong in stating that the Commission has not followed the provisions of Tariff Policy relating to conclusive demonstration of stranded capacity before allowing additional surcharge. So far as the contention raised by the Appellants that the MSEDCL is resorting to short term power procurement and hence there is no stranded capacity, it is clear from the records that such short term procurement is on account of coal shortage and not on account of MSEDCL's failure to tie up with sufficient power capacity. Through additional surcharge, only fixed cost of stranded generating capacity attributable to open access consumers is being recovered, so that it should not get loaded on the other consumers. With these submissions, learned counsel for the 1st Respondent has sought for dismissal of the appeals.

31. Learned counsel for 2nd Respondent – MSEDCL in reply arguments apart from taking us through various definitions, which are relevant and the purpose of various provisions of Electricity Act relevant for this appeal contends that the privileges and immunities granted to captive plant and the captive users under the Act do not extend to the

payment of additional surcharge to the distribution licensees. The proposition made by learned counsel for the Appellant in the appeal filed on behalf of Sai Wardha with regard to the theory of “legal fiction” provided in the Rules is totally unjustifiable and completely misplaced. 26% of ownership, referred to in the Rules, is of equity shares and not of the company, therefore neither Section 2(8) nor Rule 3 of the Rules create any such fiction. The ambiguity if at all exists, it is in the explanation to the rules wherein 26% of equity shares were meant to include voting rights and not mere ownership of shares. If the captive users meet the following three criteria in any financial year, only then such plant qualifies to be referred to as a captive generation plant and further would be entitled to the privileges and immunities granted to such entities under the Act. First part of Section 9 specifies that supply of electricity from a captive generation plant through the grid shall be regulated in the same manner as a generating station of generating company irrespective of whether the generating plant is captive or not, that is to say, such plant shall be regulated in the same manner for supply through the grid. The aforesaid three criteria are:

i. “not less than twenty six percent (26%) of the equity shares should be owned by the Captive User(s) and
ii. not less than fifty one percent (51%)of the aggregate electricity generated as determined on an annual basis is consumed for

captive use in proportion to their shares in ownership of a power plant within a variation not exceeding ten percent (10%), and

iii. the Special Purpose Vehicle can not be engaged in any other business or activity."

32. They further contend that having regard to the definition of "supply" in relation to electricity under Section 2 (70) of the Act as sale of electricity to a licensee or consumer, the "consumer" includes a "captive user" in terms of definition in Section 2 (15) of the Act as its premises is connected with the works of a licensee for receiving electricity. The open access consumer is either connected to distribution licensee or transmission licensee depending upon the voltage required in terms of open access regulations.

33. It is further contended that the transactions between the captive generation plant and its captive users are concerned, they are regulated in terms of Power Purchase Agreement entered into between the special purpose vehicle and its shareholders, who are also separate legal entities incorporated under the relevant statutes i.e., Companies Act, Societies Registration Act etc., Since such transaction under the Power Purchase Agreement is a sale and purchase of electricity for consideration, it squarely falls under the definition of supply of electricity through the grid. The last proviso of Section 9(1) of the Act gives

immunity to the captive generation plant to supply electricity to any consumer without a licence as long as the provisions of sub-section (2) of Section 42 of the Act are met, which requires cross subsidy surcharge to be paid to the distribution licensee for taking open access for wheeling electricity through the distribution network after the said open access is allowed by the State Commission. The second part of section 9(2) of the Act pertains to the privileges of right to open access provided to a captive generation plant to evacuate power though transmission system of a transmission licensee as long as it is for his use and not for sale to a third party. The proviso places a reasonable restriction in as much as the said "right to open access" is subject to availability of adequate transmission facility as determined by Central Transmission Utility or State Transmission Utility.

34. By referring to sections 2(47), 2(19), 2(76), 62, 62(1)(c), 62(4) of the Act, learned counsel for the 2nd Respondent contends that wheeling is for both transmission as well as distribution of electricity i.e., open access is meant for both transmission as well as distribution. Section 38 of the Act is relied upon to submit that how transmission is dealt with in relation to open access. Under Section 42 of the Act open access of the distribution system of distribution licensee is permitted. A privilege has been granted to a captive generation plant that cross subsidy surcharge

is not leviable on transmission/open access for carrying electricity to destination of his use i.e., last proviso to Section 38(2)(d) of the Act. Similar provision has been inserted in respect of State Transmission Utility and its functions under Section 39 of the Act. Section 40 of the Act deals with the duties of transmission licensee. Therefore according to Respondent No.2 Transmission/Open Access is to be considered only after open access is provided under Section 42 (2) of the Act and therefore the right to open access under Section 9 (2) of the Act for carrying electricity from captive generation plant to destination of his use is in respect of the use of transmission facility as provided under Section 38, 39 and 40 of the Act.

35. Then coming to additional surcharge, this is covered under Section 42(4), which is in part VI of the Act. For meeting current level of cross subsidy, cross subsidy surcharge is levied while permitting open access in terms of the first proviso to Section 42 (2) of the Act, and in terms of fourth proviso to Section 42 (2) of the Act privileges are granted to the captive generation plant inasmuch as there is no levy of cross subsidy surcharge for carrying portion of electricity to destination of his own use. In respect of a person whose premises is situated within the area of supply of a distribution licensee and the person wishes to take supply from an entity other than the distribution licensee as in the case of

instant appeal, according to the 2nd Respondent such persons may by notice require the distribution licensee to provide wheeling in accordance with the regulations made by the State Commission in terms of Section 42 (3) of the Act.

36. According to the 2nd Respondent when the State Commission permits a consumer or class of consumers (including captive consumers) to take electricity from third parties such consumers are liable to pay additional surcharge on charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee arising out of obligations to supply. In terms of Section 43 of the Act for the purpose of "duty to supply on request", according to the 2nd Respondent, the distribution licensee enters into a long-term PPA with different generating companies as approved by the State Commission. The said cost of power procurement from these generating companies include fixed as well as variable cost. Even when distribution licensee has to stop procurement of power temporarily due to surplus power, the distribution licensee has obligation to pay fixed cost to the generation company. This fixed cost due to stranded power backed down by the distribution licensee is determined in terms of per unit cost, which is known as additional surcharge. According to the 2nd Respondent the similarity between cross subsidy surcharge and

additional surcharge is only the nomenclature as “surcharge” and both are compensatory in nature. Cross subsidy surcharge is decrease in cross subsidy amount and the additional surcharge is towards compensation for the loss due to payment of fixed cost to the generation company due to stranding down of power. Thus the two, according to the respondents are totally different in terms of their character as well as determination. Therefore, the exemption insofar as payment of cross-subsidy surcharge given to a captive generation plant in terms of proviso to Section 42 (2) of the Act cannot and should not be read into section 42(4) of the Act.

37. The additional surcharge is payable by any consumer, be it captive or otherwise, in terms of the provisions of the Electricity Act read with Electricity Rules. So far as the argument of the Appellant that there was no certainty with regard to stranded capacity, the reason for such short term procurement was due to multiplicity of factors ranging from shortage of coal to increase or sudden spurt in demand by any consumer. The distribution licensee is bound to supply power in terms of its universal supply obligation and therefore has to resort to such procurement only on day ahead basis or short term basis. Explaining how and why that purchase of power from traders and exchanges through 2017 to 2018 happened, the 2nd respondent has sought for

dismissal of the appeal contending that the immunity given to captive generation plant and captive generation users so far as cross subsidy surcharge cannot be extended to additional surcharge.

38. Based on the above submissions of the parties, the point that would arise for our consideration is:

> *"Whether the impugned order is sustainable and whether the Appellants are liable to pay additional surcharge as held by Respondent Commission?"*

39. We have heard the arguments of learned counsel for the parties at length. We have also gone through the written submissions submitted by them. The relevant definitions of Electricity Act 2003, to be considered for the purpose of these Appeals, are as under:

Section 2 (8)

> *" "**Captive generating plant**" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such cooperative society or association;"*

Section 2 (15)

*“ "**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;”*

Section 2 (17)

*“ "**distribution licensee**" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;*

Section 2 (19)

*“ "**distribution system**" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers;”*

Section 2 (28)

*“ "**generating company**" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station;”*

Section 2 (33)

*“ "**Grid Code**" means the Grid Code specified by the Central Commission under clause (h) of sub-station (1) of section 79;”*

Section 2 (47)

*“ “**open access**” means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;”*

Section 2 (49)

*“ "**person**" shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person;”*

Section 2 (70)

*“ "**supply**", in relation to electricity, means the sale of electricity to a licensee or consumer;”*

Section 2 (72)

*“ “ **transmission lines**" means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switchgear and other works;”*

Section 2 (74)

> " *"**transmit**" means conveyance of electricity by means of transmission lines and the expression "transmission" shall be construed accordingly;"*

Section 2 (76)

> *" "**wheeling**" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;"*

40. The relevant provisions of the Act pertaining to the present Appeal are as under:

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."

Section 38:

"Central Transmission Utility and functions - *(1) The Central Government may notify any Government company as the Central Transmission Utility:*

Provided that the Central Transmission Utility shall not engage in the business of generation of electricity or trading in electricity:

Provided further that, the Central Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in

transmission of electricity of such Central Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 to function as a transmission licensee, through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

(2) The functions of the Central Transmission Utility shall be –

(a) to undertake transmission of electricity through inter-State transmission system;

(b) to discharge all functions of planning and co-ordination relating to inter-state transmission system with –

(i) State Transmission Utilities;

(ii) Central Government;

(iii) State Governments;

(iv) generating companies;

(v) Regional Power Committees;

(vi) Authority;

(vii) licensees;

(viii) any other person notified by the Central Government in this behalf;

(c) to ensure development of an efficient, co-ordinated and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centres;

(d) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the Central Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced 1[***] in the manner as may be specified by the Central Commission:

2[***]

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Central 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"

Section 39:

*"**State Transmission Utility and functions -** (1) The State Government may notify the Board or a Government company as the State Transmission Utility:*

Provided that the State Transmission Utility shall not engage in the business of trading in electricity:

Provided further that the State Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 (1 of 1956) to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

(2) The functions of the State Transmission Utility shall be –

(a) to undertake transmission of electricity through intra-State transmission system;

(b) to discharge all functions of planning and co-ordination relating to intra-state transmission system with –

(i) Central Transmission Utility;

(ii) State Government;

(iii) generating companies;

(iv) Regional Power Committees;

(v) Authority;

(vi) licensees;

(vii) any other person notified by the State Government in this behalf;

(c) to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres;

(d) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges ; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced 1[***] in the manner as may be specified by the State Commission:

2[***]

Provided also that the manner of payment and utilisation of the surcharge shall 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."

Section 40:

*"**Duties of Transmission licensees** - It shall be the duty of a transmission licensee –*

(a) to build, maintain and operate an efficient, co-ordinated and economical inter-State transmission system or intra-State transmission system, as the case may be;

(b) to comply with the directions of the Regional Load Despatch Centre and the State Load Despatch Centre as the may be;

(c) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge

thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced 1[***] in the manner as may be specified by the Appropriate Commission:

2[***]

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Appropriate 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."

Section 42:

*"**Duties of distribution Licensee 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 may 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 1[***] 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.

2[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) .....

(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.

.....

.....”

Section 43:

“Duty to supply on request - *(1) 3[Save as otherwise provided in this Act, every distribution] licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply :*

Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission.

Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

1[Explanation - For the purposes of this sub-section, “application” means the application complete in all respects in the appropriate form, as required by the distribution

licensee, along with documents showing payment of necessary charges and other compliances.]

(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1) :

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission .

(3) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default."

Rule 3 of the Electricity Rules 2005:

*"**3. Requirements of Captive Generating Plant**.— (1) No power plant shall qualify as a 'Captive Generating Plant' under section 9 read with clause (8) of section 2 of the Act unless—*

(a) in case of a power plant—

(i) not less than twenty six per cent of the ownership is held by the captive user(s), and

(ii) not less than fifty one per cent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered co-operative society, the

conditions mentioned under paragraphs (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one per cent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten per cent;

(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including—

Explanation.—(1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and

(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustration

In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen per cent of the equity shares in the company (being the twenty six per cent proportionate to Unit A of 50 MW) and not less than fifty one per cent of the electricity generated in Unit A

determined on an annual basis is to be consumed by the captive users.

(2) It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

Explanation.—(1) For the purpose of this rule,—

(a) "annual basis" shall be determined based on a financial year;

(b) "captive user" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "captive use" shall be construed accordingly;

(c) "ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;

(d) "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity."

41. The 'Captive Generating Plant' is defined under Section 2(8) of the Act, as stated above. This Section has to be read with Rule 3 of the Electricity Rules of 2005. The Commission has created a classification of captive users, i.e. original captive users versus converted captive users. One has to see whether the Statute or Regulations or Rules made thereunder have envisaged such distinction between original captive users and converted captive users.

42. Section 2(28) of the Act refers to ‘generating company’ which means any company or body corporate or association or body of individuals, irrespective of whether it is incorporated one or artificial juridical person, which owns, operates or maintains a generating station. Section 9(1) refers to complete scheme in relation to rights and obligations of captive generating plant. If one person generates electricity and consumes the same, the additional surcharge is not payable according to the Commission. But, if a group of persons join together and organize captive generation and self-consumption in terms of Section 2(8) and Rule 3, according to the Commission, additional surcharge becomes payable especially by converted captive consumes. Is there such distinction in terms of statute, regulations, rules etc.? Once a generating plant is vested with the status of a captive generating plant in terms of provisions of the Act and the Rules, can such status be taken away by creating a classification as is done in the impugned order? Therefore, the Appellants contend that the impugned order to that extent is against law and without jurisdiction.

43. It is relevant to refer to the Statement of Objects and Reasons for the enactment of Electricity Act of 2003, i.e. Para 4, which reads as under:

> *4. The main features of the Bill are as follows:*
>
> *(i) Generation is being delicensed and captive generation is being freely permitted. Hydro projects would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilisation of water resources."*

44. Section 9 of the Act starts with a non-obstante clause, as indicated above. Reading of Section 42 in its entirety and in particular Section 42(2), 42(4) and Section 9 of the Act, it is crystal clear that sub-section (4) of Section 42 does not override or control the applicability of Section 9, except to the extent provided under Section 9 itself. Section 9 is in two paras – 9(1) and 9(2). There are provisos to Section 9(1). Apparently, in terms of Section 9(1), a person which includes an association of persons or cooperative society may construct, maintain or operate a captive generating plant and have dedicated transmission line. The first proviso to Section 9(1) says, the supply of electricity from such captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

45. Section 9(2) of the Act creates or vests a positive right to a person who has constructed a captive generating plant to have the right to open access for the purpose of carrying electricity from his generating plant to the destination of his use. The first proviso to Section 9(2) refers to availability of adequate transmission facilities. It would mean that the right to have open access for the purpose of carrying electricity is subject to availability of adequate transmission facilities. Except this condition of availability of transmission facilities, we do not find any other condition which is imposed in terms Section 9(2) of the Act.

46. The first proviso to Section 9(1) of the Act deals with supply of Electricity from captive generating plant through the grid, which has to be regulated in the same manner as a generating station of a generating company. We do not find the words 'open access' in the first proviso to Section 9(1). In other words, it would mean that the proviso refers to compliance of technical standards of connectivity to the grid and nothing beyond that.

47. Second proviso to Section 9(1) of the Act was inserted by virtue of amendment in 2007 with effect from 15.6.2007. In effect, this amendment provides supply of electricity to the non-captive consumers

to the extent which can be supplied i.e., 49% after self-consumption of 51% of electricity by captive users or group captive users, i.e. 51% of electricity from the captive generating plant. Therefore, balance of 49% of electricity available to the captive generator could be sold to non-captive users including distribution licensee. Sub-Section (2) of Section 9 deals with conveyance of electricity by open access to the destination of use. It does not refer to supply of electricity at all since the consumption is for own use by captive consumers. The second proviso to Section 9(1) by way of amendment in the year 2007 came to be inserted to enable the captive generator not to waste the surplus power/electricity but to sell the same to others. This was in line with the National Electricity Policy of 2005 which intended to remove all controls over captive generators as well as to enable the captive generators to supply available surplus capacity to licensees and consumers (non-captive users).

48. Clauses 5.2.24, 5.2.25, 5.2.26, 5.7, 5.7.1 of National Electricity Policy 2005 are relevant which read as under:

> ***"Captive Generation***
>
> *5.2.24 The liberal provision in the Electricity Act, 2003 with respect to setting up of captive power plant has been made with a view to not only securing reliable, quality and cost*

effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry.

5.2.25 The provision relating to captive power plants to be set up by group of consumers is primarily aimed at enabling small and medium industries or other consumers that may not individually be in a position to set up plant of optimal size in a cost effective manner. It needs to be noted that efficient expansion of small and medium industries across the country would lead to creation of enormous employment opportunities.

5.2.26 A large number of captive and standby generating stations in India have surplus capacity that could be supplied to the grid continuously or during certain time periods. These plants offer a sizeable and potentially competitive capacity that could be harnessed for meeting demand for power. Under the Act, captive generators have access to licensees and would get access to consumers who are allowed open access. Grid inter-connections for captive generators shall be facilitated as per section 30 of the Act. This should be done on priority basis to enable captive generation to become available as distributed generation along the grid. Towards this end, non-conventional energy sources including co-generation could also play a role. Appropriate commercial arrangements would need to be instituted between licensees and the captive generators for harnessing of spare capacity energy from captive power plants. The appropriate Regulatory Commission shall exercise regulatory oversight on such commercial arrangements between captive generators and licensees and determine tariffs when a licensee is the off-taker of power from captive plant.

……..

5.7 COMPETITION AIMED AT CONSUMER BENEFITS

5.7.1 To promote market development, a part of new generating capacities, say 15% may be sold outside long-term PPAs. As the power markets develop, it would be feasible to finance projects with competitive generation costs outside the long-term power purchase agreement framework. In the coming years, a significant portion of the installed capacity of new generating stations could participate in competitive power markets. This will increase the depth of the power markets and

provide alternatives for both generators and licensees/consumers and in long run would lead to reduction in tariff. For achieving this, the policy underscores the following:-

……

c. Captive generating plants should be permitted to sell electricity to licensees and consumers when they are allowed open access by SERCs under section 42 of the Act."

49. From the above Policy, it is clear that National Electricity Policy 2005 and the Tariff Policy of 2016 were directed to encourage captive generators, i.e. after meeting self-consumption (own use), surplus power available with captive generator could be sold. Therefore, we can safely opine that Electricity Rules 2005 which came into force much prior to the amendment of 2007 inserting second proviso to Section 9(1) intended liberal interpretation of right of captive generators / captive generating plant.

50. In order to acquire or assume status of captive generating plant in terms of the Statute and the provisions, not less than 26% of the equity shares of the generating plant has to be held by the captive users in the captive generating plant. This is one of the two conditions. Another one is 51% of the aggregate electricity generated in such plant, on annual basis, has to be consumed by captive users. This is clear from Rule 3.

51. Rule 3 of 2005 Rules provides different kinds of captive establishments, i.e. cooperative society, association of persons and a special purpose vehicle. By virtue of second proviso to Section 9 brought by amendment of 2007, it only clarifies that there is no impediment for captive generating plant to sell surplus power. It is done without any condition. After consumption of 51% of the aggregate generation which has to be calculated on annual basis, surplus power is available for supply to licensees or consumers which is distinct from end user of a captive generating plant. For this purpose, there is no requirement of license by the generating plant to sell surplus power after meeting the need of 51% of the captive users.

52. Then coming to the issue of cross subsidy surcharge and additional surcharge in terms of Section 42(2) and Section 42(4), reading of these Sections clearly indicates that open access has to be introduced in a phased manner in terms of first proviso to Section 42(2) which states that open access shall be allowed on payment of surcharge in addition to charges for wheeling as may be determined by the State Commission. Apparently, captive generating plant needs a mechanism to carry power from generating plant to its users which includes captive users, members as well as to supply power to licensees and also

consumers in general. This mechanism is nothing but open access. Open access connotes freedom to procure power from any source. When we refer to transmission vis-a-vis open access it implies freedom of licensee to procure power from any source of his choice. Same open access in distribution means option to the consumer to get supply of power from any source of his choice. Open access connotes even the private players are entitled to use distribution lines or transmission lines in a non-discriminatory manner.

53. For the purpose of carrying power to its own users / members and also to consumers and licensees, the captive generating plant has to pay charges of wheeling and open access charges. However, in terms of proviso 4 to Section 42(2), there is an exemption to pay cross subsidy charges if the open access is used for carrying electricity by captive generating plant to the destination of its own use. However, this does not apply in case of supply of electricity to a consumer in general. Though open access charges and wheeling charges are to be paid, there is no requirement to pay cross subsidy charge when the supply is meant for its own use. This is clear from Section 42(2) and its provisos.

54. Then coming to sub-section (4) of Section 42, one has to see whether levy of any charge is both on captive users as well as on general consumers. In terms of Section 9(2), the right to open access to the captive user of a captive generating plant for carrying electricity to the destination of its own use is provided. We have to see whether the State Commission can control this right to open access, since Section 42(4) says that State Commission may permit a consumer or a class of consumers to receive electricity from a person other than the distribution licensees of its area. This is quite contrast to the right of the captive generating plant to carry electricity from captive generating plant to the destination of its own use in terms of Section 9(2). There is no such permission required by the State Commission, though such permission is required under Section 42(4) when a consumer or class of consumers want to receive electricity from a person other than the distribution licensee of its area of supply. In this context, i.e. Section 42 (4), one has to see whether the captive user can be equated with a normal consumer as referred in Section 42(4). A captive user gets electricity from its own plant in terms of Section 2 (8) read with Section 3 of Electricity Rules of 2005 and also in terms of scheme envisaged under Section 9 of the Electricity Act 2003. Could we equate words 'receive supply of electricity' with the words 'carrying the electricity to the destination of its own use'? One has to understand the word 'supply' being used under

various provisions, referred to above. Section 9(2) and fourth proviso to Section 42(2) refer to transaction of a captive generating plant and its users. The word ‘supply’ has not been consciously used in the context of a transaction between a captive generating plant and its users. Therefore, one has to understand Section 42(4) with reference to context and language in the context of captive generating plant and the end user being its own members.

55. From reading of sub-section (2) of Section 42 which refers to open access for conveyance of electricity, whereas in Section 42(4), the words are chosen cautiously and carefully which refers to a condition. In other words, Section 42(4) is conditional upon supply of electricity as defined in the Act. In the case of captive generating plant, it is possible to have captive consumers in terms of Rule 3 of 2005 Rules read with Section 9 of the Act.

56. So far as captive generating plant (including Group Captive Generating Plant), there could be two types of consumers; one is captive consumers who carry electricity to destination of their own use and others are consumers and licensees who get supply of electricity. Fourth proviso to Section 42(2) exempts captive consumers from paying

cross subsidy surcharge while Section 42(4) itself is conditional upon supply. There is no question of supply in case of captive consumption as contrast to the word 'supply' used in Section 42(4). This again has to be seen with reference to what amounts to supply.

57. We opine that there is no question of 'supply' in case of captive user so far as Section 42(4) of the Act is concerned for the following reasons:

Apparently, these two Appellants seem to be special purpose vehicle, which is clearly defined under Explanation (d) to sub-rule (2) of Rule 3 of 2005 Rules. It is an entity which owns, operates and maintains a generating station. Its business is to run the generation station and it cannot have any other business or activity. In other words, if such special purpose vehicle does any other activity other than generating process, it cannot be a special purpose vehicle as defined under Rule 3. A captive generating plant could be owned by a company, which can be termed as special purpose vehicle. Sub-Rule (1) to Rule 3 of 2005 Rules refer to different facets of "self/own consumption". It also refers to circumstances where a special purpose vehicle is formed for the purpose of captive generation wherein the power generated by special

purpose vehicle is consumed by its equity shareholders/members. They certainly fall within the ambit of captive user i.e., own use. Absolutely there is no reference to the word 'supply' or 'sale' of power in sub-rule (1) of Rule 3. Consciously it uses the word 'own use' and not 'supply' of electricity. But whereas sub-rule (2) deals with a situation when captive generating unit losses the status of captive nature. Sub-Rule (2) of Rule 3 reads as under:

> *"It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company."*

58. From a reading of the above sub-rule (2) of Rule (3), it is clear that if captive generating unit goes out of the definition of captive generating plant, then the entire electricity from the generating plant has to be treated as if it is supply of electricity by a generating company as envisaged in sub-section (2) of Section 10 of the Act. This sub-rule (2) hints at the controversy in issue before us in a subtle manner. The converse of the above rule would mean as long as the consumption by captive users at the percentage mentioned in sub clauses (a) and (b) of sub-rule (1) of Rule 3 is maintained, it would not amount to supply of

electricity in the normal parlance. Therefore, there is force in the argument of the Appellants that the word ‘supply’ has to be understood with reference to the context and the language in which such word is used.

59. It is also not in dispute that a unit or units of such generating station could be identified for captive plant and there is no need that the entire generating station should be recognised or notified as captive generating plant. The illustration to Rule 3(1)(b) clearly indicates this position since it says it’s an individual or a company formed as special purpose vehicle as long as the generating plants complies with two conditions of Rule 3(a)(I&II), otherwise it does not fall within the definition of captive generating plant. Therefore, the owners of generating plant, who invest in the setting up of captive generating plant by way of equity, can consume electricity for their own use. Therefore, in terms of Section 2(8), read with Section 9 and Rule 3, it would mean the consumption of electricity not by a single person rather it would mean that consumption by an association of persons generating electricity primarily for the benefit of members of the association. Definitely there is rationale behind this i.e., the owners of the generating plant who part with their money by investment in the plant in the form of equity shares have to primarily use the electricity for their own use i.e.,

51% of the aggregate electricity generated in the plant. As already stated, the surplus power can be sold to a licensee or consumer without having a license, and in that situation, such licensee or consumer would be liable to pay additional surcharge. In this context, one has to understand the scope of special purpose vehicle and consumption of electricity as conditioned in Rule 3 of the Rules of 2005.

60. In the case of **Kadodara Power Private Limited** this Tribunal had an occasion to deal with a company formed as special purpose vehicle and whether it would also be an association of persons. Section 2(8) of the Act refers to an association of persons for generating electricity primarily for the use of members of association. The question that arose was whether a company formed as special purpose vehicle can be equated with an association of persons. In that context, paragraph 15 thereof is relevant, which reads as under:

> *"15) The question has arisen because the word 'association of persons' is not defined anywhere in the Act or in the Rules. The proviso to Rule 3 (1)(a)(ii) makes two special conditions for cooperative societies and association of persons. If the CGP is held by a person it is sufficient that the person consumes not less than 51% of the aggregate electricity generated in such plant. In case the plant is owned by a registered cooperative society then all the members together have to collectively consume 51% of the aggregate electricity generated. In case the CGP is owned by an association of*

persons the captive users together shall hold not less than 26% of the ownership of the plant in aggregate and shall consume not less than 51% of the electricity generated in proportion to their shares of the ownership of the plant within a variation not exceeding + 10%. A special purpose vehicle is a legal entity owning, operating and maintaining a generating station with no other business or activity to be engaged in by the legal entity. Now if three companies need to set up the power plant primarily for their own use they can come together and form another legal entity which may itself be a company registered under the Companies Act. This company may set up a power plant. In that case the company formed by three different companies would become a special purpose vehicle. If a company which is a special purpose vehicle is one person then all that is necessary is that this company should consume 51% of the generation. However, if it is treated as association of persons apart from a condition of consuming minimum 51% of its generation the three share holders will also have to consume 51% of the generation in proportion to their ownership in the power plant. It is contended on behalf of some of the appellants before us who are special purpose vehicles that they are not an association of persons and accordingly it is only necessary for them to consume 51% of their generation collectively without adhering to the Rule of proportionality of consumption to their share. This does not appear to us to be the correct view. Section 2(8) of the Act, as extracted above, says that a captive generating plant may be set up by any person and includes the power plant set up by any cooperative society or association of persons. Mr. M. G. Ramachandran contends that going by this definition if the special purpose vehicle is not an association of persons it cannot set up a captive generating plant because the definition does not mention any person other than a cooperative society and association of person. There is small flaw in the argument of Mr. M. G. Ramachandran in as much as the definition of captive generating plant is inclusive. In other words, the captive

generating plant may be set up by any person including a cooperative society or association of persons. In other words, the person to set up a generating plant may be somebody who does not fulfil the description of either a cooperative society or association of persons. Nonetheless, reading the entire Rule 3 as a whole it does appear to us that a CGP owned by a special purpose vehicle has to be treated as an association of person and liable to consume 51% of his generation in proportion to the ownership of the plant. Every legal entity is the person. Therefore, the special purpose vehicle which has to be a legal entity shall be a person in itself. Any generating company or a captive generating company is also a person. The Rules specially deals with cooperative society. In an association of persons it has to be a 'person' because without being a person it cannot set up a captive generating plant. Therefore it will be wrong to say that since the special purpose vehicle is a 'person' in itself it cannot be covered by a definition of 'association of persons' and has to be covered by the main provision which requires the owner to consume 51% or more of the generation of the plant. In our view the definition is somewhat strange in as much as the term 'person' is said to include an 'association of persons'. One therefore cannot say that a CGP owner can be either a 'person' or an 'association of persons' a special purpose vehicle thus can be a 'person' as well as an 'association of persons'. A cooperative society is an 'association of persons' in the sense that some persons come together to form a cooperative society. However, the moment an association or society is formed according to the legal provisions it becomes a person in itself. A special provision has been made permitting a cooperative society from consuming 51% collectively. The first proviso 3 (1)(a)(ii) itself suggests that a special privilege has been conferred on a cooperative society. Other persons who are also legal entities formed by several persons coming together have not been given such special privilege. Who can such association of persons be? Of the various legal entities comprehended as

persons owning a CGP the special purpose vehicle does seem to fit the description of 'association of persons'. We fail to comprehend who other than a special purpose vehicle can be an 'association of persons'. None of the lawyers arguing before us gave example of 'association of persons' other than a special purpose vehicle. Therefore, we have no hesitation to hold that special purpose vehicle is an association of persons."

61. This judgment of the Tribunal is under challenge before the Hon'ble Supreme Court, however, there is no stay of the judgment. Therefore, the law laid down by the Tribunal in the above judgment holds good as on today.

62. Reading of the above judgment makes it clear that the shareholders having 26% equity holding would be considered as owners for the purpose of captive generation as well as captive consumption of electricity i.e., primarily for their own use. This is by way of deeming provision. This does not refer to supply of electricity. The deeming provision refers to own use. As rightly pointed out by learned counsel for the Appellants it is well settled that where a deeming provision or legal fiction is provided, the same has to be taken to its logical end, which means all its consequences and incidents would automatically follow.

63. The relevant paragraphs of relevant authorities with regard to legal fiction as relied upon by the Appellants are as under:

(i) ***State of A.P. v Vallabhapuram Ravi (1984) 4 SCC 410.***

"8……The second reason is that the words 'as if' appearing in the second sentence in section 10-A make it a deeming provision and such deeming provision should in law be carried to its logical end. This Court while construing such deeming provision has adopted and applied in a number of cases the rule of construction expounded by Lord Asquith in East End Dwellings Co. Ltd. v. Finsbury Borough Council in the following words:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which if the putative state of affairs had in fact existed must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

(ii) ***American Home Products Corporation v Mac Laboratories(P) Ltd (1986) 1 SCC 465.***

"56. In celebrated passage Lord Asquith of Bishopstone in East End Dwellings Co. Ld. v. Finsbury Borough Council (1952) A.C. 109, said (at page 132) :

" If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from, doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must invitably have flowed from or accompanied it.

57. In the State of Bombay v. PandurangVinayakChaphalkar and Others [1953] S.C.R.773, this Court held (at page 132) while approving the above passage of Lord-Asquith

> *"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logic conclusion."*

64. Therefore, reading of Section 2(8) read with Rule 3, the deeming provision leads to a legal fiction that electricity consumed by the members of the association or equity shareholders of the special purpose vehicle has to be construed as own consumption and not as sale or supply of electricity.

65. It is clear that only if the two conditions envisaged under Rule 3 of Rules 2005 are fulfilled by captive users i.e., minimum of 26% shareholding and consume 51% of aggregate electricity on annual basis generated in the captive plant, the association of persons or members of special purpose vehicle can be treated as members of captive generating plant. Whether this consumption of required (minimum percentage) can be equated with the 'supply' of power by a generating company in terms of Section 2 (70)? **A.P. Gas Power Corporation Limited,** which is a case much prior to the enactment of the Electricity Act 2003 is relevant since the opinion expressed by the Hon'ble

Supreme Court therein would throw light on the controversy in issue. The relevant paragraphs are as under:

> *"45. We have, however, already discussed about the participating industries that consumption of electricity by them in their units to the extent of their shareholding amounts to captive consumption for which no licence would be required as it would neither be a supply nor distribution of the electricity produced. It is utilisation of the product by the manufacturer itself. There would be no sale, supply or distribution to the self so long as the power produced is utilised by those who are participating in the activity of generating electricity. In a case where it is not a single owner but a joint or collective venture for generation of electricity for their own captive consumption, obviously the self-consumption of the power generated would be amongst those who are participating in the activity of generation and it shall not be confined to any one industry. … …*
>
> *46. … … The prohibition under the legal provisions is as against sale, supply or distribution of electricity without a licence. Captive consumption being outside the pale of the above expressions, there is no justification for raising such an objection that the number of shareholders is increasing so long it is restricted within the shareholding of the participating industry. … …"*
>
> *[Underline Supplied]*

66. It is also relevant to refer to the Judgment in ***Tata Power Company Limited*** to understand the context in which the word 'supply' has to be read so far as sub-section (4) of section 42 of the Act is concerned. The relevant paragraphs 96, 97 & 98 are as under:

96. It was submitted by the respondents that in any event the word "supply" as used in Section 23 should be given the same meaning as is given to it in Section 2(70) of the Act i.e. the sale of electricity to a licensee or consumer. Accordingly, by its very nature, supply would have a supplier and a receiver and any direction which is aimed at ensuring or regulating supply by its very nature would have to be directed to both the supplier and the receiver.

97. However, when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The legal principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clause which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have some what different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words "unless there is anything repugnant to the subject or context". (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] , Garhwal Mandal Vikas Nigam Ltd. v. Krishna Travel Agency [(2008) 6 SCC 741] and National Insurance Co. Ltd. v. Deepa Devi [(2008) 1 SCC 414 : (2008) 1 SCC (Cri) 209] .)

98. Accordingly, the word "supply" contained in Section 23 refers to "supply to consumers only" in the context of Section 23 and not to supply to licensees. On the other hand, in Section 86(1)(a) "supply" refers to both consumers and licensees. In Section 10(2) the word "supply" is used in two parts of the said section to mean two different things. In the first part it means "supply to a licensee only" and in the second part "supply to a consumer only". Further in the first proviso to Section 14, the word "supply" has been used specifically to mean "distribution of electricity". In Section

62(2) the word "supply" has been used to refer to "supply of electricity by a trader"."

67. Therefore it is clear that the word 'supply' has to be understood in the context it is used with reference to Section 42 (4) of the Act. It does not at any stretch of imagination mean to include utilization of power by a captive user from a generating plant in which he or it has ownership i.e., equity interest. Therefore, the words 'consume' and 'receive supply' used in Section 42(4) have to be carefully understood and interpreted. The words 'consume' and 'receive supply' used in the context of captive user, which is recognized in Section 9(2) and fourth proviso to Section 42(2) would clearly mean a captive generator carrying electricity to the destination of his own use. Therefore, if the transaction is between the captive generating plant and its shareholders/users, it cannot be equated with the case of supply of power (in the context of definition of Section 2(70) of the Act). In other words, the relevance is with regard to carrying power to the destination of use rather than supply to a consumer. Sub-section (2) of Section 42 does not deal with supply. It only refers to open access and sub-section (4) of Section 42 is conditional on there being supply of electricity as defined in the Act, which does not occur in the case of captive consumption. In other words, if the captive consumers, who get 51% of aggregate power generated, use the electricity generated from a captive generating plant,

it is not supply of electricity as defined in the Act. From the very same generating plant, the surplus power i.e., beyond 51% of self-consumption by the members is supplied to a consumer there is supply of electricity as defined. In that situation, payment of surcharge, additional surcharge arises, therefore, we are of the opinion that no separate exemption is provided under Section 42(4) of the Act exempting captive users to pay additional surcharge on wheeling charges which is payable by consumer in general if he were to change his supply from a third party i.e., other than the licensee of that area. Therefore, like exemption being provided to cross subsidy surcharge was not necessarily to be provided in so far as additional surcharge to Sub-Section 42(4). If cross subsidy surcharge is exempted for captive generation and use, there was no reason why legislature intended to impose additional surcharge on captive users. In terms of National Electricity Policy of 2005 it aims at creation of employment opportunities through speedy and efficient growth of industries. Captive power plants by group of consumers were promoted with an objective to enable small and medium industries being set up which may not be possible and easy individually to set up a plant of optimal size in cost effective manner. Therefore, with certain riders like 26% share holding and minimum 51% of annual consumption of electricity generated in the captive plants setting up of captive or group captive plants were encouraged. If these

members or captive users contribute some money towards consumption of electricity, it cannot be equated with ‘supply’ of electricity in normal parlance. Therefore, we are of the opinion that captive consumers are not liable to pay additional surcharge. If it is understood as contended by the Respondent Commission, the entire policy which formulated into law to promote captive generation and its users (captive users) would be a futile exercise and the purpose of the entire law will be defeated as argued by the Appellants.

68. The issue of cross subsidy surcharge and additional surcharge is concerned, the rationale behind these came up for consideration before the Hon’ble Supreme Court in the case of **Sesa Sterlite Limited.** The relevant paragraphs 27 to 33 reads as under:

> ***“27.*** *The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts — one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The*

mechanism of surcharge is meant to compensate the licensee for both these aspects.

28. *Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring* 458 *freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the consumers do not go out of their fold to get supply from some other source.*

29. *With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross-subsidy. Thus, the State Electricity Regulatory Commissions are authorised to frame open access in distribution in phases with surcharge for:*

> ***4. (vi)(a)*** *current level of cross-subsidy to be gradually phased out along with cross-subsidies; and*
>
> ***(b)*** *obligation to supply."*

30. *Therefore, in the aforesaid circumstances though CSS is payable by the consumer to the distribution licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. In a nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidising a low end consumer if he falls in the category of subsidising consumer. Once a cross-subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross-subsidy within the area. A fortiori, even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" would be liable to pay cross-subsidy surcharge under the Act. Thus, cross-subsidy surcharge, broadly speaking, is the charge*

payable by a consumer who opt to avail power supply through open access from someone other than such distribution licensee in whose area it is situated. Such surcharge is meant to compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee.

(4) Application of the Cross-Subsidy Surcharge principle

31. *In the present case, admittedly, the appellant (which happens to be the operator of an SEZ) is situate within the area of supply of WESCO. It is seeking to procure its entire requirement of electricity from Sterlite [an independent power producer (IPP)] (which at the relevant time was a sister concern under the same management) and thereby is seeking to denude WESCO of the cross-subsidy that WESCO would otherwise have got from it if WESCO were to supply electricity to the appellant. In order to be liable to pay cross-subsidy surcharge to a distribution licensee, it is necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated and it is not necessary that such consumer should be connected only to such distribution licensee but it would suffice if it is a "consumer" within the aforesaid definition.*

32. *Having regard to the aforesaid scheme, in the normal course when the appellant has entered into PPA with Sterlite, another electricity generating company, and is purchasing electricity from the said company it is liable to pay CSS to WESCO. Admittedly under the PPA, the appellant is purchasing his electricity from the said generating station and it is consumed by the single integrated unit of the appellant. The appellant therefore, qualifies to be a "consumer" under Section 2(15) of the Electricity Act. It is also not in dispute that the unit of the appellant is in the area which is covered by the licences granted to WESCO as distribution licensees.*

33. *Notwithstanding the above, because of the reason that the area where the VAL-SEZ the unit of the appellant is situate is an SEZ area and the appellant is declared as developer for that area under the SEZ Act, it is the contention of the appellant that in such a scenario it is not liable to pay any CSS to WESCO. This submission flows from the fact that there is a notification issued in this behalf under the proviso to Section 49 of the SEZ*

Act and the appellant itself is treated as a deemed distribution licensee as per the provisions of Section 14 of the Electricity Act. On that basis, detailed submissions are made by the appellant with an attempt to show that it cannot be treated as a "consumer" under the Electricity Act when the appellant itself is deemed to be a licensee. It is further argued that since the supply-line of VAL-SEZ is not connected to WESCO and it is getting the electricity directly from Sterlite under the PPA, there is no question of payment of CSS to WESCO at all. The argument of WESCO that the lines owned by the VAL-SEZ are only "transmission lines" under Section 2(72) of the Electricity Act and not "dedicated transmission lines" because of the reason that the duty of the generator to establish and maintain dedicated transmission lines, is sought to be refuted by arguing that even as per Section 2(72) of the Act, transmission lines are part of the distribution system of licensing. It is argued that it is not even the case of WESCO that the supply-line of SEL-VAL is a part of WESCO distribution system."

69. Reading of the above paragraphs it would mean that cross subsidy surcharge and additional surcharge are leviable on those who source electricity from any other source other than the distribution licensee in the area who supplies electricity. Therefore, we accept the argument of Appellants that once the scheme of the Act was to liberalise generation of electricity and in the case of captive generation and captive use, the intention was to permit the person or association of persons to establish his or its own generating station i.e., for the purpose of self-consumption.

70. Once the electricity generated by captive power plant or a group captive plant is consumed by captive user/users in terms of Rule 3 of

2005 Rules (i.e., 51% of electricity) the same has to be treated as own use. From the scheme of the Act including the rules made thereunder one has to understand the intention of the legislation i.e., whether it was intended to extend any benefit to captive users and therefore no license was required if surplus power were to be sold. Once surplus power is permitted to be sold, such power has to be supplied either to the licensee or consumer (other than captive users) by complying with all terms and conditions of the Act and the Rules. In that situation, definitely surplus power beyond 51% of aggregate power on annual basis has to be sold and the provisions of Section 42 of the Act would definitely apply. In that event, cross subsidy surcharge is payable by such consumer and so also additional surcharge. The exemption of surcharge therefore applies to both cross subsidy surcharge as well as additional surcharge.

71. It is relevant to refer to Section 39 of the Act which speaks of surcharge in general and not with reference to cross subsidy surcharge. Similar provisions are made in Sections 38 and 40. In these three provisions, i.e., 38, 39 & 40 it refers to open access in the context of sub-rule (2) of Section 42. It also refers to surcharge and cross subsidy in general but it does not restrict it to sub section (2) of Section 42. In that context, the surcharge, referred to, would include additional

surcharge referred at sub-section (4) of Section 42 of the Act. Therefore, it is clear that the provisions with reference to surcharge, cross subsidy, referred to in sections 38, 39 and 40, is in the context of open access, which is allowed for conveyance of electricity, but not in the context of either cross subsidy surcharge or additional surcharge. In other words, these provisions i.e, Section 38(2)(d)(ii) and Section 39(2)(d)(ii) and Section 40(c)(ii) and proviso to sub-section (2) of Section 42 of the Act deal with the manner of procedure how this surcharge has to be utilised. The utilisation of additional surcharge is also meant for sharing the burden of fixed cost of power purchase and also for meeting the requirements of current level of cross subsidy existing in the tariff of the distribution licensees. In this background, one has to understand what exactly is stranded capacity. The obligation of distribution licensee to supply power on the tariff approved by the Commission, which includes fixed cost of such distribution licensee and the same gets stranded when 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. If the consumer or group of consumers change their source of supply since distribution licensee has the obligation to meet fixed cost if such quantum of power gets stranded as consumer or group of consumers go out of the purview of distribution licensee of such area, the statute imposes an obligation on such

consumer or consumers to pay additional surcharge. This would not apply to captive consumers.

72. Learned counsel arguing for Respondent Commission relies upon following judgments to contend that merely because a particular treatment or exemption has been granted to a particular person in one section of the act, it would not mean that same treatment would extend to every other provision of the act.

i) ***Brihanmumbai Electric Supply & Transport Undertaking vs. Maharashtra Electricity Regulatory Commission & Ors.***[6]

ii) ***Hindustan Zinc Limited vs. Rajasthan Electricity Regulatory Commission***[7]

73. As a matter of fact one has to see from the very provision of sub-section (4) of Section 42 who is the consumer or section of consumers referred to therein. Does it include captive consumer who transports power from its own plant for his own use. To understand this, the scheme of the act and other provisions of the act and the rules made

[6] CA 4223 of 2012
[7] 2015 (12) SCC 611

thereunder have to be taken into consideration to arrive at proper opinion.

74. We are also of the opinion that there is no conflict between statute and the rules referred to by us.

75. There cannot be a second opinion so far as argument of learned counsel for the Respondent Commission that no rule could override the parent act. But we find no conflict between the parent act and the rules made thereunder to understand the meaning of words like ‘captive’, ‘special purpose vehicle’, ‘supply’ and ‘receive power’. The rules are in aid of parent act. Act and rules have to be interpreted harmoniously.

76. In the light of our discussion above, it is clear that once the captive user or members of special purpose vehicle or members of association satisfy the conditions at (a) and (b) of sub-rule (1) of Rule 3 of Rules 2005, they cannot be treated as consumer or class of consumers who receive supply of electricity in normal course of business. A separate class is carved by fiction of law i.e., captive user/users or consumers by complying with certain conditions. At what stage or when this special category of consumers become captive would depend upon compliance

with the requirements in terms of the statute as well as rules. There is no stage at which one can become such captive consumer and there is no time limit till what date they could be captive consumers or users. As long as the conditions to become captive consumer exists and all requirements are complied with, they are captive consumers consuming electricity generated by captive generating plant, therefore it is self consumption.

77. We cannot appreciate the opinion of the State Commission in the impugned order that the statute and the rules made thereunder envisaged original captive users and another class of captive users i.e., converted captive users. There is no such purpose or intention which could be made out either from the statute or the rules made thereunder.

78. Apparently, in the MYT order dated 3-11-2016, the Respondent Commission held that additional surcharge was not applicable to captive users of captive generating plant. This was while exercising jurisdiction under Regulation 8.1 and 8.2 of Multi-Year Tariff Regulations 2015.

79. During MTR proceedings, the Respondent Commission has opined that additional surcharge is leviable against captive users of captive generating plant.

80. Appellants contend that the scope of the Mid-Term Review is restricted or very limited; therefore, the fundamental principles or basis adopted in MYT order cannot be reopened in Mid Term Review proceedings.

81. The opinion of the Commission rendered in case No. 48 of 2016 dated 3-11-2016 is as under:

> *"8.40.*
>
> *.....*
>
> *On the other hand, MSEDCL has stated that the Additional Surcharge, being a compensatory amount payable towards the fixed cost of stranded power resulting from approved power purchase contracts, has to be determined commonly for all the OA Users, including captive consumers.*
>
> *As per Section 42(4) of the EA, 2003, the levy of Additional Surcharge arises 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. However, as per Section 9 of the EA, 2003, CPPs have been given the right to carry electricity from the Generating Plants to the destination of their own use. The question of 'permit' and 'supply' does not arise to the extent of 'self-consumption' by Captive Users of the CPPs. Thus, the Commission is of the view that Additional Surcharge is not*

applicable to Captive Users of CPPs to the extent of their self-consumption from such Plants."

82. In terms of clauses 8.1 and 8.2 of the MERC Regulations 2015, it explains the purpose of Mid Term Review, which reads as under:

"8. Mid-term Review-

8.1 The Generating Company or Licensee or MSLDC shall file a Petition for Mid-term Review and Truing-up of the Aggregate Revenue Requirement and Revenue for the years 2015-16 and 2016-17, and provisional Truing-up for the year 2017-18, by November 30, 2017.

Provided that the Petition shall include information in such form as may be stipulated by the Commission, together with the Accounting Statements, extracts of books of account and such other details, including Cost Accounting Reports or extracts thereof, as it may require to assess the reasons for and extent of any difference in operational and financial performance from the approved forecast of Aggregate Revenue Requirement and expected revenue from Tariff and charges.

8.2 The scope of the Mid-term Performance Review shall be a comparison of the actual operational and financial performance vis-à-vis the approved forecast for the first two years of the Control Period; and revised forecast of Aggregate Revenue Requirement, expected revenue from existing Tariff, expected revenue gap, and proposed category-wise Tariffs for the third and fourth year of the Control Period."

83. The scope of Mid Term Review proceedings is understood from the above regulations. As seen from the above Regulations, the Commission cannot deviate from the principles adopted in the Multi Year Tariff order. Fundamental principles adopted in the MYT proceedings

cannot be reopened and challenged at the stage of MTR proceeding, the scope of which is very limited.

84. Admittedly, the impugned order seems to be passed in exercise of powers under Regulations 8.1 and 8.2.

85. There is one more flaw in the manner in which the Respondent Commission proceeded with Mid-Term-Performance Review. Having come to conclusion that captive consumers are not liable to pay additional surcharge in MYT proceedings, which was implemented by MSEDCL, MERC opines in Review Proceedings that additional surcharge is payable by captive consumers of captive power plant. But this is without giving an opportunity of being heard to the Appellants. This is nothing but violation of principles of natural justice. Firstly, Mid-Term Review is nothing but a comparison between the actual operational performance (factual) vis-a-vis the approved forecast in terms of MERC regulations of 2015. This is nothing but ignoring its own regulations.

86. Much was argued pertaining to stranded capacity with the distribution licensee when State Commission permits a consumer or group of consumers to receive power from captive generating plant. If

such consumer is not captive consumer, he has to pay additional surcharge. Once he is a captive consumer (including shareholders of special purpose vehicle or the company) it is not supply of power as meant or understood when consumer in general gets supply of power. It is self consumption of power produced by captive generating plant in which the captive consumer or shareholder has rights of ownership. Since we are not inclined to accept the opinion of the Commission that captive consumers have to pay additional surcharge on wheeling charges when they switch over from distribution licensee, we are of the opinion, we need not deliberate much on the issue of stranded capacity with reference to facts and figures.

87. It is also pertinent and relevant to make reference to important fact that was brought on record by the Appellants. The forum of Regulators which includes Maharashtra State Electricity Regulatory Commission, there was common understanding that additional surcharge is not leviable so far as captive users/consumers are concerned.

88. In the light of the above discussion and reasoning, we are of the opinion that there cannot be any distinction between an individual captive consumer and group captive consumers or original captive consumers and converted captive consumers. For the above mentioned

reasons, the above appeals deserve to be allowed and accordingly allowed. The impugned order dated 12.09.2018 passed by Maharashtra Electricity Regulatory Commission is hereby set aside. All the pending IAs shall stand disposed of. No order as to costs.

89. Pronounced in the open court on this the 27th March 2019.

S.D. Dubey
[Technical Member]

Justice Manjula Chellur
[Chairperson]

Dated: 27th March, 2019

REPORTABLE/~~NON-REPORTABALE~~