IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
APPELLATE JURISDICTION

APL No. 76 OF 2024 & IA No. 1314 OF 2024 &
IA No. 2400 OF 2023 & IA No. 552 OF 2024

Dated: 18th November, 2024

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

Tamil Nadu Generation and Distribution Corporation Limited
Represented by its Chief Financial Controller/Revenue
144, Anna Salai, Chennai – 600 002 … Appellant(s)

Versus

1. **Tamil Nadu Electricity Regulatory Commission**
Represented by its Secretary,
4th Floor, SIDCO Corporate Office Building,
Thiru Vi Ka Industrial Estate Guindy,
Chennai – 600032 … Respondent No.1

2. **The Chettinad Cement Corporation Private Limited**
CCCPL, Rani Meyyammai Nagar Karikkali,
Gujilamparai (Via) Dindigul District – 624 703
… Respondent No.2

Counsel on record for the Appellant(s) : Ms. Anusha Nagarajan

Counsel on record for the Respondent(s) : Mr. Kumar Mihir for Res. 2

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I.INTRODUCTION:

The 2nd Respondent-Chettinad Cement Corporation Private Limited has three cement manufacturing units at Karikkali (Dindigul), Puliyur (Karur), and Ariyalur (Perambalur), all in the State of Tamil Nadu. At the relevant time, the 2nd Respondent had also set up coal based generating plants of 75 MW, 15 MW and 45 MW respectively at the said places, aggregating to 135 MW. In the Impugned Order dated 13.07.2023, the Tamil Nadu Electricity Regulatory Commission (the "TNERC" for short), while holding that the quantum of consumption should be considered on the basis of the aggregate of all three power plants, rejected the claim of the appellant that each of the three generating stations be considered separately**.**

While the 2nd Respondent, admittedly, satisfies the first requirement of holding a minimum of 26% equity to fulfil the test of being a Captive Generating Plant ("CGP" for short), the dispute, in the present appeal, relates to whether the second respondent satisfies the test of consumption of a minimum 51% of the electricity generated from the captive generation plant.

The issues, which arise for consideration in the present appeal, are two-fold, firstly whether generation and consumption from different power plants, set up for captive use by the same user, can be aggregated for the purpose of ascertaining compliance with Rule 3 of the Electricity Rules, 2005; and, secondly, whether the petition, filed by the Appellant before the TNERC claiming payment of cross-subsidy surcharge by the 2nd Respondent, was time-barred.

On the first issue, while the Appellant contends that consumption from each captive generation plant should be considered separately, in which event the requirement of Rule 3 of the Electricity Rules, 2005 would not be fulfilled with respect to the Karikkali (Dindigul) plant of the 2nd Respondent for Financial Years 2014-15 and 2015-16, the submission urged on behalf of the 2nd Respondent is that, since all the three cement plants and all the three power plants, (electricity generated from which are consumed by the three cement plants), belong to the same entity, the aggregate consumption of all three cement plants should be taken together in determining whether or not the 2nd Respondent has fulfilled the requirement of the second limb of Rule 3 ie of consumption by all the three cement plants together of an aggregate of 51% of the electricity generated from the three captive generation plants.

II. A BRIEF BACKGROUND:

As noted hereinabove, the 2nd Respondent-Chettinad Cement Corporation Private Limited has three cement manufacturing units at Karikkali (Dindigul), Puliyur (Karur), and Ariyalur (Perambalur), all in the State of Tamil Nadu. It also has generating plants at each of the aforesaid three places. Each such generation plant is co-located with a cement factory which draws power from the said plant. The three CGPs and the respective co-located cement factories (each consuming electricity generated from the co-located CGP) are located in three different districts in the State of Tamilnadu. They are (i) Puliyur, HT SC No. 101, Karur Electricity Distribution Circle (**EDC**) – **CGP1;** (ii) Ariyalur, HT SC No. 70, Perambalur EDC – **CGP2**; and (iii) Karikalli, HT SC No. 345, Dindigul EDC – **CGP3.**

Based on the data submitted by the 2nd Respondent, vide letter

dated 30.07.2019, the Appellant found that CGP-3 of the 2nd Respondent at Karikalli, Dindigul had failed to meet the minimum consumption requirement of 51% for two years ie FY 2014-15 (46.99%) and FY 2015-16 (47.66%). The Appellant issued Show Cause Notice on 23.09.2020, and thereafter raised a demand for Rs. 95,02,09,269/- towards cross subsidy surcharge. On the 2nd Respondent disputing the demand, by letter dated 06.10.2020, the Appellant invoked the jurisdiction of the TNERC filing MP No. 36 of 2020. The 2nd Respondent raised several objections thereto, including that the demand raised by the appellant was time barred.

By the Impugned Order dated 13.07.2023, the TNERC held that, as the captive user was a single entity, the energy generated in the three CGPs should be aggregated for the purpose of compliance with the 51% consumption criteria and, on that basis, held that, for the years 2014-15 and 2015-16, cross-subsidy surcharge was not payable. The TNERC, possibly because the aforesaid issue was held in favour of the 2nd Respondent, did not examine the issue whether or not the demand raised by the Appellant was barred by limitation.

III. IMPUGNED ORDER:

M.P. No. 36 of 2020 was filed by the Appellant herein to declare that the 2nd Respondent was not a Captive Generating Plant for the Financial Years 2014-15 and 2015-16, and that they were liable to pay Cross Subsidy Surcharge for Rs.95,02,09,269/- on its disqualification of Captive status.

In the impugned order, passed in M.P. No. 36 of 2020 dated 13.07.2023, the TNERC noted the submission of the appellant that the 2nd Respondent had three captive generating plants located at different

places; these three generating plants had executed the Grid connectivity with Parallel Operation Agreement with TANGEDCO/ TANTRANSCO separately; the energy generated in each captive generating plant was self-consumed by the respective cement plant co-located therein; since there was in-house self-consumption, there was no separate Energy Wheeling Agreement executed by the three captive generating plants; the energy generated from Puliyur Captive Generating Plant had to be self-consumed only by the co-located Puliyur Cement plant, and energy generated therein could not be wheeled to other cement plants located in Ariyur and Karikkali respectively; similarly, the energy generated from Ariyaur Captive Generating Plant had to be self-consumed by the co-located Ariyalur Cement plant only, and the energy generated therein could not be wheeled to other cement plants located in Puliyur and Karikkali respectively; similarly, the energy generated from Karikkali Captive Generating Plant had to be self-consumed only by the co-located Karikkali Cement plant only, and the energy generated could not be wheeled to other cement plants located in Ariyur and Puliyur respectively.

The TNERC thereafter recorded its findings in Para 8 of the impugned order. In Para 8.1 of the impugned order, the TNERC observed that the seminal issue which arose for consideration was whether an entity, be it a company or partnership or concern or any other entity for that matter having captive generating plants at different locations, can aggregate the entire energy consumed in all such plants as a single unit instead of plant-wise consumption for the purpose of deciding 51% of the consumption as required under Rule 3 of the 2005 Rules; the factual matrix of the case lay in a narrow compass; and it

would suffice if the entire issue is decided with reference to the prevailing authoritative pronouncements on the subject.

In Para 8.2 of the impugned order, the TNERC observed that the present petition had been filed to declare that the respondent, namely, M/s. Chettinad Cement Corporation Private Limited having HT SC No. 345, Dindigul EDC, had lost the status of a captive generating plant for the financial years 2014-15 and 2015-16, and in consequence thereof the respondent was liable to pay cross subsidy surcharge in view of such disqualification of the said company arising out of its inability to satisfy the consumption criteria of 51% as postulated in the 2005 Rules.

In Para 8.3 of the impugned order, the TNERC held that the seminal issue, which had cropped up in this petition, had already been settled in the order of the Commission in M.P. No. 24 of 2020 and, only with a view to reiterate the same and make the decision explicit, the present order was issued by the Commission; however, for understanding the past history relating to the verification of the captive plants status, it was necessary to set out a brief history of the background leading to the filing of the present petition.

After tracing the history of the past litigation, in regard to the verification and determination of CGP status in Paras 8.5 of the impugned order, the TNERC, in Para 8.6, observed that, in such circumstances, where the issue having already attained finality before APTEL and the consequential order passed in M.P. No. 24 of 2020 too having become final without any challenge to the same, it would suffice if the contentions of both sides are decided with reference to the said orders.

In Para 8.7, the TNERC observed that the company was holding 97.230 % of shares in the Group Captive Scheme, and hence fulfilled the criteria on shareholding required under Rule 3 of Electricity Rules, 2005; however, the issue arose in regard to the requirement of 51% of consumption as required under the 2005 Rules; while the stand of the petitioner was that the Commission's clarification on CGP verification permitted computation of energy generated either on generating plant wise or EWA wise, the petitioner had taken a stand to the effect that the consumption in an aggregate manner had been permitted by the Commission only for the wind energy generating plants, and not for the other generating plants .After extracting the relevant portion of the written submission filed by the petitioner in this regard, the TNERC, in Para 8.8 of the impugned rder held that the petitioner had relied upon para 9.9.7.1 of the order dated 07-12-2021 in M.P. No. 24 of 2020 in support of its stand; however, the petitioner had overlooked the fact that, in the same order, the Commission had rendered a finding to the effect that identification of captive generating plant shall be done on the basis of captive user which meant that it is the user's over all consumption which mattered for the purpose of aggregate consumption, and not the consumption pertaining to the individual plants.

In Para 8.9, the TNERC observed that there was no provision either in the Act or the Regulations which put an embargo on consideration of the energy generated at different places in the name of a single user, and hence the order dated 07-12- 2021 in M.P. No. 24 of 2020 was in consonance with the provisions of the Electricity Act and the judgment of the APTEL in Appeal No. 131 of 2020; and the relevant portions of the order dated 07-12-2021 in M.P. No. 24 of 2020 was reproduced for reference:-

"9.9.2.2. Hon'ble APTEL's order does not prevent TANGEDCO from conducting the exercise of verification of data with respect to CGP status for the past years. For the past years i.e. cases from 2014-15 to 2019-20, TANGEDCO shall verify data for the purpose of verification of captive generating plant status in the State, on the basis of data already furnished by CGP/ captive user(s).

9.9.5.2. (i) If there is one captive user, the user shall hold not less than 26% of the equity share capital with voting rights and shall consume not less than 51% of the electricity generated on an annual basis for captive use."

Clause No. 9.9.7.3.state as under:

"The Aggregate generation for each Generating Plant / Unit identified (unit identification applies to SPV) for captive use on Annual basis shall be calculated as follows:

(a) For all generators except wind generator:

Aggregate generation = Gross generation of generating plant or units identified (-) Auxiliary consumption."

In Para 8.10 of the impugned order, the TNERC observed that the contentions advanced on behalf of the petitioner was not sustainable in the light of the decisions of APTEL and the order of the Commission in M.P. No. 24 of 2020; the question whether an entity, having generating plants at different locations, was entitled to aggregate the energy from all such captive generating plants was no longer a subject matter of dispute, and had been settled by the Commission in M.P. No. 24 of 2020, albeit not explicitly enough.

In Para 8.11, the TNERC made it clear that the spirit of the order, in M.P. No. 24 of 2020, was not to treat different generating stations as an individual unit for the purpose of deciding the CGP status with reference to consumption; and it was the captive user as a single entity which should be criteria for the purpose of deciding the overall consumption, and not the individual generating stations. In Para 8.12, the TNERC observed that para 9.9.7.1 of the Commission's order had been misunderstood by the petitioner to the effect that, except for wind energy generators, the verification criteria shall be done generating station-wise; however, such distinction had been made only to enable the CGP having multiple WEGs and who had separate wheeling agreements to aggregate the consumed units of all stations, and it could not be considered otherwise; all other aspects remaining as such, the only criteria to be seen was whether the generating station was identified before the commencement of captive wheeling; and, if the answer was in affirmative, there was no doubt that it was the consumption of the whole entity which should be the criteria for consumption.

In Para 8.13, the TNERC observed that, if the contention of the petitioner was accepted, it would lead to an anomalous situation where a corporate entity or any other entity having its Registered office or Corporate office at a particular place, and having place of business in various places, will not be in a position to account its own generation from various generating stations in the aggregate for the purpose of Rule 3 of the 2005 Rules in regard to consumption, but an entity having place of business at a specific place will be entitled to account its entire consumption; this would lead to absurdity, and was, certainly, not the true intent and import of the order of the Commission in M.P. No. 24 of

2020; and, hence, the arguments of the petitioner in this regard was devoid of merits.

In Para 8.14 of the impugned order, the TNERC held that the respondent had furnished a Table in its counter statement to demonstrate as to how the captive consumption norms had been met by them for the Financial Years 2014-2015 and 2015-2016; as per the details set out in Table B and Table C, the aggregate consumption of the respondent for the Financial Years 2014-2015 and 2015-2016 was 53.30% and 58.78% respectively; the figures furnished by the respondent in Table B and Table C had not been put to any challenge by the petitioner; and it was apparent that the respondent had satisfied the condition/ requirement of Rule 3 of the Electricity Rules, 2005 so as to categorize the respondent's plant as a "Captive Generating Plant".

In Para 8.15, the TNERC observed that the fact that, during the relevant Financial Years, the equity share capital with voting rights held by the respondent was more than 26% was not disputed by the petitioner, and the same was borne out through documents; since the norms set out in Rule 3 of the Electricity Rules, 2005 had been satisfied by the respondent, the petitioner's contention that the respondent cannot be construed as a Captive Generating Plant for the Financial Years 2014-2015 and 2015-2016, and that the respondent was liable to cross subsidy surcharge of Rs.95,02,09,269/- for the disqualification of Captive Status, could not be countenanced. The TNERC concluded, in Para 8.16 of the impugned order, holding that there was no merit in the application.

IV. RIVAL SUBMISSIONS:

Elaborate submissions, both oral and written, were put forth by Sri P. Chidambaram and Sri B.P.Patil, Learned Senior Counsel appearing on behalf of the Appellant, and Sri M.G. Ramachandran, Learned Senior

Counsel appearing on behalf of the 2nd Respondent. It is convenient to examine the rival submissions, urged by Learned Senior Counsel on both sides, under different heads.

V. DOES THE SCHEME OF THE ACT AND RULES SHOW THAT THE TEST IS PLANT-CENTRIC AND NOT USER-CENTRIC?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, under Section 2(8) of the Electricity Act, 2003, a 'captive generating plant' is defined to mean a power plant set up by any person to generate electricity 'primarily for his own use', and includes a power plant set up by a cooperative society or association of persons for generating electricity primarily for the use of its members; in the present case, the inclusive part of the definition has no application; the criteria, for satisfying the test of a captive generating plant, is prescribed in Rule 3 of the Electricity Rules, 2005; in terms of Rule 3, no power plant would qualify as a captive generating plant unless it meets the twin test of 26% of the ownership being held by the captive user(s); and not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis (defined under Explanation (1) as being based on a financial year), being consumed for captive use; the 2nd and 3rd Provisos to Section 42(2) of the Act provide for payment of cross subsidy surcharge by a consumer who avails supply of electricity from a person other than the area distribution licensee; however, under the 4th Proviso to Section 42(2), electricity consumed from a captive generating plant for captive use is exempt from the liability to pay such surcharge; consequently, where a power plant does not meet the requirements of Rule 3, supply of electricity to the user from such power plant is not eligible to be exempted from cross subsidy surcharge; and

Rule 3(2) of the Rules makes this position clear, in as much as it provides that, where the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is supply of electricity by a generating company.

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that the Electricity Act defines and treats a 'captive generating plant' as a separate species; the Electricity Act spells out the definition with reference to the power plant itself, rather than with reference to the person setting up the plant or the user of the electricity generated by such plant; the relevant part of the definition in Section 2(8) is that the *plant* must be set up by a person primarily for his own use; the criteria to be met, in order to qualify as a plant set up to generate electricity primarily for one's own use, is set out in the Rules; it is again *the plant* that has to meet the requirements in order to qualify as a captive generating plant; in this, the threshold consumption requirement is defined with reference to the electricity generated in such plant; and, if the Act and the Rules supported aggregation of generation and consumption from different plants set up by the same captive user(s), then the test would have been defined with reference to the captive user(s) in terms of total generation and consumption by the captive user(s) without reference to the specific plants.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the appellant-TANGEDCO is wrong in interpreting the provisions of the Act and the Rules out of context and subject, and in introducing the concept that each generating station should be considered individually; this is contrary to

the concept of use of the generated units; for all generating stations belonging to the same company, there is a single user claiming captive status, and the basic conditions of ownership and 51% consumption are duly satisfied; the scheme and object mentioned above is clear from the decisions in **CSPDCL -v- CSERC, 2022 SCCOnLine SC 604 at Paras 21 to 23; Prism Cement Limited -v- MPERC :**(Judgement in Appeal No. 2 of 2018 dated 17.05.2019 (APTEL) at Para 9.20; and **Salasar Steel -v- CSERC:** (Judgement in Appeal No. 252 of 2015 dated 08.11.2016 (APTEL), at Para 11.

C. JUDGEMENTS RELIED ON BEHALF OF THE RESPONDENTS:

i. The relevant facts, in **Chhattisgarh State Power Distribution Co. Ltd.v. Chhattisgarh SERC, 2022 SCC OnLine SC 604,** were that M/s Shri Bajrang Power and Ispat Ltd. (hereinafter referred to as "SBPIL") had established a Captive Generation Plant. M/s Shri Bajrang Metallics and Power Ltd. (hereinafter referred to as "SBMPL") was a sister concern of SBPIL. SBPIL submitted a petition to the Chhattisgarh State Electricity Regulatory Commission (hereinafter referred to as "the Commission") for providing open access and wheeling of power through the transmission system of the appellant for captive use by SBMPL. The petition of the SBPIL was for permission to wheel 19 lakh units, corresponding to 13 MW, to SBMPL. It was stated in the said petition that SBMPL holds 27.6% of the equity shares of SBPIL, and more than 51% of the electricity generated by the captive power plant would be consumed by them; the generating capacity, of the captive generation plant set up by SBPIL, would be 103.68 MU per annum; out of the said 103.68 MU per annum of power generated, 13.22 MU per annum would be utilized in its sponge iron plant; 54 MU per annum would be supplied to SBMPL through the appellant's grid and the balance would be sold to the appellant.

The said petition came to be resisted by the appellant contending that SBPIL holds more than 72% of the shares of the company; however, its consumption would be limited only to 14.16% (13.22 MU), whereas the consumption of SBMPL, holding 26.67% shares, would be 57.87% (54 MU); and this was not proportionate to the ownership of the power plant.

The Commission, vide its order dated 14th October 2005, rejected the contention of the appellant, and held that SBPIL was entitled to supply electricity to its sister concern SBMPL, and the same would qualify to be treated as 'own consumption' within the ambit of Section 9 read with Section 2(8) of the Electricity Act, 2003 (hereinafter referred to as "the said Act") and Rule 3 of the Electricity Rules, 2005 (hereinafter referred to as "the said Rules"). While allowing the said petition, the Commission imposed the following conditions: (i) The consumption of electricity by the captive users shall not be less than 51% over a financial year, and in case it is not so it would be treated as 'supply of electricity by a generating company' in terms of provision of rule 3(2) of the Rules, (ii) the CSEB is entitled to charge for wheeling of electricity and levy other charges as per their present rates which shall be subject to revision as per the provisions in the regulations on the charges for open access to be notified by the Commission shortly, (iii) The company may enter into necessary agreement with the CSEB for the sale of balance power under the present terms and conditions of the CSEB, which is subject to revision as per the directions of the Commission from time to time." Aggrieved thereby, the appellant preferred appeals before APTEL which came to be dismissed by APTEL vide impugned judgment dated 6th December 2007. Aggrieved thereby, the present appeals.

It is in this context that the Supreme Court observed that a combined reading of Section 9 and Clause (8) of Section 2 of the

Electricity Act would reveal that a person is entitled to construct, maintain or operate a captive generating plant; such a plant should be primarily for his own use; clause (8) of Section 2 would further show that it includes a power plant set up by any cooperative society or association of persons for generating electricity; the requirement is that it should be primarily for the use of the members of such co-operative society or association; the definition of “person” is wide enough to include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person; it was thus clear that a person, to get benefit under Section 9 of the said Act, could be an individual or a body corporate or association or body of individuals, whether incorporated or not; even an association of corporate bodies can establish a captive power plant; the only requirement would be that the said plant must be established primarily for their own use; the fourth proviso to sub-section (2) of Section 42 of the said Act would also reveal that surcharge would 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; and, therefore, the question that would arise was whether open access for transmitting electricity from SBPIL to SBMPL would be for own use or not.

The Supreme Court further observed that sub-rule (1) of Rule 3 provides that no power plant shall qualify as a “Captive Generating Plant” under Section 9 read with Clause (8) of Section 2 of the said Act unless the conditions stated therein are fulfilled; the first requirement is that not less than 26% of the ownership is held by the captive user(s); the second requirement is that not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use; the second proviso to Rule 3(1)(a)(ii) of the said Rules provides that in case of association of persons, the captive user(s)

shall hold not less than 26% of the ownership of the plant in aggregate and such captive user(s) shall consume not less than 51% 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 10%; admittedly, SBMPL holds 27.6% equity shares in SBPIL; as such, the requirement of not less than 26% of shares is fulfilled by SBMPL; even an association of corporate bodies can establish a power plant; since SBMPL holds 27.6% of the ownership, the use of electricity by it would be for captive use under the provisions of the Act; the other requirement would be that the consumption of SBIPL and SBMPL together should not be less than 51% of the power generated; admittedly, the joint consumption by SBIPL and SBMPL is more than 51%; as such, both the conditions as provided under Rule 3 of the said Rules were satisfied.

The Supreme Court further observed that the National Electricity Policy, 2005 (hereinafter referred to as “the said Policy”) was notified by the Government of India, in exercise of its powers under Section 3 of the said Act, on 12th February 2005; Clauses 5.2.24 to 5.2.26 deal with “Captive Generation”; the provision with respect to establishing 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; the said Policy further stated that the provision relating to captive power plants to be set up by a group of consumers has been made primarily for 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 also states that the efficient expansion of small and medium industries across the country would lead to creation of enormous employment opportunities; clause 5.2.26 of the

said Policy further states that the captive and standby generating stations in India have surplus capacity that could be supplied to the grid continuously or during certain time periods; the said Policy was issued under Section 3 of the Electricity Act and, as such, had a statutory flavour; in any case, the said Policy was in tune with the provisions contained in Section 9 and Clause (8) of Section 2 of the said Act; a liberal provision had been made in Section 9 of the said Act so as to promote establishment of captive power plants; and an interpretation which advances the object and purpose of the Act, has to be preferred as held in **Administrator, Municipal Corporation, Bilaspur v. Dattatraya Dahankar, Advocate, (1992) 1 SCC 361, S. Gopal Reddy v. State of A.P., (1996) 4 SCC 596** and **Ahmedabad Municipal Corporation v. Nilaybhai R. Thakore, (1999) 8 SCC 139.**

ii. The relevant facts, in **Prism Cement Ltd. V. MPERC (Judgement in Apl No. 2 of 2018 dated 17.05.2019),** were that M/s BLA signed a Memorandum of Understanding, and an Implementation Agreement with the Government of Madhya Pradesh regarding setting up of a thermal power plant in the State of M.P. The MoU and the IA enabled GoMP to exercise the first right to purchase available 30% of the aggregate capacity of M/s BLA's proposed project at the tariff determined by the Commission, and an additional 5% of the net power on annualized basis at a price equivalent to the Variable Cost only (excluding fixed charges). Pursuant to the exercise of the first right to purchase power, the following power purchase agreements ("**PPA**") were entered by M/s BLA: On 05.01.2011, a PPA was executed between M/s BLA and M.P. Power Management Co. Ltd. ("**MPPMCL**") (earlier known as MP Power Trading Co. Ltd.) for sale of thirty percent (30%) ofInstalled Capacity of the Generating Station, for a period of 20 years (hereinafter referred to as the "**30% PPA**"). As per the 30% PPA, the Tariff for the capacity so

supplied comprised of CapacityCharge, Variable Charge and any other charges as determined by the State Commission. On 04.05.2011, a PPA was executed by M/s BLA and GoMP (hereinafter referred to as the "**5% PPA**"). By and under the said5% PPA, GoMP nominated MPPMCL, to receive the 5% power(at variable cost) referred to in the IA, on its behalf. The PPAs were operationalized and M/s BLA was supplying powerunder these PPAs to MPPMCL. In June 2016, M/s Prism acquired 1,75,00,000 equity shares of M/s BLA, which corresponded to more than 26% shareholding in Unit-1 of M/sBLA's Generating Station. Simultaneously, M/s Prism and M/s BLA entered into a Power Supply Agreement ("**PSA**") on 07.06.2016 forsupply of 25 MW of power generated by Unit-1 of M/s BLA's Generating Station whereby M/s Prism was contractually bound to procure more than 51% of the power generated by the said Unit-1, so as to qualify as captive consumers. From 22.06.2016, M/s Prism commenced its captive consumption from Unit-1 of M/s BLA. On 20.10.2016, M/s M. P. PoorvKshetra Vidyut Vitaran Co. Ltd. ("**MPPKVVCL**") directed M/s Prism to deposit an amount totaling to Rs. 8,66,99,753/- as CSS within 15 days treating consumption of power from Unit-1 of M/s BLA by M/s Prism as a supply to a consumer from a generator and not as captive consumption. On 20.10.2016, M/s MPPKVVCL filed Petition No. 56/2016 before the State Commission, seteking clarification on various issues pertaining to change of status of an existing Generating Plant toa Captive Generating Plant, and the applicability of **CSS** on M/s Prism's consumption from Unit -1 of M/s BLA. In January, 2017 M/s Prism filed WP No. 604 / 2017 before the High Court of Madhya Pradesh due to the threat of disconnection and stand taken by MPPKVVCL .On 17.08.2017, the High Court of Madhya Pradesh granted liberty to M/s. Prism to approach the State Commission

for redressal of its grievances. On 21.08.2017 M/s Prism filed Petition No. 36 of 2017 before the State Commission.

In its order, the State Commission held that the capacity of Unit-1 of M/s BLA Power Pvt. Ltd could not be treated as a Captive Power Plant as it had a Long Term PPA for 20 years in the capacity of an IPP in terms of the MoU & IA signed with GoMP; in view of the status of Unit No.1 of M/s BLA PowerPvt. Ltd having been decided, M/s Prism Cement Limited could not be treated as a Captive Power User for a part of Unit-1 of M/s BLA Power; consequently, Cross Subsidy Surcharge was leviable/applicable on the power sourced by M/s PCL from Unit-1 of M/s BLA under the provisions of the Electricity Act, 2003, and the Electricity Rules, 2005 made thereunder.

It is in this context that this Tribunal observed that, in the impugned order, the State Commission had held that a power plant or a unit thereof cannot be an IPP (i.e. having a long term PPA) and CPP at the same time, and no such hybrid status was recognized under the Electricity Act, 2003 ("**Act**") or the Electricity Rules, 2005 ("**Rules**"); consequently, Unit-1 was not a CPP; and, therefore, cross subsidy surcharge was payable on the power sourced by M/s Prism from M/s BLA's Unit-1.

This Tribunal further held that the National Electricity Policy 2005 and the Tariff Policy of 2016 were directed to encourage captive generators, i.e. after meeting self-consumption (own use), balance capacity available with captive generator could be sold to a third party; therefore, the Electricity Rules 2005 intended liberal interpretation of the right of captive generators / captive generating plant; a reading of the Act and the Rules did not justify the findings by the State Commission; as the twin-conditions as per Rule 3 were met by M/s. Prism and M/s. BLA in terms of Unit-1, Unit-1 of M/s. BLA was a CGP with M/s. Prism as

its captive user; therefore, in terms of the 4th Proviso to Section 42(2) of the Act, cross-subsidy surcharge could not be levied on the power captively consumed by M/s. Prism from M/s. BLA's Unit-1. Consequently, the impugned demand notices dated 02.01.2018 were set-aside. It was, however, clarified that, if at the end of a particular financial year it was found that the twin-conditions were not satisfied, the exemption from levy of cross subsidy surcharge would not be available; whether or not Unit-1 of BLA Power qualified as a CGP under Rule 3, the Tariff for supply of 30% of installed capacity of Unit-1 under Long-Term PPA would continue to be determined in the same manner as had been done in the past, i.e. under MPERC Generation Tariff Regulations.

iii. The relevant facts, in **Salasar Steel & Power Ltd. v. Chhattisgarh State Electricity Regulatory Commission, 2016 SCC OnLine APTEL 139**, were that the Appellant, a company registered under the Companies Act, 1956, was engaged in the manufacture of various steel products and had installed 15 MW and 65 MW power plant along with 2 × 100 TPD sponge iron manufacturing unit at Raigarh in the State of Chhattisgarh. In the year 2006, the Appellant established a 15 MW power plant to meet its captive power requirements, out of which 4.5 MW was generated through waste heat (TG-1). The State Commission passed an order in Petition No. 16 of 2006 (M) holding that the Chief Electrical Inspector, Government of Chhattisgarh shall be responsible for obtaining details of generation, auxiliary consumption and consumption by captive and non-captive users from all Captive Power Plants (CPPs), and shall then submit such details to the State Commission, after which the State Commission shall determine whether or not the generating unit qualifies as a CPP as per requirements of Rule 3 of the Electricity Rules. The Appellant further established a separate thermal generating unit of 65

MW capacity (TG-2) in the same premises on 28.03.2012. As required by the State Commission, the Appellant submitted the prescribed and approved Form ‘G’ to the Chief Electrical Inspector, at the end of every month, containing details of generation, consumption, power exported etc. for the period April 2013 - March 2014. On 13.05.2014 the Appellant provided tothe Chief Electrical Inspector a summary of total number of units generated and consumed by the Appellant, including total auxiliary consumption and power exported though the grid.

The State Commission initiated Suo-Motu proceedings on 25.05.2015 against the Appellant under Rule 3 of the Electricity Rules, 2005 regarding captive status of power plants of the Appellant for FY 201314, and held that that the generating units of the Appellant i.e. TG-1 of 15 MW and TG-2 of 65 MW, had both lost their captive status for FY 2013-14 as they could not fulfil the requirements under Rule 3 of the Electricity Rules, 2005.

In appeal, this Tribunal held that the Appellant had 100% ownership in the Power Plant and hence fulfilled one of the requirement as per Clause 3(1)(a)(i) of Electricity Rules 2005 regarding ownership; for the purpose of determining the annual captive status of any power plant only the relevant ‘G’ Forms submitted by the generator were required to be considered; it was possible that a generator, held to be an IPP in a relevant financial year, may be a CGP in the subsequent year based on the ‘G’ Forms submitted by the generator and as per its annual captive consumption; the Appellant had submitted that, in FY 2013-14 out of the two units, the first Unit of 15 MW was the captive generating plant while the second 65 MW was an Independent generating unit, as provided in the explanation and illustration to Rule 3(1) of the Electricity Rules 2005.

After noting the captive consumption from both the Units i.e. TG-1 (15 MW) as well as TG-2 (65 MW) during the period under consideration from the Form “G” submitted by the Appellant regularly on monthly basis to the Chief Electrical Inspector, this Tribunal observed that, though there had been significant consumption for TG-1 but there had been captive consumption for TG-2 also but the quantum was very less; hence they were not in agreement with the submissions of the Appellant that only TG-1 (15 MW) had been identified by the Appellant for captive use and TG-2 was an Independent Generating Unit; considering Rule 3(1)(b) of Electricity Rules, 2005, which prescribes that a generating station can identify a unit or units of such generating stations for captive use, it was clear that the Appellant had identified both the Units i.e. TG-1(15 MW) and TG-2 (65 MW) for captive use during FY 2013-14; and for deciding the captive status of the Appellant plant, the aggregated Generation and consumption from both the units i.e. TG-1 (15 MW) and TG-2 (65 MW) had to be considered as per the provision of Rule 3(1)(b) of Electricity Rules 2005.

On the issue, whether the State Commission had correctly determined the captive status of the TG-1 (15 MW) generating unit of the Appellant for FY 2013-14?, this Tribunal held against the Appellant, and found no infirmity in the decision of the State Commission in this regard. On the Issue, whether the State Commission has overlooked that the Appellant has supplied the bifurcated and separate details of generation and consumption vide ‘G’ Forms prescribed and approved by the State Commission, to the Respondent No. 2 after every month during the FY 2013-14?, this Tribunal decided that there was no shortcoming in the analysis of the State Commission and the Impugned Order had been passed after considering all the facts and aspects in place. On the last IsDsue, i.e. whether the State Commission has the power to correct the

mistakes even assuming that the Appellant had incorrectly given the summarized details of generation and consumption from both its units to the Respondent No. 2 at the end of the financial year vide its Letter dated 13.05.2014 in a combined manner though at sl. No. 2 in format-B it is indicated that the said details were for both the units, TG-1 and TG-2, this Tribunal was of the firm view that there was no mistake as such by the Appellant and the State Commission had rightly decided the issue in the Impugned Order. In conclusion, this Tribunal found no merit in the Appeal, and dismissed it as devoid of merit.

D. ANALYSIS:

The dispute, in the present appeal, is whether the Ariyalur HT.SC No. 345 Dindigul EDC/ CGP-3 generation plant of the 2nd Respondent is a "captive generating plant" within the meaning of Section 2(8) of the Electricity Act.

Section 42 of the Electricity relates to the duties of distribution licensees and open access. Section 42(1) stipulates that 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 the Electricity Act. Section 42(2) obligates the State Commission to 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; and, in specifying the extent of open access in successive phases and in determining the charges for wheeling, the State Commission shall have due regard to all relevant factors including such cross subsidies and other operational constraints. The conditions, subject to which open access should be provided, are to be specified by the State Commission, in view of Section

2(62) of the Electricity Act, by way of Regulations. The first proviso to Section 42 stipulates that open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission. The second proviso requires such surcharge to be utilized to meet the requirements of the current level of cross subsidy within the area of supply of the distribution licensee.

Open access is required to be provided by a distribution licensee on payment of surcharge. However, the fourth proviso, to Section 42(2) of the Electricity Act, stipulates 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 electricity to the destination of his own use. In case CGP-3 of the 2nd Respondent is held to be a captive generating plant i.e. a plant established for carrying electricity to the destination of the 2nd Respondent for its own use, then the Appellant would not be entitled to impose such surcharge (including cross subsidy surcharge) on the 2nd Respondent. It is in this context that the status of CGP-3 as, and whether or not it is, a captive generating plant assumes relevance

The definition clause, in Section 2 of the Electricity Act, commences with the words "*In this Act, unless the context otherwise requires"*. The definitions of various words and expressions, in clauses (1) to (77) of Section 2, must be given the meaning in terms of the definition, unless a meaning contrary thereto arises in the context of the provision under consideration. The definition, given to various words and expressions under Section 2, would apply wherever such words and expressions are used in the other provisions of the Electricity Act unless the context in which such words and expressions are used in the said provision require a different meaning to be given thereto.

A definition clause, in any statute, does not necessarily apply in all possible contexts in which the word, which is defined, may be found therein. The opening clause of Section 2 of the Electricity Act itself, by the use of the words "***in this Act, unless the context otherwise requires"***, suggests that any expression defined in that Section should be given the meaning assigned to it therein unless the context otherwise requires. **(K. Balakrishna Rao v. Haji Abdulla Sait, (1980) 1 SCC 321; Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659; K.V. Muthu v. Angamuthu Ammal, (1997) 2 SCC 53).** This implies that a definition, like any other word in a statute, has to be read in the light of the context and scheme of the Act as also the object for which the Act was made by the legislature. Where the definition or expression is preceded by the words "unless the context otherwise requires", the said definition set out in the Section is to be applied and given effect to but this rule, which is the normal rule, may be departed from if there be something in the context to show that the definition could not be applied. **(K.V. Muthu v. Angamuthu Ammal, (1997) 2 SCC 53).**

While interpreting a definition, it should be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or is likely to defeat the purpose of the Act has to be ignored and not accepted. **(K.V. Muthu v. Angamuthu Ammal, (1997) 2 SCC 53).** The phrase "Unless the context otherwise requires" is meant to prevent a person from falling into the whirlpool of "definitions", and not to look to the other provisions of the Act which, necessarily, has to be done as the meaning ascribed to a "definition" can be adopted only if the context does not otherwise require. **(Whirlpool Corpn. v. Registrar of**

Trade Marks, (1998) 8 SCC 1). The test to be ordinarily applied is that the meaning given in the definition should be considered as the meaning of the said word or expression wherever it is used in the Electricity Act. It is only as an exception that a contrary meaning can be given to the said words and expressions, that too only if it is so required in the context of the provision under interpretation.

Repugnancy of the definition of any term may arise only if such definition does not agree with the subject or context of a particular provision. However, any action not in conformity with the provision of the definition clause will not render the definition of a term repugnant to the subject or context of any provision of the statute containing the term. **(State Bank of India v. Yogendra Kumar Srivastava, (1987) 3 SCC 10).** All statutory definitions have to be read subject to the qualification variously expressed in the definition clauses 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 a somewhat different meaning in different Sections of the Act depending upon the subject or context. Thus there may be Sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used, and that will be giving effect to the opening sentence in the definition section, namely *"unless the context otherwise requires*". In view of this qualification, the court/tribunal has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words. (**Vanguard Fire and General Insurance Co. Ltd. v. Fraser & Ross: AIR 1960 SC 971; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1)**

Section 2(8) of the Electricity Act defines “captive generating plant” to mean 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 the members of such co-operative society or association. There are two limbs to the definition of *“captive generating plant”* under Section 2(8) of the Electricity Act. Use of the word “means”, in the first limb of Section 2(8), suggests that the definition of ‘captive generating plant’ is intended to cover only those captive generating plants specified therein. **(P. Kasilingam v. P.S.G. College of Technology, 1995 Supp (2) SCC 348).** It must be understood to be an extensive explanation of the meaning which, for the purpose of the Electricity Act, must invariably be attached to these words or expressions.

The word *“means”*, used in the first limb of Section 2(8), is to exhaustively define a “captive generating plant”, make the definition a hard and fast definition, and prevent any other meaning to be assigned to the said expression, than that is put down in the definition. **(P.Kasilingam & Ors. Vs. P.S.G. College of Technnology (AIR 1995 SC 1395: 1995 SCC Supl. (2) page 348; Gough v. Gough: (1891) 2 QB 665; Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court: (1990) 3 SCC 682)**.

Section 2(48) of the Electricity Act defines a “person” to include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person. In order to fall within the first limb of Section 2(8), and to be held to be a captive generating plant, the power plant should be set up, among others, by a company to generate electricity primarily for its own use.

The second limb of Section 2(8), by use of the word *'includes',* conveys an extensive meaning. The word *"include"* is generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute and, when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. **(*ESI Corpn.* v. *High Land Coffee Works*, (1991) 3 SCC 617**;***Oswal Fats & Oils Ltd.* v. *Commr. (Admn.)*, (2010) 4 SCC 728; Municipal Corpn. of Greater Bombay v. Indian Oil Corpn. Ltd., 1991 Supp (2) SCC 18 : AIR 1991 SC 686; Associated Indem Mechanical (P) Ltd. v. W.B. Small Industries Development Corpn. Ltd., (2007) 3 SCC 607;*CTO* v. *Rajasthan Taxchem Ltd.*, (2007) 3 SCC 124; P. Kasilingam v. P.S.G. College of Technology, 1995 Supp (2) SCC 348).** Black's Law Dictionary defines the word "include" to mean: "To contain as a part of something. The participle *including* typically indicates a partial list". Use of word "include" enlarges the scope of the definition (**Municipal Corpn. of Greater Bombay v. Indian Oil Corpn. Ltd., 1991 Supp (2) SCC 18 : AIR 1991 SC 686),** and when it is so used, the words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include (**ESI Corpn. v. High Land Coffee Works, (1991) 3 SCC 617; Oswal Fats & Oils Ltd. v. Commr. (Admn.), (2010) 4 SCC 728; CTO v. Rajasthan Taxchem Ltd., (2007) 3 SCC 124; Associated Indem Mechanical (P) Ltd. v. W.B. Small Industries Development Corpn. Ltd., (2007) 3 SCC 607).**

The word "include" is generally used as a word of extension. (**Forest Range Officer v. P. Mohammed Ali, 1993 Supp (3) SCC 627)**

It is an inclusive definition and expands the meaning (**Doypack Systems (P) Ltd. v. Union of India, (1988) 2 SCC 299).** When the word "includes" is used in a phrase or sentence, it makes the phrase/sentence enumerative but not exhaustive. The term defined will retain its ordinary meaning, but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise (**Mamta Surgical Cotton Industries v. Commr. (Anti-Evasion), (2014) 4 SCC 87).**

The word "include", a word of extension, is used in an interpretation clause when it seeks to expand and enlarge the meaning of the words or phrases occurring in the body of the statute. **(Forest Range Officer v. P. Mohammed Ali, 1993 Supp (3) SCC 627; *Doypack Systems (P) Ltd.* v. *Union of India*, (1988) 2 SCC 299; *CTO* v. *Rajasthan Taxchem Ltd.*, (2007) 3 SCC 124).** It gives extension and expansion to the meaning and import of the preceding words or expressions. In using the word "includes", the legislature does not intend to restrict the definition. it makes the definition enumerative, but not exhaustive. The term defined will retain its ordinary meaning but its scope would be extended to bring within it matters which its ordinary meaning may or may not comprise. (***Mamta Surgical Cotton Industries* v. *Commr. (Anti-Evasion)*, (2014) 4 SCC 87).** The word "includes" is also used in interpretation clauses in the normal standard sense, to mean "comprises" or "consists of" or "means and includes", depending on the context. **(*N.D.P. Namboodripad* v. *Union of India*, (2007) 4 SCC 502).**

As the word "includes" is used, the definition of "captive generating plant" in Section 2(8) would not only mean a power plant set up by any person to generate electricity primarily for his own use, but would also include a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of the members of such co-operative society or association of persons. But for the inclusive

definition, the power plant set up by a co-operative society or association of persons may not have fallen within the definition of *"captive generating plant"* in Section 2(8) of the Electricity Act.

Unlike the word "includes" which is merely illustrative, and may also bring other power plants, apart from those set up by a co-operative society or association of persons, within the ambit of the definition of a "captive generating plant", use of the word *"means"* in the first limb of Section 2(8) discloses the intention of Parliament to exhaustively define the said provision, make the definition a hard and fast definition, and prevent any other meaning to be assigned to the said expression, than that is put down in the definition.

Craies on Statute Law (7th Edn., 1.214) states that an interpretation clause which extends the meaning of a word does not take away its ordinary meaning, and is *not meant to prevent* the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable, but to enable the word as used in the Act to be applied to something to which it would not ordinarily be applicable. Therefore, the inclusive part of the definition cannot prevent the main provision from receiving its natural meaning. The first part of the definition of *"captive generation plant"* in Section 2(8) must, therefore, be given its ordinary, and natural meaning. **(*Black Diamond Beverages v. CTO*, (1998) 1 SCC 458).** Interpretation thereof is in no way controlled or affected by the second part which "includes" certain other things/aspects in the definition. The definition of 'captive generation plant' in the first limb of Section 2(8) would therefore mean a a power plant set up, among others, by a company to generate electricity primarily for its own use.

Use of the word *"primarily"*, both in the first and second limbs of Section 2(8) of the Electricity Act, is not without significance. The said

word means *"mainly"*. As long as the power plant is set up by a person to generate electricity mainly for his own use, it would satisfy the requirement of a captive generating plant. In other words, it is not necessary that the power plant should be set up by a company exclusively for its own use, and it would suffice if it is set up primarily or mainly by a company for its own use.

Part-III of the Electricity Act, 2003 relates to generation of electricity. Section 9, thereunder, relates to captive generation. Section 9(1) stipulates that, notwithstanding anything contained in the Electricity Act, a person may construct, maintain or operate *"a captive generating plant"* and dedicated transmission lines. Under the first proviso thereto, 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. Under the second proviso, no license shall be required under the Electricity Act for supply of electricity generated from *"a captive generating plant"* to any licensee in accordance with the provisions of the Act and the rules and regulations made there-under, and to any consumer, subject to the regulations made under sub-section (2) of Section 42. Section 9(2) stipulates that 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.

Since the Electricity Act does not define the word "primarily, and in as much as the tests to be fulfilled to satisfy this requirement is not provided under the said Act, the Central Government, in the exercise of the power conferred on it by Section 176 of the Electricity Act 2003, made the Electricity Rules, 2005. Rule 2 of the Electricity Rules, 2005 stipulates that, in these Rules, unless the context otherwise requires, the

words and expressions used and not defined therein but defined in the Act shall have the meaning assigned to them in the Electricity Act. Rule 3 relates to the requirements of captive generating plant. Rule 3(1)(a) stipulates that no power plant shall qualify as 'a captive generating plant' under Section 9 read with clause (8) of Section 2 of the Electricity Act unless – (a) in case of a power plant, (*i*) not less than twenty six percent of the ownership is held by the captive user(s), and (*ii*) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use.

It is un-necessary for us to take note of the contents of the two provisos there-under, since the first proviso refers to a registered co-operative society and the second to an association of persons. Rule 3(1)(b), which relates to a generating station owned by a company formed as special purpose vehicle, is also not of relevance in the facts and circumstances of the present case, as the 2nd Respondent is not formed as a special purpose vehicle.

Explanation (1) below Rule 3(1) states that 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. Explanation (2) states that 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.

The illustration thereunder provides that, 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 percent of the equity

shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

Rule 3(2) stipulates that 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.

The Explanation, below Rule 3(2) of the Electricity Rules, 2005, stipulates that, for the purpose of Rule 3, (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.

In this context, it is relevant to note that an Explanation, added to a statutory provision, is not a substantive provision, but, as the plain meaning of the word itself shows, is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. (**S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591**). The object of an Explanation is to understand the Act in the light of the explanation. It does not, ordinarily, enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute. (**S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591; Sarathi**

in Interpretation of Statutes). Sometimes an Explanation is appended to stress upon a particular thing which, ordinarily, would not appear clearly from the provisions of the section. The proper function of an Explanation is to make plain or elucidate what is enacted in the substantive provision, and not to add or subtract from it.Thus an Explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain. The Explanation must be interpreted according to its own tenor that it is meant to explain and not vice versa. **(Swarup in Legislation and Interpretation; S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591).** An Explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an Explanation only explains and does not expand or add to the scope of the original section. The purpose of an Explanation is, however, not to limit the scope of the main provision. The construction of the Explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. An 'Explanation' must be interpreted according to its own tenor. **(Bindra in Interpretation of Statutes (5th Edn.) at p. 67; S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591).**

The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section. **(Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar : AIR 1967 SC 389; S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591).** It is true that the orthodox function of an Explanation is to explain the meaning and effect of the main provision to which it is an Explanation, and to clear up any doubt or ambiguity in it. Therefore, even though the provision in question has been called an Explanation, we must construe it according

to its plain language and not on any a priori considerations. **(Dattatraya Govind Mahajan v. State of Maharashtra: (1977) 2 SCC 548; Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591).**

It is, thus, manifest that the object of an Explanation to a statutory provision is: (*a*) to explain the meaning and intendment of the Act itself, (*b*) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve, (*c*) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful, (*d*) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act, it can help or assist the Court in interpreting the true purport and intendment of the enactment, and (*e*) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming a hindrance in the interpretation of the same. (**Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591).**

It is not in dispute that all the three generating plants, as well as all the three co-located cement manufacturing units where the electricity generated in such plants are consumed, are owned by the 2nd Respondent. Consequently, the requirement of Rule 3(1)(a)(*i*) of the 2005 Rules is satisfied. What is required to be examined is whether the 2nd Respondent satisfies the test stipulated in Rule 3(1)(a)(*ii*) of the Electricity Rules, 2005.

The words “not less than fifty one percent” in Clause (*ii*) of Rule 3(1)(a) would mean a minimum of 51%. This minimum requirement of

51% is with respect to the aggregate electricity generated in such plant. The word 'such' would refer to the earlier part of the Rule which, under Rule 3(1)(a), is the power plant. In other words, at least 51% of the aggregate electricity generated in the said power plant should be consumed for captive use. As noted hereinabove, for the two Financial Years 2014-15 and 2015-16, the cement plant, to which CGP-3 was supplying electricity, had consumed less than 50% of the annual aggregate electricity generated in CGP-3.

If Rule 3(1)(a)(*ii*) is held to apply to each power plant separately, then CGP-3 would not qualify as a captive generating plant and would, consequently, fall outside the ambit of the fourth proviso to Section 42(2) of the Electricity Act requiring the 2nd Respondent to make payment towards surcharge (including cross subsidy surcharge) to the appellant. The submission urged on behalf of the 2nd Respondent, however, is that the electricity generated by all the three power plants, all of which were established and are owned exclusively by the 2nd Respondent, should be aggregated; and, as long as more than fifty one percent of the aggregate electricity, generated in all these three power plants taken together, has been cumulatively consumed by all the three cement plants established by the 2nd Respondent, the requirement of Clause (*ii*) of Rule 3(1)(a) of the 2005 Rules must be held to have been satisfied.

The words *"no power plant shall qualify……unless"* in Rule 3(1) make it clear that, save in cases where the tests stipulated in Rule 3(1) are satisfied, the power plant would not qualify to be a "captive generation plant". That the test is "power plant" centric is evident from Rule 3(1) (a) which begins with the words *"in case of a power plant".* Rule 3(1)(a)(i) requires atleast 26% of the ownership of the power plant to be held by the captive user(s). The power plant need not be owned by a

single captive user and, while 26% and more of the ownership can be held by more than one person, all such owners together should be consuming atleast 51% of the electricity generated from such a power plant. The requirement is for all captive users together to hold 26% or more of the ownership of the power plant. Explanation (b) below Rule 3(2) explains *"captive user"* to be the end user of the electricity generated in a captive generating plant. Persons, who are end users of the electricity generated in a captive generating plant, are required to hold atleast 26% of the ownership of the said power plant.

The words "such plant" in Rule 3(1)(a)(ii) refers to the power plant referred to in Rule 3(1)(a). It is only if atleast 51% of the aggregate electricity generated in the power plant, referred to in Rule 3(1)(a), is consumed for captive use would it then qualify as a captive generation plant. On a conjoint reading of Rule 3(1)(a)(ii) with Explanation (1)(b), it is clear that it is only if at least 51% of the aggregate electricity generated in such a power plant is meant for the end use of the person who owns the said power plant, would it qualify as a captive generation plant.

The stipulation in Rule 3(1)(A)(ii) is "not less than 51% of the aggregate electricity generated in "*such a plant"*. As long as it is more than 51%, it matters little whether consumption for captive use is 51% or 100% of the aggregate electricity generated in such a plant. Rule 3(2) obligates the captive user to ensure that its consumption is maintained at the percentage mentioned in Rule 3(1)(a)(ii). The consequences of non-compliance with this requirement is also provided in Rule 3(2). The consequence is that the entire electricity generated in such a power plant is required to be treated as if it is supply of electricity by a generating company. The moment consumption by a captive user, of the aggregate electricity generated in the plant owned by it, falls below 51%, the entire electricity generated in such a power plant (even if say 50% is consumed

by the captive user) would be subjected to payment of cross subsidy surcharge.

In **Chhattisgarh State Power Distribution Company Limited vs. Chhattisgarh State Electricity Regulatory Commission [2022 SCC OnLine SC 604]**, on which reliance is placed on behalf of the 2nd Respondent, SBPIL had, besides establishing captive generating plants, also acquired 27.6% equity stake of another company called SBPIL. Besides consuming a portion of the electricity generated from its captive generating plant, SBPIL also supplied electricity to SBMPL for its captive use. The question which fell for consideration in the afore-said judgement was whether consumption of electricity by SBPIL could be aggregated with that of the electricity consumed by SBMPL to determine whether the 51% requirement under Rule 3(1)(a)(ii) was satisfied.

The issue which fell for consideration in the afore-said case does not arise for consideration in the present appeal. The question which arises for consideration, in the present appeal, is whether electricity generated by three distinct generation plants, which is supplied to three distinct cement plants (all of which are owned by the 2nd Respondent), could be aggregated to ascertain whether the requirement under Rule 3(1)(a)(ii) of the 2005 Rules have been complied with. The law declared in **Chhattisgarh State Power Distribution Company Limited vs. Chhattisgarh State Electricity Regulatory Commission [2022 SCC OnLine SC 604]** has, therefore, no application to the facts of the present case.

The question which arose for consideration before this Tribunal in **Salasar Steel and Power Limited vs. Chhattisgarh State Electricity Regulatory Commission [2016 SCC OnLine APTEL 139],** on which reliance is placed on behalf of the 2nd Respondent, was whether it was

possible for a generator, which was held to be an IPP in a relevant financial year, to be held to be a CGP in a subsequent year based on the G-forms submitted by the generator. This question does not arise for consideration in the present appeal. Reliance placed on the judgement of this Tribunal, in **Salasar Steel and Power Limited,** is also of no avail.

The question which arose for consideration, in **Prism Cement Limited vs. MPERC [Judgment of APTEL in Appeal No. 2 of 2018 dated 17.05.2019],** on which reliance is placed on behalf of the 2nd Respondent, was whether the power plant or a unit thereof could be an IPP having a long term PPA, and a CPP at the same time. This Tribunal held that, as long as the twin conditions under Rule 3 of the 2005 Rules, were met with respect to one unit, such a unit would be a captive generating plant. The question of law which arose for consideration, in **Prism Cement Limited,** is distinct and different from the question which arises for consideration in the present appeal.

We are satisfied, therefore, that the test of consumption stipulated in Rule 3(1)(a)(ii) is with reference to the electricity generated in a single power plant/generating plant, and not with reference to the person or company which has established both the power plant and the consumption unit where the power generated in such a power plant is consumed. In other words, the test in Rule 3(1)(a)(ii) of the 2005 Rules is “power plant/generation plant” centric, and not ownership centric. The criterion of consumption of 51% of the electricity generated is with respect to a single power plant/generating plant, and while more than one user can consume this 51% of electricity generated, provided the test of ownership in Rule 3(1)(a)(i) is satisfied, aggregation of two or more power plants/generating plants, to determine whether the 51% test is satisfied, is impermissible. That all the power plants/generating plants

are owned by a single user has no bearing on fulfilment of the test stipulated in Rule 3(1)(a)(ii) of the 2005 Rules.

VI. SHOULD A LITERAL INTERPRETATION BE APPLIED?

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would submit that Section 2(8) of the Electricity Act defines "*captive generating plant*" as *"a power plant"* set up by any person to generate electricity primarily for his own use; the use of the word '*a*' before 'power plant' in Section 2(8) of the Electricity Act makes it clear that 'a' is being used to denote an object that satisfies a condition; Rule 3 of the Electricity Rules, 2005 is couched in the negative to provide that "*No power plant*" shall qualify as a captive generating plant unless the conditions provided therein are satisfied, meaning thereby that each plant has to satisfy the conditions stipulated therein; Rule 3(1)(a) again uses the expression '*a power plant*' while defining the qualifying criteria; while defining the consumption criteria, Rule 3(1)(a)(ii) specifies that not less than 51% of the aggregate electricity '*generated in such plant*' has to be consumed for captive use; each of these expressions make it clear that the test of captive generation has to be applied qua each plant; where the plural is intended, it is expressly so provided in the Rules – as has been provided while using the expression '*captive user**(s)***'; the express distinction drawn between the language used in Rule 3(1)(a) and Rule 3(1)(b) is also informative; Rule 3(1)(b) expressly contemplates aggregation of energy generated in one or more units designated for captive use; this implies that where aggregation was permissible, the Rules expressly provide for the same; while one of the objects of the Act is to promote captive generation, the benefits available to captive generating plants are subject to the plants meeting the requisite criteria; the mere fact that one of the objects of the Act is to promote captive

generation does not imply that aggregation of energy has to follow; the criteria has to be strictly met, considering that the implication of a plant being considered to be a captive generating plant is an exemption from the requirement to pay cross subsidy surcharge; and an exemption provision has to be given strict construction.

A. ANALYSIS:

Section 2(8) of the Electricity Act, by use of the words *"a power plant"*, makes it clear that a captive generation plant is a single power plant, and not more than one, even if all of them are owned by a single company. The words a *"captive generation plant"* are used in Section 9(1), the second proviso thereto, and in Section 9(2) of the Electricity Act. Likewise, Rule 3(1) stipulates that no power plant shall qualify as a "captive generation plant". Reference therein is again to the captive generation plant in the singular, and not in the plural. Rule 3(1)(a) again begins with the words in case of *"a power plant"*, which again refers to the power plant in the singular ie to each power plant and not a combination of more than one.

B. PLAIN MEANING OF THE PROVISION SHOULD, ORDINARILY, BE ADOPTED:

Courts should adopt the primary rule, and give effect to the plain meaning of the expressions in a Statute or Statutory Rule. This rule can be departed, only when there are ambiguities. (**Jaishri Laxmanrao Patil v. State of Maharashtra, (2021) 8 SCC 1).** The rule of "plain meaning" or "literal interpretation", which remains "the primary rule", should be kept in mind. The rule of "literal construction" is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results. (**Kuldip Nayar v. Union of India [Kuldip Nayar v. Union of India, (2006) 7 SCC 1; and G.**

Narayanaswami v. G. Pannerselvam, (1972) 3 SCC 717). The first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself (**Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907 : 1958 SCR 360**). If the language or the meaning of the statute is plain, there is no need for construction, as legislative intention is revealed by the apparent meaning (**Adams Express Co. v. Commonwealth of Kentucky, 238 US 190 (1915))**. The legislative intent must be primarily ascertained from the language used in statute itself (**United States v. Goldenberg, 168 US 95 (1897)**). The elementary principle of interpreting a statute is to look into the words used in the statute and, when the language is clear, the intention of the legislature is to be gathered from the language used. Aid to interpretation is resorted to only when there is some ambiguity in the words or expression used in the statute (**State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501)**. The plainest duty of the court is to give effect to the natural meaning of the words used in the provision, if the words of the statute are clear and unambiguous (**R.S. Nayak v. A.R. Antulay, (1984) 2 SCC 183)**. The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise between the subject of the enactment and the object which the legislature has intended to achieve. However, the object-oriented approach cannot be carried to the extent of doing violence to the plain language used by rewriting the section, or structure words in the place of the actual words used by the legislature (**CIT v. N.C. Budharaja & Co., 1994 Supp (1) SCC 280**).

The primary rule of construction is the literal construction. If there is no ambiguity in the provision, which is being construed, there is no need to look beyond. Legislative intent, which is crucial for understanding the object and purpose of a provision, should be gathered from the

language; and, while the purpose can be gathered from external sources, any meaning inconsistent with the explicit or implicit language cannot be given. Where the language of an enactment is plain and clear upon its face, and is susceptible to only one meaning, then, ordinarily, that meaning should be given by the Court. In such a case the task of interpretation can hardly be said to arise. (**Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193)**. The duty of the Court is to give effect to the intention of the legislature, and that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. (**Banarsi Debi v. ITO, (1964) 7 SCR 539; ATTORNEY-GENERAL v. CARLTON BANK, [1899] 2 Q.B. 158).** The primary rule of construction is that the intention of the Legislation must be found in the words used by the Legislature itself. (**Unique Butyle Tube Industries Pvt. Ltd. v. Uttar Pradesh Financial Corporation***; **D. Mahesh Kumar v. State of Telangana, 2016 SCC OnLine Hyd 382)**

The legislature is deemed to intend and mean what it says. Statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances, (**Chertsey Urban District Council v. Mixnam's Properties Ltd.**),** and must be construed according to the rules of grammar. When the language is plain and unambiguous, and admits of only one meaning, no question of construction of a Statute arises, for the Act speaks for itself. The meaning must be collected from the expressed intention of the legislature. (**State of U.P. v. Dr. Vijay Anand Maharaj, (1963) 1 SCR 1)**. In construing a statutory provision, the first and foremost rule of construction is the literal construction. All that the court has to see, at the very outset, is what does that provision say. If the provision is unambiguous and if, from that provision, the legislative intent is clear, the

Court need not call into aid other rules of construction of Statutes (**Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230; Hiralal Ratanlal v. STO***)**, nor would it be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. (**Kanai Lal Sur v. Paramnidhi Sadhukhan, 1958 SCR 360)**, as it is well recognised that the language used speaks the mind and reveals the intention of the framers. (**C.I.T. v. T.V. Sundaram Iyengar (P) Ltd.**; D. Mahesh Kumar v. State of Telangana, 2016 SCC OnLine Hyd 382)**

The language employed in a Statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake and to have intended to say what it has said. Assuming there is a defect in the words used by the legislature, the Court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result. (**Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230; Ombalika Das v. Hulisa Shaw, (2002) 4 SCC 539; CIT v. Sodra Devi***; Prakash Nath Khanna v. CIT, (2004) 9 SCC 686; Delhi Financial Corpn. v. Rajiv Anand, (2004) 11 SCC 625).** It would be impermissible to call in aid any external aid of construction to find out the hidden meaning. (**D.D. Joshi v. Union of India, (1983) 2 SCC 235; D. Mahesh Kumar v. State of Telangana, 2016 SCC OnLine Hyd 382).**

It is no doubt true that a fortress out not to be made of the dictionary as a Statute always has some purpose or object to accomplish, whose discovery is the surest guide to its meaning. (**Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193)**. While it is permissible to look into the object of the Legislation (**Inder Sain v. State of Punjab, (1973) 2 SCC 372),** if the provision is unambiguous and if,

from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. (***Hiralal Rattanlal*****; **D. Mahesh Kumar v. State of Telangana, 2016 SCC OnLine Hyd 382**). A provision is not ambiguous merely because it contains a word which, in different contexts, is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is ambiguous only if it contains a word or phrase which, in that particular context, is capable of having more than one meaning. (**Kirkness (inspector of taxes) vs John Hudson & Co: [1955] 2 WLR 1135).** It is only when the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act, whilst the other construction is likely to assist the achievement of the said policy, would Courts prefer to adopt the latter construction. (**D. Mahesh Kumar v. State of Telangana, 2016 SCC OnLine Hyd 382).**

'The golden rule' of construction is to read the statutory language, grammatically and terminologically, in the ordinary and primary sense which it bears in its context, without omission or addition. (**Suthendran v. APPELLANT AND IMMIGRATION APPEAL TRIBUNAL, [1976] 3 WLR 725; Farrell; R. v. Inhabitants of Banbury**).** It is only when such an approach produces injustice, absurdity, contradiction or stultification of statutory objective, the language may be modified sufficiently to avoid such disadvantage, though no further. (**SUTHENDRAN APPELLANT AND IMMIGRATION APPEAL TRIBUNAL RESPONDENTS, [1976] 3 WLR 725; Becke v. Smith**; R. v. Inhabitants of Banbury**; Tzu-Tsai Cheng v. Governor of Pentonville Prison**; Applin v. Race Relations Board; Harbhajan Singh v. Press Council of India, (2002) 3 SCC 722; Justice G.P. Singh Principles of Statutory Interpretation**

(8 Edn., 2001; D. Mahesh Kumar v. State of Telangana, 2016 SCC OnLine Hyd 382).

An ordinary meaning, or a grammatical meaning, does not imply that the Judge attributes the meaning to the words of a statute independent of their context or of the purpose of the statute, but rather that he adopts a meaning which is appropriate in relation to the immediately obvious and unresearched context and purpose in and for which they are used. By enabling citizens to rely on ordinary meanings, unless notice is given to the contrary, the legislature (or Rule or Regulation making authority) contributes to legal certainty and predictability for citizens, and to greater transparency in its own decisions. (**Cross in Statutory Interpretation (3 Edn., 1995)**; ***Harbhajan Singh***; **D. Mahesh Kumar v. State of Telangana, 2016 SCC OnLine Hyd 382)**.

Departure from the literal interpretation Rule is permissible only if reading statutory words in its primary and natural sense, would lead to some repugnance or inconsistency with the rest of the enactment or rules, or would result in absurdity and inconsistency. (**Grey v. Pearson**; Kehar Singh v. State (Delhi Admn.), (1988) 3 SCC 609); Maulavi Hussein Haji Abraham Umarji v. State of Gujarat, (2004) 6 SCC 672).** The need for interpretation arises only when the words used in the statute are, on their own terms, ambivalent and do not manifest the intention of the legislature. (**ITC Ltd. v. CCE, (2004) 7 SCC 591**). As neither Section 2(8) and Section 9 of the Act, nor Rule 3(1) of the 2005 Rules, would, on a literal interpretation thereof, result in absurdity, and a literal reading thereof produces an intelligible result, we see no reason to depart from the literal interpretation Rule or to resort to any other aid of construction.

VII.JUDGEMENT IN JAYASWAL NECO INDUSTRIES LTD VS CHHATTISGARH ELECTRICITY REGULATORY COMMISSION & ANR." (ORDER IN APPEAL NO. 77 OF 2010 DATED 18.02.2011)

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would submit that allowing a captive user to aggregate the electricity generation and consumption from different plants would also lead to a situation where a user enjoys the benefit of exemption from cross subsidy surcharge even where a plant is primarily selling electricity for commercial benefit, merely by aggregating the electricity generated with other captive generating plants; this interpretation of the Appellant finds support in the decision rendered by this Tribunal in ***"Jayaswal Neco Industries Ltd vs Chhattisgarh Electricity Regulatory Commission & Anr."*** (Judgement in Appeal No. 77 of 2010 dated 18.02.2011) where it was categorically held, after examining the language of the statute as well as the purpose, that the test has to be met by each power plant and the generation and consumption from two plants cannot be combined [**paras 17, 18**]; the 2nd Respondent has contended that, in the facts of the said case, the plants in question were owned by two separate entities; and the said distinction has no bearing upon the ratio of the judgment as this Tribunal expressly held that for the purpose of the Rules, since the captive user owned one plant and held more than 26% in the other, the two plants were be deemed to be captive generating plants of the appellant therein [**para 20**].

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that reliance placed by TANGEDCO on the decision of this Tribunal, in **Jayaswal Neco Industries Ltd. -v- CSERC:** (Judgement in Appeal No. 77 of 2010 dated 18.02.2011), is misplaced; the said decision is distinguishable on facts; in the said case. the captive consumption was being claimed by aggregating electricity from two different generation stations, owned by two different legal entities; further, there were more than one captive user as has been noted in the Judgment at para 2, 3, 4, 17 and 18; and the said judgement does not, therefore, constitute a binding precedent in so far as the present case is concerned.

C. THE LAW DECLARED IN "JAYASWAL NECO INDUSTRIES LTD. V. CHHATTISGARH ELECTRICITY REGULATORY COMMISSION: 2011 SCC ONLINE APTEL 21".

In **Jayaswal Neco Industries Ltd. v. Chhattisgarh Electricity Regulatory Commission, 2011 SCC OnLine APTEL 21.** the Appellant, which was engaged in the business of production of steel, commissioned two generators having 4 MW capacity each and one generator with 6 MW capacity between the years 1996 – 2001; in March, 2007 M/s. Maa Usha Urja Limited (MUUL) commissioned a generating plant of 7.5 MW which operated on non-conventional fuel (rice husk); the Appellant subscribed to 31.63% of the equity share in MUUL as a result of which MUUL became the captive generating plant of the Appellant. According to the Appellant, this was a special purpose vehicle of the Appellant generating electricity for captive use which fulfilled the requirement of Rule 3 of the Electricity Rules, 2005 read with applicable provisions of the Electricity Act, 2003. Therefore, according to the Appellant, its total generation under the captive route was 14 MW (4 × 2 +6 =14) in respect

of M/s. Jayaswal Neco Industries Ltd. (JNIL) and 7.5 MW which was the generation of MUUL.

The Commission held that the Appellant was a captive generating plant having generating assets aggregating to 14 MW and 7.5 MW, but was alleged to have wrongly held that "*while on the basis of shareholding of MUUL by JNIL (to the extent of 31.63%), the power plant of MUUL can be treated as CGP of JNIL, but it cannot be combined with the consumption of electricity generated by another plant.*"

The Commission, thereafter, issued notices under Section 142 of the Act against the Appellant and two other generating companies alleging that self consumption of electricity by the Appellant and the other two companies was found to be below the minimum requirement of 51% on annual basis which was in violation of Section 10 and 12 of the Electricity Act, 2003. The Appellant contended, before the Commission, that they owned and control 31.63% of the share of the MUUL, and tthe total consumption of the Appellant, from its aggregating generation, was 63.66% which, according to the Appellant, was in compliance with the criteria laid down in Rule 3 of the Electricity Rules 2005. Though the Commission, in the impugned order, accepted MUUL to be a generating plant owned by the Appellant, it refused to combine the consumption of electricity generated from the power plant of JNIL together with that of MUUL of the Appellant.

The contention, urged on behalf of the appellant, was that, from the total generation by the Appellant through MUUL of 54.23 Mus, the Appellant was the consumer of 53.53 MU which corresponded to nearly 99% of the total generation. The Appellant further contends that, from 101.31 MU generated by its other plant, its consumption was 38.34 MU which was approximately 41.68%. They were, in fact, thus consuming 62.33% of its total generation. The case of the appellant was that their

total consumption, from both the power plants. satisfied the criteria as laid down in Rule 3(1)(a)(i) & (ii) of the Electricity Rule 2005 for each of such power plants.

On the other hand, the contention of Chhattisgarh State Power Distribution Company Ltd was that consumption of electricity, as captive user of a captive generating plant, cannot be combined or clubbed with self-consumption of electricity by that captive user from its own captive generating plant for the purposes of fulfilling the mandatory requirement of a minimum 51% of self consumption under Rule 3; in the present case there were two captive generating plants in question and power was being drawn in dual capacity of a captive generator (from own plant) and as a captive user (from captive generating plant of another entity).

Before the Commission, the Appellant pleaded that, if self consumption of the Appellant's industry is combined with MUUL, then the total consumption is much more than 51%. The Commission held that the power plant of MUUL, because of the Appellant's share in that plant, could be treated as CGP of the Appellant, but MUUL was a different company and the consumption of the two could not be combined although benefit of consumption of electricity generated by MUUL may go to JNIL.

This Tribunal held that, even though MUUL was a different company, it could not be denied that, in view of the Appellant having acquired 31.63% ownership in MUUL, the Appellant satisfied the first requirement of the rule so as to be a CPP, and its consumption also satisfied the second requirement; the opening words of Rule 3 referred to the provision of Section 9 read with Section 2(8); the requirements in Rule 3(1)(a)(i) and (ii) are distinct and separate, and they cannot be said to be disjunctive of each other so that each of the two plants has to meet with each of the two requirements; the word ‘a’ is used before the word

‘power plant’ in Section 2(8) which defines captive generating plant; Section 9, in its sub-sections (1) and (2), repeats the word ‘a’ to qualify ‘captive generating plant’; the provision of Section 2(8) and Section 9 have been taken note of in Rule 3 while prescribing the requirements of a captive generating plant; here also in Rule 3 the word ‘a’ has been used before the words ‘captive generating plant’; and, necessarily, such a captive generating plant, before being recognized as such, must satisfy that it has at least 26% of the ownership and that its own consumption from the generating plant is not less than 51%.

This Tribunal further observed that the Appellant's power plant called JNIL was a distinct power plant; equally was the distinct power plant in the name and style of Maa Usha Urja Ltd. (MUUL); they were both captive power plants; however the appellant was not correct in picking up compliance with consumption of one power plant, as the consumption of the other, in order to show the JNIL power plant to be the CPP; each of the two power plants had to satisfy each of the two requirements of ownership of 26% and consumption of 51% and consumption of one is not permitted to be combined under the rules with the consumption of the other, so as to fulfill the requirements of the former; the intention of the legislature is very clear as it uses the word ‘ such plant’ in Rule 3(1)(a)(ii) to denote a singular power plant, not two power plants, that has to satisfy both the requirements of (i) and (ii); and a leverage is given in Rule 3(1)(b) just for dividing or splitting units of single generating station and not for combining two or more generating stations for determination of this status of captivity.

Relying on *Jugalkishore Sharaf* v. *Raw Cotton Ltd.* (AIR 1955 SC 376), to hold that the rule of literal interpretation should be adopted, this Tribunal observed that. in the instant case, there was no absurdity in the plain meaning of Rule 3 of the Rules read with Section 2(8) and Section

9 of the Electricity Act of 2003; on the contrary, the plain meaning harmonizes the object of the statute; cross subsidy surcharge is utilized to meet the requirements of current level of cross-subsidy within the area of supply of the distribution licensee and, hence, has a direct bearing on the tariff formulization of the distribution licensee which, in turn, has its impact on the tariff payable by the consumers; thus, one who is unable to fulfill the twin requirements of Rule 3 is not permitted under the law to have exemption from payment of cross-subsidy surcharge while availing open access or any other rigor of law to which a generating company or a distribution company is subjected to.

After taking note of the fourth proviso to Section 42 of the Act, this Tribunal observed that it was not without purpose or object that the words 'captive generating plant' used in Section 2(8) and Section 9 of the 2003 Act, and Rule 3 of the Rules, 2005, have been qualified with the prefix 'a' before them. After referring to paragraph (2) below the illustration to Rule 3, this Tribunal observed that it was difficult to accept the submission, urged on behalf of the appellant, that, once MUUL is held to be the captive generation plant of the Appellant, it ceases to be a different plant for the purpose of applicability of Rule 3; the two power plants were distinct having respective generation capacity of their own, and they could not be combined with one another, although legal ownership with respect to the two plants vests in one and the same person; and, in effect, what the Appellant was asking for was deviation from the Rules based on equity which they were unable to concede to.

This Tribunal then took note of the submission seeking to make a distinction between the two plants by styling one power plant as the Appellant's own generating plant and the other by styling the Appellant as a captive user of the MUUL; ie the argument was that electricity generated in generating plant and consumed for self-use was distinct

from that of electricity generated in another plant and consumed as a captive user; they felt it impossible to agree with the submission in as much as given the undisputed fact that in MUUL the Appellant had 31.63% equity share and its consumption was not less than 51% it becomes a captive generating plant of the Appellant.

D. ANALYSIS:

The judgement of this Tribunal, in **Jayaswal NECO Industries Ltd. vs. Chhattisgarh State Electricity Regulatory Commission & Anr. (Appeal No. 77 of 2010 dated 18.02.2011),** is sought to be distinguished by Sri M.G. Ramachandran, Learned Senior Counsel for the 2nd Respondent, contending that, unlike in the present appeal, captive consumption was being claimed, in **Jayaswal NECO Industries Ltd,** by aggregating electricity from two different generating stations owned by two distinct legal entities, whereas, in the present appeal, ownership of all the three generating stations belongs to a single entity.

In **Jayaswal NECO Industries Ltd.**, the Appellant had three generating plants. In addition, it had subscribed to 31.63% of the equity share capital in another company called MUUL, from whose generating plant the Appellant also consumed electricity. The Appellant sought to aggregate the total generation from its power plants and the generating plant of MUUL, with respect to its captive use, to claim compliance with Rule 3(1)(a)(ii) of the 2005 Rules i.e. of 51% of the aggregate electricity generated in the power plants as having been consumed by the appellant for its captive use.

After holding that the Appellant satisfied the requirement of Rule (3)(1)(a)(i) of the 2005 Rules, since it had acquired 31.63% of the equity share capital of MUUL, this Tribunal then examined the scope of Rule 3

of the 2005 Rules and Sections 2(8) and (9) of the Electricity Act. This Tribunal noticed that the word 'a' was used before the word 'power plant' in Section 2(8); the said word 'a' was again used in Sections 9(1) and (2) to qualify 'captive generating plant'; the provisions of Sections 2(8) and 9 were taken note of in Rule 3 while prescribing the requirement of a "captive generating plant"; the word 'a' had again been used before the word 'captive generating plant' in Rule 3; and, consequently, each such captive generating plant must satisfy the requirement of own consumption not being less than 51%.

After noting that the power plant belonging to the Appellant therein was distinct from the power plant belonging to MUUL, this Tribunal, in **Jayaswal NECO Industries Ltd,** had further observed that each of the two power plants had to satisfy each of the two requirements of ownership of 26% and consumption of 51%, and consumption of one was not permitted to be combined under the Rules with the consumption of the other so as to fulfil the requirements of the former.

It is evident therefore, that the law declared in **Jayaswal NECO Industries Ltd.** was on an interpretation of the statutory provisions both under the Electricity Act and the Electricity Rules. It matters little, therefore, that, unlike the present case where the generating plants, and the cement plants where such electricity is consumed, are owned by one single entity, whereas, in **Jayaswal NECO Industries Ltd.**, the captive generating plants were owned by two separate entities. Even otherwise, a similar contention, as is urged before us, was also raised in **Jayaswal NECO Industries Ltd.** where a distinction was sought to be made between the two plants by styling one power plant i.e. the Appellant's own generating plant, and the other by styling it as a plant with respect to which the Appellant was a captive user of MUUL. This contention was

rejected by this Tribunal holding that the undisputed fact was that the Appellant held 31.63% equity shares in MUUL and its consumption was not less than 51%. The law declared by this Tribunal, in **Jayaswal NECO Industries Ltd,** is binding both on the TNERC and on this Tribunal, and necessitates adherence. The judgement of this Tribunal, in **Jayaswal NECO Industries Ltd,** was not even considered by the TNERC in the order impugned in this Appeal. The contentions urged on behalf of the 2nd Respondent, seeking to distinguish the said judgment on facts, does not merit acceptance.

VIII. SECTION 13 OF THE GENERAL CLAUSES ACT, 1897:

A. SUBMISSION URGED ON BEHALF OF THE APPELLANT:

With respect to the contention of the 2nd Respondent that as Section 13 of the General Clauses Act provides that, in any Central enactment, expressions in the singular shall be read as plural, therefore a the expression 'power plant' ought to be read as plural, and hence the test of captive generation has to be met in the aggregate, Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, firstly, the General Clauses Act itself is a tool of interpretation; as held by the Constitution Bench of the Supreme Court, in ***Commissioner of Customs, Mumbai v. Dilip Kumar and Company & Ors.***, **(2018) 9 SCC 1,** the General Clauses Act is to be referred to only when the plain meaning is unclear and a doubt arises as to the meaning to be assigned to any word or expression used in a statute [**@ para 17**]; the provisions in question are unambiguous and leave no scope for applying any other tool of interpretation, and hence the question of applying the General Clauses Act does not arise; in any event, the application of Section 13 of the General Clauses Act, 1897 to a Central Act is also qualified by the expression "*unless there is anything*

repugnant in the subject or context"; the provision in question is Section 2 of the Electricity Act, 2003, which is a definition clause; Section 2 starts with the expression "*unless the context otherwise requires*", meaning thereby that, unless there is a context to the contrary, the definition clause as is, must be given effect to; reading the two together, primacy must be given to the definition in the Electricity Act, 2003, and if the definition is clearly expressed in the singular, then the plural in terms of the General Clauses Act, 1897 would itself become applicable only if "*the context otherwise requires*" as envisaged in Section 2 of the Electricity Act; pertinently, the relevant part of the definition of 'captive generating plant' uses the expression "means"; when a definition clause uses the word "means", it is generally restrictive and exhaustive; in any event, having regard to the context, purpose and subject matter, the criteria prescribed for a captive generating plant has to be satisfied for each power plant; and, therefore, application of the rule in Section 13 of the General Clauses Act would be repugnant to the context and subject matter.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the TNERC has rightly considered aggregate consumption from all generating stations; the plain and natural meaning to be given to the expressions used in Section 2(8) and Section 9 of the Act and Rule 3 of the Electricity Rules, 2005, namely, ***"a power plant", "a captive generating plant", "a generating station",*** is by applying Section 13(2) of the General Clauses Act, 1897 to the effect that —-"*In all Central Acts and Regulations, unless there is anything repugnant in the subject or context) words in the singular shall include the plural, and vice versa.";* accordingly, each of the expressions

described in a singular manner should also be read as including the plurality; even Article 367 of the Constitution of India, applies the General Clauses Act, 1897; it is for TANGEDCO to establish that there is something repugnant in the subject or context, because of which Section 13(2) of the General Clauses Act should not be applied to read the plurality; in **Commissioner of Trade Tax -v- DSM Group, (2005) 1 SCC 657**; and **Shivnarayan -v- Maniklal, (2020) 11 SCC 629**, it has been held that singular should be considered as including the plural.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would further submit that the opening part of Section 13(2), which reads *unless there is anything repugnant* General Clauses Act, 1897 *in the subject or context,* will have no application in the present case for the reasons: (a) TANGEDCO, did not plead or otherwise state anything in support that the subject or context would exclude the plural i.e., not give effect to the statutory mandate contained in Section 13(2); to the contrary, the scheme of Act, as interpreted and applied by the Supreme Court, clearly supports the expressions to be considered as including the plural, and there is no reason or justification for applying them in a restricted manner to single generating stations, individually; (b) the scheme of the Electricity Act, 2003, is to allow setting up of Captive Generating Plants, freely; this is a departure from the earlier dispensation, ie the Electricity (Supply) Act, 1948, where, under Section 44, Captive Generation was largely restricted, with a view to require electricity consumers to take electricity from the Electricity Board or the Licensees only; (c) the 2nd Respondent falls under the first part of Section 2(8) of the Electricity Act, 2003 dealing with one captive user as well as Rule 3(1)(a) of the Electricity Rules, 2005 opening part, qua one user; the issues regarding number of users, proportionality of ownership, proportionality of consumption, implication of transfer of ownership,

during a financial year and other complex aspects in the case of group captive, has no application to the case of the 2nd Respondent; (d) the Statement of Objects and Reasons of the Electricity Act, at Para 4(i), provides that '*Generation is being delicensed and captive generation is being freely permitted….*'; and (e) Section 2(8) uses the expression, '*primarily for his own use*'. Rule 3 liberalizes and provides a meaning to the word primarily for his own use as covering not less than 51% of the generation; and if a single company and a single user establishes more than one facility, for generation because of exigencies of different plants being located at different places, so long the aggregate consumption of 51% is satisfied, there is no rationale in their being deprived of the captive status.

C. JUDGEMENTS RELIED ON BEHALF OF THE 2nd RESPONDENT:

Let us now refer to the judgements of the Supreme Court, in **Commr., Trade Tax v. DSM Group of Industries, (2005) 1 SCC 657** and **Shivnarayan v. Maniklal, (2020) 11 SCC 629**, on which reliance is placed on behalf of the 2nd Respondent.

The relevant facts, in **Commr., Trade Tax v. DSM Group of Industries, (2005) 1 SCC 657,** were that M/s Dhampur Sugar Mills Limited ("the Company" for short), having its registered office at Dhampur, Bijnore district, U.P, carried on business of manufacturing sugar. In 1991 it opened, at Dhampur, a unit manufacturing chemicals. In 1993, it opened a unit manufacturing particle board at Agwanpur, Moradabad district, U.P. In 1993, it established another unit manufacturing sugar at Rozagaon, Barabanki district and in 1995 it established a unit manufacturing sugar at Asmoli, Moradabad district, U.P. By a notification dated 21-2-1997 certain exemptions were granted to an undertaking which made a fixed capital investment of Rs 50 crores

or more in expansion, modernisation or diversification or backward integration. On 17-5-2000 the Company styling itself as Dhampur Sugar Mills Group of Industries filed an application, before the General Manager, District Industries Centre, District Bijnore, claiming exemptions under the notification dated 21-2-1997 on grounds of expansion, diversification and modernisation. This application was rejected by an order dated 31-10-2000, among others, on the ground that a joint application for multiple units was not permissible under the Rules. The Company filed an appeal to the Trade Tax Tribunal against this order. This appeal, filed against the said order, was rejected by the Trade Tax Tribunal holding that every unit was a separate unit and that a joint application could not be made. The Company then filed a trade tax revision before the High Court which allowed the revision and directed the authority concerned to issue an eligibility certificate under Section 4-A for the benefit of tax rebate on all goods manufactured as well as on the waste products. Aggrieved thereby, the Commissioner, Trade Tax approached the Supreme Court.

Among the question, which arose for the consideration of the Supreme Court, was whether one application can be filed or each unit of an industrial undertaking needed to file an application. The Supreme Court observed that the answer depended on the wording of the notification read along with Section 4-A of the U.P. Trade Tax Act, keeping in mind Rule 6-A of the U.P. Trade Tax Rules which provided that if a dealer is carrying on business in more than one place then the assessing authority for that dealer can be one where his principal place of business is; it was an undisputed fact that the exemption claimed by the respondent, under the notification dated 21-2-1997, was for expansion, modernisation or diversification; Section 4-A(6) Explanation (5) defined “unit” to mean an “industrial undertaking” of a dealer who was

not a defaulter and who met the requirements as set out in clause (*b*) thereof; the dealer, indisputably, was the respondent Company; the industrial undertaking of the respondent was the Company; it was the Company which would be paying the tax, and which would get the benefit of exemption, if entitled to it; that the expansion, modernisation or diversification need not be in one unit was also clear from the wording of the notification; the preamble to the notification showed that the capital investment of rupees fifty crores or more has to be in a new unit or in expansion, modernisation and diversification; to the words "expansion, modernisation and diversification", there were no qualifying words; it was not stated that these must be in one unit of the industrial undertaking; the preamble, therefore, clearly supported the case of the respondents that the expansion, diversification and modernisation need not be only in one of the units of the industrial undertaking; this became further clear if one looked at clause 1 of the notification; under sub-clause (*a*) the benefit was in respect of a new unit but under sub-clause (*b*) it was in respect of a unit which had undertaken expansion, modernisation or diversification between 1-12-1994 and 31-3-2000; Section 4-A defined the term "unit" to mean an industrial undertaking, which has undertaken expansion, modernisation and diversification; even under the General Clauses Act, where the context so requires, the singular can include the plural; a plain reading of the notification showed that for "expansion, modernisation and diversification" it was the industrial undertaking which was considered to be the "unit"; this was also clear from the fact that, in the notification wherever the words "expansion, modernisation or diversification" were used, there were no qualifying words to the effect "in any one unit"; in none of the clauses was there any requirement of the investment being in one unit of the industrial undertaking; words to the effect "in a particular unit" or "in one unit" were missing; and to accept the submission of the

appellant would require adding words to a notification which the Government had purposely omitted to add.

The scope of Section 17 of the Civil Procedure Code fell for consideration, before the Supreme Court in **Shivnarayan v. Maniklal, (2020) 11 SCC 629.** As per Section 17, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situated. On the meaning to be assigned to the words “any portion of the property”, the Supreme Court observed that there may be a fact situation where immovable property is a big chunk of land, which falls into territorial jurisdiction of two courts, in which event, the court in whose jurisdiction any portion of property is situated can entertain the suit. On whether Section 17 applied only when a composite property spread in jurisdiction of two courts or Section 17 contemplated a wider situation, the Supreme Court observed that one of the submissions urged on behalf of the appellant was that the word “property” as occurring in Section 17 shall also include the plural as per Section 13 of the General Clauses Act, 1897; applying Section 13 of the General Clauses Act, the Bombay High Court explaining the word “property” used in Section 17, had held that it includes properties; they were also of the same view that the word “property” used in Section 17 can be more than one property or properties; the word “property” under Section 17 of the Civil Procedure Code may also be properties, hence, in a schedule of plaint, more than one property can be included; Section 17 can be applied in the event there are several properties, one or more of which may be located in different jurisdiction of courts; the words “portion of the property” occurring in Section 17 had to be understood in the context of more than one property also, meaning thereby one property out of a lot of several properties can be treated as portion of the property as occurring in

Section 17; thus, interpretation of words “portion of the property” cannot only be understood in a limited and restrictive sense of being portion of one property situated in jurisdiction of two courts; and the word “property” occurring in Section 17, although has been used in “singular” but by virtue of Section 13 of the General Clauses Act it may also be read as “plural” i.e. “properties”.

D. ANALYSIS:

The General Clauses Act, 1897 was enacted to consolidate and extend the General Clauses Acts of 1868 and 1887. Section 3 of the said Act is the definitions clause. Section 3(42) provides that a “person” shall include any company or association or body of individuals, whether incorporated or not. Section 13 relates to gender and number. Section 13(2) stipulates that, in all Central Act and Regulations, unless there is anything repugnant in the subject or context, words in the singular shall include the plural, and vice versa. The Electricity Act is a Central Act and, therefore, the provisions of the General Clauses Act, including Section 13 thereof, would apply. Consequently, the singular words can be read as plural and vice versa in the Electricity Act unless there is anything repugnant in the subject or context requiring the words be not so read. As noted hereinabove, Section 2 of the Electricity Act defines the expressions there-under to have the meaning given thereto in terms of Section 2 unless the context otherwise requires.

In all the Acts of Parliament, the words and phrases as defined in the General Clauses Act, and the principles of interpretation laid down therein, must, necessarily, be kept in view. If, while interpreting a statutory law, any doubt arises as to the meaning to be assigned to a word or a phrase or a clause used in an enactment, and such word,

phrase or clause is not specifically defined, it is legitimate and indeed mandatory to fall back on the General Clauses Act. Notwithstanding this, when there is repugnancy or conflict as to the subject or context between the General Clauses Act and a statutory provision which falls for interpretation, the Court must necessarily refer to the provisions of the statute. **(Commr. of Customs v. Dilip Kumar & Co., (2018) 9 SCC 1).**

The words "*unless there is anything repugnant in the subject or context".* in Section 13(2) of the General Clauses Act are of significance. The expression *"repugnant"* literally means "inconsistent with." Etymologically things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or provisions of one law conflicts directly with the other. **(Uttar Pradesh Electricity Supply Company, Ltd. v. R.K. Shukla: 1969- II L.L.J. 728 (SC); Rajeshwar Mahato v. Eighth Industrial Tribunal, 1996 SCC OnLine Cal 116)**. The word 'repugnancy' has been defined by the Pocket Oxford Dictionary of current English as 'aversion, disinclination, (to, against); inconsistency or incompatibility of ideas, statements tempers'. The Black's Law Dictionary (9th Ed.) defines the word repugnant as 'inconsistent or irreconcilable with; contrary or contradictory to'. The Wharton's Law Lexicon (16th Ed.) defines repugnant as 'inconsistent with and when they cannot stand together at the same time and one law is inconsistent with another law when the command or power or provision in the one law conflicted directly with the command or power or provision in the other; that which is contrary to what is stated before'. **(Arjaul Hoque v. State of W.B., 2016 SCC OnLine Cal 4282).** Repugnancy between two pieces of legislation means that conflicting results are produced when both the laws are applied to the same set of facts. Repugnancy arises when the

provisions of both the laws are fully inconsistent or are absolutely irreconcilable and that it is impossible to obey one without disobeying the other. **(Arjaul Hoque v. State of W.B., 2016 SCC OnLine Cal 4282).**

There may be provisions in the Electricity Act (which is a Central Act) where the stipulation in Section 13(2) of the General Clauses Act may have to be departed from, on account of the subject or context in which the words in the Electricity Act have been used, and that will be giving effect to the opening sentence in Section 13 of the General Clauses Act, namely, *"in all Central Acts and Regulations unless there is anything repugnant in the subject or context".* In view of this qualification, the court has not only to look at the words in the Electricity Act, but also to look at the context, the collocation and the object of such words relating to such a matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. **(Fraser & Ross, AIR 1960 SC 971).**

Section 13 of the General Clauses Act only enacts a rule of construction which is to apply "unless there is anything repugnant in the subject or context". The interpretation clause, in Section 13, may be rejected as repugnant to the subject or context, if it is shown that, if that is adopted, it will lead to absurd or anomalous results. **(Dhandhania Kedia & Co. v. CIT, (1959) 35 ITR 400 : 1958 SCC OnLine SC 19).** If the context and effect of the relevant provisions in the Electricity Act is repugnant to the application of the rule of construction stipulated in Section 13(2) of the General Clauses Act, assistance of Section 13(2) of the General Clauses Act cannot be taken. **(Venkatrayapuram Industrial Area Township v. Govt. of A.P., 2014 SCC OnLine Hyd 707).**

In **Commissioner of Trade Tax vs. DSM Group [2005 1 SCC 657]**, on which reliance is placed on behalf of the 2nd Respondent, the

Supreme Court, on an analysis of the statutory provisions and those contained in the notification, and relying on Section 13(2) of the Electricity Act, held that the word 'unit' must be understood in the plurality i.e. as 'units'. In **Shivnarayan vs. Maniklal [2020 11 SCC 629]**, on which also reliance is placed on behalf of the 2nd Respondent, the Supreme Court, on an analysis of the scope and ambit of Section 17 of the Civil Procedure Code, and after referring to Section 13 of the General Clauses Act, held that the word 'property' used therein could also denote 'properties' and may apply to several properties.

Section 13 of the General Clauses Act is a rule of construction which would apply unless there is anything repugnant in the subject or context. Reading the relevant words in the Electricity Act, which are in the singular, as plural would be repugnant to the very language of Sections 2(8) and 9 of the Electricity Act as well as Rule 3(1) of the Electricity Rules, 2005 which, on a literal reading, makes it amply clear that each power plant/generating plant must be treated separately for ascertaining compliance with clauses (i) and (ii) of Rule 3(1)(a) of the Electricity Rules, 2005. It is impermissible for the electricity generated in all the three generating plants, and consumed in all the three cement plants, to be aggregated to ascertain whether the requirement of Rule 3(1)(a)(ii) of the 2005 Rules is satisfied. That reading of the expressions 'power plant' and 'captive generating plant' in the plurality, would be repugnant to the context and result in absurdity, can be better explained by way of an illustration.

In the present case, the second Respondent owns three thermal generating plants and three cement plants. While each one of generating plants are co-located with one cement plant which consumes electricity generated from such a power plant, each of the power plants and the co-

located cement manufacturing units are established at three different places in three different districts in the State of Tamil Nadu. The electricity generated in each such power plant is consumed only by the cement plant which is co-located. The electricity generated by the power plant in one place is not supplied to the cement plant located at another place.

Accepting the submission, urged on behalf of the second Respondent, that the aggregate consumption by all the three cement plants, of 51% of the aggregate electricity generated in all the three power plants put together would suffice, may well result in absurdity. For instance if say 100% of the electricity generated by two of the three power plants is consumed entirely by the two co-located cement plants owned by the second Respondent, and the entire electricity generated from the third power plant is supplied, in its entirety, to a person other than the captive user (ie the third cement plant), the test of 51% of the aggregate electricity generated in all the three power plants being consumed by all the three cement manufacturing units put together, may still be satisfied and, consequently, the electricity generated in the third power plant (even though not a single unit generated therefrom is consumed by the person(s) for whose use the plant was established), must still be held to fall within the ambit of a “captive generation plant”, rendering the word “primarily” in Section 2(8) and the stipulation of 51% in Rule 3(1)(a)(ii) meaningless. As it would be repugnant to the subject and context, application of the rule of plurality in Section 13(2) of the General Clauses Act to Sections 2(8) and 9 of the Electricity Act read with Rule 3(1)(a)(ii) of the Electricity Rules, 2005, should be avoided.

That the letter ”a“, used as a prefix in Section 2(8), Section 9(1) and its second proviso, Section 9(2) and Rule 3(1), cannot be read in the singular is clear from the incongruity of reading the prefix in the plural.

From the illustration referred to hereinabove, reading the words “a power plant”/ “a generating plant” as more than one power plant/one generating plant or an aggregate of all the power plants/all the generating plants owned by the user would well result in absurdity, defeating the very purpose for which restrictions were placed by Rule 3(1) on a power plant to qualify to be a captive generation plant.

Yet another reason why the words a power plant should not be read in plural is clear from the Rule 3(1) itself. Rule 3(1)(a)(i) uses the words “captive user(s)”, A similar expression is to be found in the two places in the second proviso to Rule 3(1)(a), and in Explanation (2) below Rule 3(1). Use of the expression “captive user(s)”, in the afore-said provisions, makes the intention of the rule making authority clear that Rule 3(1)(a)(i) and its second proviso, as also Explanation (2) below Rule 3(1), would apply to captive user both in the singular and in the plural. Unlike Rule 3(1)(a)(i), the second proviso below Rule 3(1)(a), and Explanation (2) below Rule 3(1), the rule making authority has not used the words “captive generating plant(s)”. It has, on the other hand, used the word “a” as a prefix either to “captive generation plant” or “power plant”.

It is well settled that when two different words are used by the same statute, one has to construe these different words as carrying different meanings. **(*Kailash Nath Agarwal* v. *Pradeshiya Industrial & Investment Corpn. of U.P. Ltd.*, (2003) 4 SCC 305; Kurapati Bangaraiah and 17 others vs Govt. of A.P: 2014 SCC OnLine Hyd 1294).** Different use of words in two provisions of a statute is for a purpose. If the field of the two provisions were to be the same, the same words would have been used. **(*B.R. Enterprises* v. *State of U.P.*, (1999) 9 SCC 700; Kurapati Bangaraiah and 17 others vs Govt. of A.P: 2014 SCC OnLine Hyd 1294).** When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain

that they are used in the same sense, and the conclusion must follow that the two expressions have different connotations. **(*Member, Board of Revenue* v. *Arthur Paul Benthall, AIR 1956 SC 35;* Kurapati Bangaraiah and 17 others vs Govt. of A.P: 2014 SCC OnLine Hyd 1294).** When the legislature has taken care of using different phrases in different sections/Rules, normally different meaning is required to be assigned to the language used by the legislature. If, in relation to the same subject-matter, different words of different import are used in the same statute, there is a presumption that they are not used in the same sense. **(*Arthur Paul Benthall, AIR 1956 SC 35*; *Oriental Insurance Co. Ltd.* v. *Hansrajbhai V. Kodala,* (2001) 5 SCC 175; Kurapati Bangaraiah and 17 others vs Govt. of A.P: 2014 SCC OnLine Hyd 1294).** When the situation has been differently expressed the legislature must be taken to have intended to express a different intention. **(*CIT* v. *East West Import and Export (P) Ltd., (1989) 1 SCC 760*; Kurapati Bangaraiah and 17 others vs Govt. of A.P: 2014 SCC OnLine Hyd 1294).**

As the Rule making authority has, in Rule 3(1)(a)(i), at two places in the second proviso to Rule 3(1)(a), and Explanation (2) below Rule 3(1), used the words “captive user(s)” meaning thereby that these provisions would apply to captive user both in the singular and in the plural, but has repeatedly used the word ”a generating plant” and “a power plant”, it is evident that the legislative intent was to refer to the captive generating plant/power plant only in the singular and not in the plural. Reliance placed on Section 13 of the General Clauses Act is therefore misplaced.

E. STATEMENT OF OBJECTS & REASONS:

Para 4 of the Statement of Objects and Reasons, accompanying the Electricity Bill (which culminated in the Electricity Act 2003 being

enacted), refers to the main features of the Bill. Clause 4(1) states that generation is being de-licensed and captive generation is being freely permitted. Clause 4(vi) states that the State Electricity Regulatory Commission may permit open access in distribution in phases with surcharge for - (a) current level of cross subsidy to be gradually phased out along with cross subsidies; and (b) obligation to supply.

The Statement of Objects and Reasons for introduction of a bill can be usefully referred to for the limited purpose of ascertaining the conditions prevailing at the time the bill was introduced, and the purpose for which the provision was made. (**Kavalappara Kottarathil Kochuni v. Kavalappara Kottarathil Kochuni).** The Statement of objects and reasons can be legitimately used for ascertaining the object which the legislature had in mind. (**Sanghvi Jeevraj Ghewar Chand v. Sanghvi Jeevraj Ghewar Chand).** The Objects and Reasons of the Act may be taken into consideration in interpreting the provisions of the statute in case of doubt. (**Doypack Systems (P) Ltd. v. Union of India, (1988) 2 SCC 299).**

F. RESORT TO EXTERNAL AIDS, SUCH AS STATEMENT OF OBJECTS AND REASONS, IS IMPERMISSIBLE WHERE STATUTORY LANGUAGE IS CLEAR:

When the language of the Section is clear and categorical, no external aid is permissible in interpretation of the same. (**State of Maharashtra v. Marwanjee F. Desai, (2002) 2 SCC 318)**. When the language of the statutory provision is plain and clear no external aid is required, and the legislative intention has to be gathered from the language employed. (**Deptt. of Forests v. J.K. Johnson, (2011) 10 SCC 794**). The golden rule of interpretation of Statutes is to read the

words of a statutory provision as they mean ie its literal interpretation. It is only where the words of a statutory regulation are ambiguous, or are capable of more than one meaning, would resort to any other canon of construction be justified. Even in such a situation, the court/tribunal should first resort to internal aids such as a purposive or a harmonious construction of the provisions of the Regulations itself. It is only where internal aids for interpretation of Statutes do not also suffice, can resort be then had to external aids of construction of statutory provisions. As Statement of Objects and Reasons are more, in the nature of external aids to interpretation of statutes, resort to such external aids is unnecessary when the statutory provisions are unambiguous.

While Clause 4(i) of the Statement of Objects and Reasons, no doubt, states that generation is being de-licensed and captive generation is being freely permitted, the manner in which the captive generation is freely permitted is in terms of Section 9 of the Electricity Act 2003 read with Section 2(8) thereof. It is only such generating plants which satisfy the requirements of Section 2(8) of the Act read with Rule 3(1) of the 2005 Rules, which can be held to be a captive generation plant which, clause 4(1) of the Statement of Objects and Reasons states, is freely permitted.

While it is true that clause 4(1) of the Statement of Objections and Reasons states that captive generation is being freely permitted, it is also clear from the provisions of the Electricity Act and the 2005 Rules, that it is only if the power plant satisfies the tests of being a captive generation plant would it then, in view of the fourth proviso to Section 42 of the Electricity Act, not be liable to pay surcharge on open access being provided to it to carry electricity to the destination of its own use. Its needs no reiteration that the exemption provided from payment of surcharge,

under the fourth proviso to Section 42(2), is only to captive generation plants and not to all the generation plants. As an exemption provision must be strictly construed, the rigor of Rule 3(1)(a) of the 2005 Rules would apply and, where the power plant does not satisfy the stipulated tests, it would neither qualify as a captive generation plant nor be exempt from the liability to pay surcharge to the distribution licensee.

IX. PREVIOUS ORDERS OF THE TNERC:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the order of the TNERC dated 28.01.2020, relied upon on behalf of the 2nd Respondent, allowed aggregation of energy generated by wind energy generators for ascertaining captive consumption; however, the said stipulation is of no avail in so far as the 2nd Respondent is concerned because it is a thermal generator; the Order dated 28.01.2020 carved out a clear exception for wind energy generators which is clear from the language of the order: "*aggregate energy generated from generating unit(s) in a generating station identified for captive use before the commencement of captive wheeling to be determined on annual basis i.e gross energy generated less auxiliary consumption**. In the case of wind energy,** if the CGP having multiple generating units have separate Energy Wheeling Agreements, aggregate energy of all generating units of the CGP shall be considered irrespective of separate wheeling agreements";* the TNERC further clarified that the *Aggregate Generation for each Generating Plant/Unit identified (in the case of SPV)* for captive use on Annual basis shall be calculated as follows: Aggregate generation =Total generation of the Financial year of all units or units identified (-) Auxiliary consumption; in any event, an incorrect interpretation of the Rules by TNERC is neither

binding, nor can be taken advantage of by thermal power generators such as the 2nd Respondent; and even in its order dated 07.12.2021 passed in the Review Petition, and clarification applications bearing MP No. 24 of 2020, the TNERC distinguished between “generators except wind generator”, for which generation shall be plant wise and for “wind energy generators” where aggregation was permitted.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

Sri M.G.Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the TNERC in the Impugned Order dated 13.07.2023 dealt with the aspect of aggregating captive consumption; the Impugned Order refers to the earlier Order dated 07.12.2021 in MP 24 of 2020 and batch (including RP No. 3 of 2020 filed in RA 7 of 2019) in which the aspect of ‘*Computing Aggregate Generation and Verification of Consumption on Aggregate Consumption of Identified Units vis a vis each units*’ has been considered and decided; in the earlier order dated 28.01.2020 in RA 7 of 2019, the said Petition had considered various aspects in the context of not only wind power but also conventional and other generators; subsequently, in the above order dated 07.12.2021 at Para 9.9.7, the same issue had been considered and again decided that it should be in the aggregate; further, in the order dated 05.04.2022 passed by the TNERC in Petition No. 20 of 2019 in TANGEDCO -v- NuPower, the same decision has been reiterated; thus, a consistent view has been taken by the TNERC regarding the issue under consideration. TANGEDCO, did not file any appeal against the said orders, and had duly accepted and implemented the decision of aggregating the capacity in more than one generating station; obviously, the wind power projects, situated across the state of Tamil Nadu (not contiguously and at great distances) of the same owner,

have been allowed to be aggregated and TANGEDCO had no grievance with regards thereto; no reason has been given by TANGEDCO, as to why it did not challenge the said earlier orders, on the issue under consideration; consistent with the above, in the present case, in the daily order dated 02.03.2023, the counsel appearing for TANGEDCO, duly conceded before TNERC to the stand taken by the 2nd Respondent; the only explanation of TANGEDCO is that the position with regards wind power was different, and did not apply to other Captive Generators; Rule 3 does not provide for any exception and, therefore, there cannot be any differential treatment under Rule 3; non-conventional power can be given differential treatment for tariff under Section 86(1)(e) of the Act only; the consideration of captive status cannot be different, and what applies to wind power, should equally apply to all generators irrespective of being renewable or conventional.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would further submit that, in the context of the provisions of the Act and the Rules, including the scheme, objective and purpose, etc. of promoting captive generation, the consistent view taken by TNERC cannot be said to be not a possible view; the view taken is consistent with the scheme and objective of the Act; in such a situation there is no cause for interfering with the TNERC's order (Ref: **X -v- The Principal Secretary, etc.** (Judgement of the Supreme Court in Civil Appeal No. 5802 of 2022, dated 29.09.2022, at paras 31 and 36).

C. PREVIOUS ORDERS OF TNERC: ITS CONTENTSL

In Para 8.3 of the impugned order, the TNERC observed that the issue which had cropped up in this petition had already been settled in its earlier Order in MP No. 24 of 2020; it is only with a view to reiterate the same, and make the decision explicit, that the present order was being issued; pursuant to the Order of the Madras High Court, in WA No.

(M.D.) Nos. 930 and 931 of 2017, the TNERC had taken up the matter as R.A. No. 7 of 2019 and had passed appropriate orders; aggrieved by the order passed by the Commission, the Tamil Nadu Power Producers' Association had filed Appeal No. 131 of 2020 in which the directions issued in R.A. No. 7 of 2019 was modified by APTEL with reference to certain issues; thereafter, in another Petition in M.P. No. 24 of 2020, the issues remanded by APTEL were taken up and a revised order was passed; the order passed in M.P No. 24 of 2020 had become final without any challenge thereto; the question whether an entity, having generation plant at different locations, was entitled to aggregate the energy from all such captive generating plants was no longer a subject matter of dispute, and had been settled by the Commission in M.P. No. 24 of 2020 albeit not explicitly; for the purpose of clarity, it was made unequivocally clear in the present order that the spirit of the order in M.P. No. 24 of 2020 was not to treat different generating stations as individual units for the purpose of deciding the CGP status with reference to consumption; it is the captive user as a single entity which should be the criteria for the purpose of deciding the overall consumption, and not the individual generating stations; its order, in Para 9.9.7.1, had been misunderstood as an exception being made for wind energy generators, such a distinction had been made only to enable the CGP having multiple wind energy generators and who had separate wheeling agreements to aggregate the consumed units of all stations, and it cannot be considered otherwise; all other aspects remaining as such, the only criteria to be seen was whether the generating station was identified before the commencement of captive wheeling; and if the answer was in the affirmative, there was no doubt that it was the consumption of the whole entity which should be the criteria for consumption.

As reliance is placed thereupon by the TNERC, It is necessary for us to refer to the earlier orders of the TNERC culminating in the order passed in M.P. No. 24 of 2020 & batch dated 07.12.2021.

The Appellant herein had issued a Circular Memo requiring captive generators and captive users to furnish documents and data, for the purpose of verification of the status of the captive generating plant, in accordance with Rule 3 of the Electricity Rules 2005. Several captive users filed Writ Petitions before the Madras High Court questioning the validity of the said circulars. A single judge of the Madras High Court (Madurai Bench) directed the TNERC to look into the matter of verification of the status of CGPs. Aggrieved thereby, the Appellant filed W.A. Nos. 930 and 931 of 2017 contending that the power of verification and adjudication was available with them. The Division Bench of the Madras High Court passed orders on 09.10.2018 expressing its disinclination to undertake any academic exercise to decide the jurisdiction qua verification and adjudication as, ultimately, final adjudication would lie before the TNERC. As a result, the Writ Appeals were disposed of leaving the issue, qua jurisdiction and power of the Appellant to verify and determine CGP status leading to entitlement of cross surcharge subsidy, open. The TNERC was directed to issue either a general or special order detailing the procedure to be followed for verification of the CGP status either by directing or giving liberty to the Appellant to verify the captive status of the generating companies. The Writ Petitioners were directed to furnish particulars, to facilitate the process of verification as per the procedure contemplated and the directions of TNERC, when asked by the Appellants; the Appellants could make a determination on receipt of the verification particulars from the respective generating companies; in the event of disputes, the matter

be placed before the TNERC for adjudication; and, on its jurisdiction being invoked, the TNERC should adjudicate and pass a common order on the commonality of the issues involved.

Pursuant to the order of the Madras High Court, a draft procedure was webhosted by the TNERC on 27.02.2019 for verification of the consumption status of captive user(s) and captive generating plant(s) by the distribution licensee. The Commission, thereafter, issued a revised draft procedure on 09.12.2019. After conducting a personal hearing of the stakeholders, and after taking note of their written submissions, the TNERC framed seven issues. Issue No. 4 related to entities that attracted the test of proportionality in consumption, test up to 51% generation and effects of changes in shareholding; and issue No. 5 related to computing aggregate generation and verification of consumption on aggregate generation of identified units versus each units.

On issue No. 4, ie on the issue of verification of ownership and consumption for any change in the captive user in a Financial Year, the TNERC decided that it would be made for each corresponding period of change i.e by considering the proportionate generation for the corresponding period and the energy consumed by the captive user(s); and the basis of verification shall take effect prospectively from FY 2021 i.e from 01.04.2020. On issue No. 5, regarding computing aggregate generation and verification of consumption on aggregate generation of identified unit versus each unit, the TNERC observed that APTEL and other Commissions had considered the criteria of minimum 51% for verification of the same; in the case of CGPs owned by operating companies, the TNERC decided to exempt operating companies owned CGPs from the test of proportionate consumption, and held that similar

was the case with verification criteria for consumption up to 51%; and that they deemed it fit to conduct verification for the minimum criteria of 51% of energy generation.

The TNERC further observed that the captive users draw power from both renewable sources and conventional sources of power; it was the case of windmills that aggregate energy of the windmill power generating companies be considered for verification criteria of consumption; a company has multiple windmills and each of the windmill has an Energy Wheeling Agreement; the adjustment principle followed by TANGEDCO would render the last one or two mills having a non-captive status owing to the very nature of seasonal and infirm generation; on the other hand, conventional generators had requested to conduct verification of test of proportionality; the Judgment of APTEL in Appeal No. 252 of 2015 dated 08.11.2016 was relevant; the said case was on two generators with captive loads co-located, and where the energy generated from both the generators were consumed by the captive loads; when aggregate generation of the two units was considered, the CGP lost its status whereas, when considered separately, one unit complied with CGP status; the Appellant, as a 100% owned Company, wanted CGP status to be verified unit-wise; and APTEL, in Para 11(b) of its Judgment, had held that, as per Rule 3(1)(a) of the Electricity Rules 2005, it was evident that the status of any power generating plant as CPP or otherwise for any year can be established only after completion of the respective financial year, and no power plant can be declared upfront as CPP; Rule 3(1)(b) of the Electricity Rules, 2005 prescribes that a generating station can identify a unit or units of such generating stations for captive use; in such cases, when any unit(s) had been identified for captive use, the electricity consumed by captive users shall be with

reference to unit or units in aggregate identified for captive use and not with reference to generating station as a whole.

The TNERC also observed that, in R.P. No. 2 of 2013 dated 30.04.2013, APTEL had held, on the question “whether the term ‘identified for captive use’ used in the Explanation 1 to Rule 3 of the 2005 Rules denotes that the unit/ units were required to be pre-identified or could be indicated at the end of financial year’; APTEL held that the captive user was required to identify the unit/ units intended for captive consumption at the time of induction of equity stage itself; these orders answered the issue of when to consider aggregate generation i.e when any unit(s) had been identified for captive use in a generating plant, then the electricity consumed by captive users shall be with reference to unit or units in aggregate identified for captive use; therefore, aggregation of energy shall be based on identification of captive units before commencement of captive wheeling provided the ownership structure/ shareholding was the same in each agreement; in case of wind energy, if the CGP having multiple generating units had separate Energy Wheeling Agreements, aggregate energy of all generating units of the CGP shall be considered irrespective of separate wheeling agreements, provided the ownership structure/ shareholding was the same in each agreement.

Para 7.7 of its Order in R.A. No. 7 of 2019 dated 28.01.2020 related to accounting of aggregate generation and consumption and, in Para 7.7.1 thereunder, the Commission observed that verification of criteria of consumption shall be based on the aggregate energy generated from generating unit(s) in a generating station identified for captive use before the commencement of captive wheeling to be determined on annual basis i.e gross energy generated less auxiliary consumption; in the case

of wind energy, if the CGP having multiple generating units have separate Energy Wheeling Agreements, aggregate energy of all generating units of the CGP shall be considered irrespective of separate wheeling agreements, provided the captive users of each EWA are the same holding same proportion of ownership; the quantum of auxiliary consumption shall be the metered auxiliary consumption or the normative auxiliary consumption whichever is less; the captive consumption (the captive user) may be within the premises where the CGP is located or at a different location; and, in the absence of measured data on auxiliary consumption, until metering as prescribed in para 7.9.1 of this procedure is completed, the normative auxiliary consumption specified in the Regulations of the Commission may be considered for the purpose of CGP verification status.

In Para 7.7.2 of the afore-said order, the TNERC observed that, as per the explanation to Rule 3, “annual basis‟ refers to determination in a financial year; for determination of captive status on an annual basis, for the first year, the date of grant of open access shall be considered as the start date for the Financial Year(FY); and, for the subsequent years, generation from 1st April to 31st March of a FY shall be considered for determining captive status. In Para 7.7.3, the TNERC observed that the Aggregate Generation for each Generating Plant/Unit identified (in the case of SPV) for captive use on Annual basis shall be calculated as follows: Aggregate generation =Total generation of the Financial year of all units or units identified (-) Auxiliary consumption.

In Para No. 9.9.7, of its order in M.P. No. 24 of 2020 dated 07.12.2021, the TNERC dealt with accounting of aggregate generation and consumption. In Para 9.9.7.1, it observed that verification criteria of

consumption shall be based on the aggregate energy generated from generating unit(s) in a generating station identified for captive use before the commencement of captive wheeling to be determined on annual basis i.e. gross energy generated less auxiliary consumption; in the case of wind energy, if the CGP having multiple generating units, having separate Energy Wheeling Agreements with the ownership structure/shareholding being the same in each agreement, the aggregate energy of all generating units of the CGP shall be considered irrespective of separate wheeling agreements; if shareholding of each Energy Wheeling Agreement where substantial difference exists between the wheeling agreement and the shareholding, then at the option of the captive generator, Energy Wheeling Agreement wise verification shall be done; the quantum of auxiliary consumption shall be the metered auxiliary consumption or the normative auxiliary consumption whichever is less; the captive consumption (the captive user) may be within the premises where the CGP is located or at a different location; and, in the absence of measured data on auxiliary consumption, until metering as prescribed in para 9.9.9.1 of this procedure is completed, the normative auxiliary consumption specified in the Tariff Regulations of the Commission may be considered for the purpose of CGP verification status.

In Para 9.9.7.2, the TNERC observed that, as per the explanation to Rule 3, ‘annual basis’ refers to determination in a financial year; for determination of captive status on an annual basis, for the first year, the date of grant of open access shall be considered as the start date for the Financial Year(FY); for the subsequent years, generation from 1st April to 31st March of a Financial Year shall be considered for determining captive status. In Para 9.9.7.3, the TNERC held that the Aggregate

Generation for each Generating Plant/Unit identified (unit identification applies to SPV) for captive use on Annual basis shall be calculated as follows: (a) For all generators except wind generator: Aggregate generation =Gross generation of generating plant or*units identified (-) Auxiliary consumption. * in case of SPV; (b) In the case of wind generator CGPs, banking of energy and adjustment of start up power with the energy generated is permitted in the Tariff orders issued by the Commission for wind power; therefore, the banking charges in kind and the start-up power in the case of wind energy generators may be deducted from aggregate generation provided the CGP has appropriate metering, and provides details of power consumed for startup power; for wind energy, the aggregate generation shall be as follows: Aggregate generation = Gross generation (-) banking charges in kind(in units) (–)start up power(in units).

In its order in M.P. No. 20 of 2019 dated 05.04.2022, the TNERC reiterated the same view, and held that, since the issues raised in M.P. No. 20 of 2019 had already been answered by the Commission in Para 9.9.7 of its Common Order in M.P. No. 24 of 2020 dated 07.12.2021, the present petition had become infructuous.

It is not in dispute that the Appellant herein has not challenged the validity of any of the afore-said orders passed by the TNERC. Their justification in this regard is that the decision of the TNERC, in the afore-said orders, related to wind power generators; and was inapplicable to the 2nd Respondent which owned thermal power based generating stations.

D. JUDGEMENT RELIED ON BEHALF OF THE 2ND RESPONDENT:

In **X v. The Principal Secretary, Health and Family Welfare: (2023) 9 SCC 433,** on which reliance is placed on behalf of the 2nd

Respondent, the Supreme Court held that the cardinal principle of the construction of statutes is to identify the intention of the legislature, and the true legal meaning of the enactment. The intention of the legislature is derived by considering the meaning of the words used in the statute, with a view to understanding the purpose or object of the enactment, the mischief, and its corresponding remedy that the enactment is designed to actualise. **(JUSTICE G.P SINGH, G.P. SINGH: PRINCIPLES OF STATUTORY INTERPRETATION, (LexisNexis, 2016), at page 12; State of Himachal Pradesh v. Kailash Chand Mahajan, 1992 Supp (2) SCC 351; Union of India v. Elphinstone Spinning and Weaving Co. Ltd., (2001) 4 SCC 139)** Ordinarily, the language used by the legislature is indicative of legislative intent. In **Kanailal Sur v. Paramnidhi Sadhu Khan, AIR 1957 SC 907**, the Supreme Court hadopined that "the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself." But when the words are capable of bearing two or more constructions, they should be construed in light of the object and purpose of the enactment. The purposive construction of the provision must be "illumined by the goal, though guided by the word."(**Kanta Goel v. B.P Pathak, 1977 SCR (3) 412**). Aharon Barak had opined that, in certain circumstances, this may indicate giving "an unusual and exceptional meaning" to the language and words used. (**AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW, (Princeton University Press, 2007), at page 306)** Before engaging in the exercise of purposive construction, it must be borne in mind that a court's power to purposively interpret a statutory text does not imply that a judge can substitute legislative intent with their own individual notions. The alternative construction propounded by the judge must be within the ambit of the statute and should help carry out the purpose and object of

the Act in question. In ***Kerala Fishermen's Welfare Fund Board v. Fancy Food, (1995) 4 SCC 341 Bharat Singh v. Management of NewDelhi Tuberculosis Centre, New Delhi, (1986) 2 SCC 614 Bombay Anand Bhavan Restaurant v. ESI Corpn., (2009) 9 SCC 61 Union of India v. Prabhakaran Vijaya Kumar, (2008) 9 SCC 527,*** the Supreme Court had settled the proposition that progressive and beneficial legislation must be interpreted in favour of the beneficiaries when it is possible to take two views of a legal provision.

E. ANALYSIS:

While it does appear that the TNERC, in its earlier orders, had taken a view similar to that canvass before us on behalf of the second Respondent, and these orders do not seem to have been subjected to challenge before this Tribunal by the appellant, the consequence of the Appellant's failure to challenge those orders would be that these orders, which have attained finality, would be binding inter- parties in subsequent proceedings. It is not the case of the second Respondent that it was a party to the earlier proceedings before the TNERC. While it could still contend that consistency demands that the Appellant apply the same yardstick to their case also, we are satisfied, on a detailed analysis of the relevant statutory provisions, that the view taken by the TNERC, in its earlier orders, does not appear to accord with law. Further, the TNERC does not appear to have noticed the judgement of this Tribunal in ***Jayaswal Neco Industries Ltd vs Chhattisgarh Electricity Regulatory Commission & Anr*** (Judgement in Appeal No. 77 of 2010 dated 18.02.2011), though the law declared therein was binding on the Commission.

Reliance placed on the judgment of the Supreme Court in "**X vs. The Principal Secretary"** is also misplaced. The intention of Parliament, as is clear from a conjoint reading of Section 2(8) and Section 9 of the Electricity Act read with Rule 3 of the Electricity Rules, is to treat each power plant and each captive generating plant separately, and not for it to be aggregated merely because they are all owned by one single entity.

We see no reason, in such circumstances, to apply the earlier orders passed by the TNERC to the present case also. It is, however, made clear that the order now passed by us shall not be understood as our having interfered with the earlier orders passed by the TNERC, in as much as the earlier orders were not subjected to challenge in appellate proceedings before this Tribunal.

X. CONCLUSION

For the afore-said reasons, the proceedings of the Appellant, holding the 2nd Respondent's Karikkali (Dindigul) power plant not to have satisfied the requirements of Rule 3(1)(a)(ii) of the 2005 Rules for FY 2014-15 and FY 2015-16, must be upheld. The impugned order passed by the TNERC must therefore be, and is accordingly, set aside.

As noted hereinabove, two issues arose for consideration in the present appeal i.e. (1) whether generation and consumption from different power plants set up for captive use for the same user, can be aggregated for the purpose of ascertaining compliance with Rule 3 of the Electricity Rules, 2005; and (2) whether the petition filed by the Appellant before the TNERC, claiming payment of cross subsidy surcharge by the 2nd Respondent for FY 2014-15 and FY 2015-16, is barred by limitation.

On the first issue we have held in favour of the Appellant, and consequently, the impugned order has now been set aside.

While elaborate submissions, both oral and written, were made, on the question of limitation, by Shri. P. Chidambaram, Learned Senior Counsel appearing on behalf of the Appellant, and Shri. M. G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, we cannot ignore the fact that this question was not even examined by the TNERC in the order impugned in this appeal, possibly because it was not necessary for them to go into this aspect on their having held the first issue in favour of the 2nd Respondent. While we have no quarrel with the submissions, urged on behalf of the Appellant, that an appeal to this Tribunal is akin to a first appeal and is a continuation of the original proceedings, we cannot also ignore the fact that this Tribunal only exercises appellate jurisdiction and would not take up on itself the task of adjudicating issues which the Regulatory Commission ought to have addressed in the first instance, but has failed to do so.

We consider it appropriate, in such circumstances, to direct the respondent commission to restore the petition hitherto filed before it by the Appellant, and decide the question, whether the Appellant's claim for payment of cross subsidy surcharge by the 2nd Respondent, for FY 2014-15 and FY 2015-16, is barred by limitation, with utmost expedition, preferably within four months from the date of receipt of a copy of this order. It is made clear that we have not expressed any opinion on the merits of the rival contentions in this regard, and the TNERC shall, after giving both the parties a reasonable opportunity of being heard, pass orders thereon in accordance with law.

Till orders are passed by the TNERC afresh, as directed hereinabove, no coercive steps shall be taken by the Appellant against the 2nd Respondent for recovery of the cross-subsidy surcharge for the afore-said two Financial Years ie FY 2014-15 and FY 2015-16. The Appeals and the I.As therein stand disposed of accordingly.

Pronounced in the open court on this ***18th day of November, 2024.***

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

√

REPORTABLE/NON-REPORTABLE