IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 252 OF 2018 & IA NO. 1012 OF 2018 & IA NO. 1453 OF 2019

Dated: 28th January, 2020

Present: HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

IN THE MATTER OF

Century Rayon
(A Division of Century Textiles
and Industries Limited)
Having its factory at Shahad,
District. Thane 421103 **..... Appellant**
Maharashtra

VERSUS

1. **The Maharashtra Electricity Regulatory Commission**
Through its Secretary,
World Trade Centre No. 1, 13th Floor, **..... Respondent No.1**
Cuffe Parade, Colaba
Mumbai 400 001

2. **The General Secretary**,
Thane Balapur Industries Association,
Rabale Village, Post Ghansoli,
Plot P-14 MIDC,
Navi Mumbai – 400701 **..... Respondent No.2**

Counsel for the Appellant … Mr. Prakash Shah
Mr. Hasan Murtaza

Counsel for the Respondent(s)… Ms. Pratiti Rungta for R-1

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. To usher in a more "efficient and environmentally benign" regime for the power sector, and to bring in certain other reforms, India adopted a new law i.e. The Electricity Act, 2003 whereby the responsibility of preparing a National Electricity Policy and Tariff Policy was placed at the door of the Central Government (by virtue of Section 3). While the generation of electricity has been relieved from the constraints of licensing, some activities like captive generation and co-generation are also encouraged by detailed provisions contained in the statute. Activities in the nature of transmission or distribution of or trading in electricity are permitted though only in terms of authorization by a license (except where exempted) under Section 12. That there is also special impetus on generation of electricity from renewable sources of energy, this being a declared and avowed public policy of the State, is not in dispute and, for this, reference may be made, *inter alia,* to Section 61(h) and Section 86(1)(e), the conjoint effect of which is to remind the Regulatory Commissions, established by the law, of their duty to promote "co-generation and generation of electricity from renewable sources of energy", while discharging their statutory functions including not only by specifying "the terms and conditions for determination of tariff" but also in determining the actual "tariff for generation, supply, transmission, etc."

2. The focus of the dispute raised by the Appellant before us is with reference to the guidance provided to the State Electricity Regulatory Commissions (SERCs) under Section 86(1)(e). The Appellant contends that the Maharashtra Electricity Regulatory Commission (MERC) while notifying Maharashtra Electricity Regulatory Commission (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2016 [MERC (RPO) Regulations 2016, for short] has failed to abide by the letter and spirit of the said statutory provision while "not exempting" all co-generators from the Renewable Purchase Obligation (RPO) and including them amongst the various categories of "obligated entity", this being discriminatory against those dependant on conventional (fossil-fuel) sources of energy.

3. The Appellant, and two other entities similarly placed, had brought challenges, particularly to Clause 11.3 of the MERC (RPO) Regulations 2016 as notified on 31.03.2016 referring, *inter-alia*, to the corresponding provision in MERC (RPO) Regulations 2010 wherein, by a proviso, the Captive Users consuming power from grid connected to fossil fuel based co-generation plants had been exempted from applicability of RPO targets and specified conditions. By its petition (Case No. 69/2016) before MERC, the Appellant had also pointed out that exemption by retention of a similar

proviso had been proposed in the draft MERC (RPO) Regulations which had been published in 2015.

4. The Appellant, feeling aggrieved by removal of the proviso (and consequent denial of exemption) made the following prayers before MERC:

> ***a.*** *"This Hon'ble Commission be pleased to suitably modify the RPO Regulations to maintain status quo and exempt captive user(s) consuming power from grid connected fossil fuel based co-generation plants, from applicability of Renewable Purchase Obligation target and other related conditions as specified in these Regulations and make suitable and consequential modifications to the said Regulations;*
>
> ***b.*** *In the alternate, this Hon'ble Commission be pleased to exercise the power under Regulation 16 to relax/waive Renewable Purchase Obligation for captive users consuming power from co-generation having capacity of more than 5 MW generating electricity based on conventional fossil fuel..."*

5. The said petition of the Appellant, as indeed of the other entities seeking similar review or modification of MERC (RPO) Regulations 2016, was dismissed by MERC, by Order dated 28.03.2018, rejecting the contentions though granting some relief by observations in concluding para (no. 23) reading thus:

> *"23. However, having due regard to the pendency of these Petitions, the circumstances of the matter and the issues involved, the Commission may consider any consequent shortfall of such captive users of non-fossil fuel based CGPs in meeting their RPO targets in FY 2016-17 and FY 2017-18 to be met to FY 2018-19 in its compliance verification proceedings for those years."*

6. The appeal at hand invokes the jurisdiction of this tribunal under Section 111 of the Electricity Act, 2003 to impugn the above said decision of MERC.

7. The appeal is contested by MERC raising the prime issue of its maintainability, the submission being that a challenge to the validity or *vires* of statutory regulations cannot be brought before this forum, it being a matter of "judicial review".

8. *Per-contra,* the Appellant submits that it does not seek declaration of the Regulation being ultra vires, its plea essentially being that the view taken by MERC falls foul of the statutory prescription, as contained in Section 86(1)(e) and, therefore, request is for the Regulation requiring a co-generator to also comply with RPO targets be read down and the Appellant be declared as exempt from meeting such targets.

9. For clear understanding of the rival contentions *vis-à-vis* maintainability issue , the prayer clause in the appeal may be quoted verbatim, it reading thus:

> *(a) The impugned order be set aside;*
>
> *(b) That this Hon'ble Tribunal be pleased to declare that the Appellant is exempt from RPO targets;*
>
> *(c) That this Hon'ble Tribunal be pleased to direct the MERC to amend the RPO Regulations, 2016, so as to restore*

the earlier exemption from RPO to captive uses of non-fossil fuel based CGP

(d) *For such other and further relief's as the nature and circumstances of the case may require.*

10. The Appellant is a company incorporated under the Companies Act, 1956. From the pleadings, it can be safely inferred that it is not in dispute that the Appellant is engaged, *inter-alia*, in diverse industrial sectors like Textiles, Cement, Tyre yarn, Viscose Filament Yarn etc., it being presently under the management and operations of Grasim Industries Limited. The Appellant depends, *inter-alia,* on captive generating plant within the meaning of the said expression defined under Section 2(8) of the Electricity Act, 2003, meaning thereby that the power plant set up by it is meant to generate electricity primarily for its own use. The power plant in question situated at Shahad, District Thane (Maharashtra) is based on conventional fossil fuel with installed capacity of more than 5 MW and runs on the process of co-generation, within the meaning of Section 2(12), in the sense it simultaneously produces two forms of useful energy including electricity. Concededly, the Appellant also relies on electricity supplied by the distribution licensee and, thus, falls in the category of open access consumer in the State of Maharashtra.

11. The prime basis of the challenge brought by the Appellant against MERC (RPO) Regulations, 2016 is founded on the decision rendered by

this Tribunal on 26.04.2010 in Appeal No. 57 of 2009 *Century Rayon vs MERC & Ors*., which was preferred by this very Appellant against an earlier order dated 18.08.2006 of MERC. It may be noted here that MERC, by the said order dated 18.08.2006, had directed the distribution licensee as well as open access users and captive consumers to purchase renewable energy. The Appellant had raised the contention at that stage that since it was running a co-generation plant it was under no obligation to purchase renewable energy in terms of the said order of MERC. It was resisted on the ground that the cogeneration process is not by use of renewable sources of energy. A petition had been preferred by the Appellant seeking clarification to that effect, the same having been dismissed by MERC by its order dated 19.12.2008. The last said order was assailed before this Tribunal by Appeal No. 57 of 2009.

12. Section 86 of the Electricity Act, 2003 spells out the functions of the State Regulatory Commission. To the extent relevant for the present discussion, it may be quoted thus:

> *"**86. Functions of State Commission:** --- (1) The State Commission shall discharge the following functions, namely: -*
>
> *(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State: Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;*
>
> *(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall*

be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

xxxx xxxx xxxx

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

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

xxxx xxxx xxxx

(2) The State Commission shall advise the State Government on all or any of the following matters, namely :-.

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(i) reorganization and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission , distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3."

(Emphasis supplied)

13. Against the above backdrop, the provision contained in Section 86(1)(e) of the Electricity Act was construed by this Tribunal in the decision dated 26.04.2010 in Century Rayon (supra), the conclusions arrived at having been summarized with resultant directions which may be extracted thus:

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

(I) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' means cogeneration from renewable sources alone. The meaning of the term 'co- generation' has to be understood as defined in definition Section 2 (12) of the Act.

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

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

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

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

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

46. In view of the above conclusions, we are of the considered opinion that the finding rendered by the Commission suffers from infirmity. Therefore, the same is liable to be set side. Accordingly, the same is set aside. Appeal is allowed in terms of the above conclusions as well as the findings referred to in aforesaid paras 16,17,22 and 44. While concluding, we must make it clear that the Appeal being generic in nature, our conclusions in this Appeal will be equally applicable to all co-generation based captive consumers who may be using any fuel. We order accordingly. No costs."

(Emphasis supplied)

14. It is the submission of the Appellant that the aforequoted decision dated 26.04.2010 in the case of *Century Rayon vs MERC & Ors*. (supra) has been consistently followed in various later decisions of this Tribunal, reference being made particularly to judgment dated 01.10.2014 in Appeal No. 112 of 2014 – *India Glycols Limited vs Uttarakhand Electricity Regulatory Commission*, judgment dated 30.01.2013 in Appeal No. 54 of 2012 – *M/s Emami Paper Mills Ltd vs Odhisha Electricity Regulatory Commission & Ors*., and judgment dated 02.01.2019 in Appeal No. 278 of 2015 – *M/s JSW Steel Limited vs Tamil Nadu Electricity Regulatory Commission*.

15. The Central Government in discharge of its statutory responsibility in terms of Section 3 of the Electricity Act, 2003, has been preparing and notifying, from time to time, National Electricity Policy and Tariff Policy which coincides with preparation and notification of National Electricity Plan once in five years. The National Tariff Policy, as was prevalent at the time of consideration of the issue by this Tribunal, leading to judgment dated 26.04.2010 in the matter of *Century Rayon* (supra) contained guidelines for encouraging cogeneration projects as well as projects based on non-conventional energy sources. Thus, this Tribunal in the said decision had noted certain guidelines in the National Electricity Policy and National Tariff Policy then in vogue.

16. It may be noted that Clause 5.12.3 of National Electricity Policy 2006 read thus:

> *"5.12.3 Industries in which both process heat and electricity are needed are well suited for co-generation of electricity. A significant potential for cogeneration exists in the country, particularly in the sugar industry. SERCs may promote arrangements between the co-generator and the concerned distribution licensee for purchase of surplus power from such plants. Co-generation system also needs to be encouraged in the overall interest of energy efficiency and also grid stability*
>
> ***(Emphasis supplied)***

17. The Tariff Policy dated 06.01.2006, issued under section 3 of the Electricity Act, 2003, *inter alia*, provided as under:

> *"5.2.26 A large number of captive and standby generating stations in India have surplus capacity that could be supplied to the grid continuously or during certain time periods. These plants offer a sizeable and potentially competitive capacity that could be harnessed for meeting demand for power. Under the Act, captive generators have access to licensees and would get access to consumers who are allowed open access. Grid interconnections for captive generators shall be facilitated as per section 30 of the Act. This should be done on priority basis to enable captive generators to become available as distributed generation along the grid. Towards this end, appropriate commercial arrangements would need to be instituted between licensees and the captive generators for harnessing of spare capacity energy from captive plants. The appropriate Regulatory Commission shall exercise regulatory oversight on such commercial arrangements between captive generators and licensees and determine tariffs when a licensee is the off-taker of power from captive plant."*
>
> *"6.3 Captive generation is an important means to making competitive power available. Appropriate Commission should create an enabling environment that encourages the captive power plants to be connected to the grid.*
>
> *6.4 Pursuant to provisions of section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage for purchase of energy from such sources(i.e. non-conventional source of energy generation including co-generation) taking into account availability of such resources in the region and its impact on retail tariffs."*
>
> ***(Emphasis supplied)***

18. As already mentioned, it is not in dispute that MERC (RPO) Regulations, 2010 which preceded the regulations that are under challenge specifically provided for an exemption from RPO targets in favour of such captive users as would consume power from grid connected fossil-fuel based generation plants. The said exemption was proposed to be carried forward for the subsequent period intended to be covered by the Regulations that were notified eventually in 2016 by inclusion of proviso to such effect in the draft regulations notified by MERC in 2015. The relevant clause of the said draft regulations put in public domain reads thus:

> *"11.3 Captive Users and Open Access Consumers who are unable to fulfil their respective RPO shall be liable to pay RPO Regulatory Charges as specified in Regulation 12:*
>
> *Provided that Captive Users consuming power from grid connected fossil fuel based co-generation plants are exempt from applicability of RPO targets and specified conditions."*
>
> ***(Emphasis supplied)***

19. In exercise of its power in terms of Section 3 of the Electricity Act, 2003, the Central Government notified the revised Tariff Policy 2016, made effective from the date of its publication (28.01.2016) (to be referred hereafter as 'Tariff Policy, 2016'). By guidelines contained in para 6.3 of the said revised Policy, Regulatory Commissions were called upon to create an enabling environment that encourages captive power plants to be connected to the grid noting that captive generation is an important means to make captive power available. The Policy reiterated the intent to

promote renewable sources for energy generation including cogeneration by, *inter alia,* stating thus:

> *"6.3 Renewable sources of energy generation including C-generation from renewable energy sources:*
>
> *(1) Pursuant to provisions of section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage of the total consumption of electricity in the area of a distribution licensee for purchase of energy from renewable energy sources, taking into account availability of such resources and its impact on retail tariffs. Cost of purchase of renewable energy shall be taken into account while determining tariff by SERCs. Long term growt5h trajectory of Renewable Purchase Obligations (RPO) will be prescribed by the Ministry of Power in consultation with MNRE.*
>
> *Provided that cogeneration from sources other than renewable sources shall not be excluded from the applicability of RPOs.*
>
> *xx xx xx xx xx"*
>
> ***(Emphasis supplied)***

20. Taking note, *inter alia,* of the revised Tariff Policy, 2016 issued by the Central Government under Section 3 of the Electricity Act, 2003, the MERC notified the MERC (RPO) Regulations, 2016 omitting the proviso to para 11.3 as published in the draft earlier, it now plainly reading thus:

> *"11.3 Captive Users and Open Access Consumers who are unable to fulfil their respective RPO shall be liable to pay RPO Regulatory Charges as specified in Regulation 12."*

21. It is clear that by omission of the proviso, the exemption that had been earlier granted from applicability of RPO targets to captive users consuming power from grid-connected fossil-fuel based cogeneration plants stood withdrawn.

22. When the withdrawal of exemption as aforesaid was questioned by the Appellant (and two other entities) leading to the impugned Order being passed, the MERC has justified the approach referring primarily to the revised Tariff Policy 2016 issued by the Central Government and a decision of Gujarat High Court referred to as *Hindalco Industries Limited (Unit:Birla Copper) vs Gujarat Electricity Regulatory Commission* in Case No. 171 of 2011 decided on 12.03.2015 *[reported at 2015 LawSuit(Guj)431]*.

23. It appears from the impugned order of MERC that, in its understanding, reliance by the Appellant on decisions of this Tribunal in the cases of *Century Rayon* (supra), *Emami Paper Mills Ltd* (supra), *Hindalco Industries Limited* (supra), etc was misplaced.

24. The critical import and significance of both cogeneration and generation of electricity from renewable sources of energy was considered at length by this Tribunal leading to the judgment dated 26.04.2010 passed in the matter of *Century Rayon* (supra). Cogeneration empowers energy supply to all types of consumers with great benefits to both users and society at large. It leads to energy savings, reducing energy costs, improving energy security and creating jobs. The statistics show, as noted in the said earlier judgment, that energy efficiency of cogeneration plant is almost double than the normal power plants which would, but for such tapping, release residual energy in the atmosphere. Thus, cogeneration

of energy helps in harnessing what may otherwise go waste, adding to the endeavour of the environmental protection which is the objective of impetus on renewable sources of energy bestowing on it the status of an important ingredient of private power policy.

25. From the above perspective, we do not have the least doubt that the interpretation of Clause (e) of Section 86(1) of the Electricity Act, 2003 by this Tribunal in the judgment dated 26.04.2010 in the matter of *Century Rayon* (supra) was based on sound logic and reasoning. The use of word "and" segregating the word "cogeneration" and the expression "generation of electricity from renewable sources of energy" is indicative of a disjunctive clause. As rightly observed in the previous judgment dated 26.04.2010, if the words "from renewable sources of energy" were to qualify, not only the words latter "generation of electricity" but also "cogeneration", it would render the use of the latter ("cogeneration") redundant. The very basic justification for such construction of the clause rests in the fact that generation of electricity includes electricity generated by the process of cogeneration. For this view, and for the detailed discourse on the subject in the judgment dated 26.04.2010 in the matter of *Century Rayon* (supra), which we adopt, we only reiterate the conclusions set out in the said judgment (para 45) as quoted earlier.

26. From the above, it naturally follows that the statutory policy inherent in Section 86(1)(e) of Electricity Act 2003 expects the Regulatory

Commissions to promote both “generation of electricity from renewable sources of energy” and also “cogeneration”. We mention the two in reverse order for better clarity and for removal of doubts, if any persist.

27. But then, the State Electricity Regulatory Commissions upon which the power and jurisdiction is conferred to frame and notify the Tariff Regulations, and also to “determine” the tariff for generation, supply, transmission, etc are expected by Section 86(4) to be “guided by” the National Electricity Policy, National Electricity Plan and Tariff Policy published by the Central Government in exercise of its enabling power under Section 3. It is the submission of the counsel for MERC/Respondent No.1 that given the express exclusion by the proviso to para 6.4(i) of the Tariff Policy 2016 (quoted earlier) it was obliged to take away the exemption by omitting the proviso to Regulation 11.3 while notifying MERC (RPO) Regulations 2016. It is also the argument of the counsel for the MERC that the National Electricity Policy, National Electricity Plan and Tariff Policy issued by the Central Government in exercise of its power under Section 3, as indeed the Tariff Regulations framed and notified by the Electricity Regulatory Commissions (ERCs) under Section 61 read with Section 181 of the Electricity Act, 2003 are in the realm of subordinate legislation and, therefore, beyond the purview of permissible challenge before this Tribunal under Section 111, the controversy raised being not a “dispute” within the meaning of the

expression used with reference to adjudicatory role of SERCs under Section 86(1)(f).

28. The Respondent Commission/MERC relies upon the rulings of the Hon'ble Supreme Court reported as *PTC India Ltd v Central Electricity Regulatory Commission [(2010) 4 SCC 603]* and *Energy Watchdog & Ors v Central Electricity Regulatory Commission & Ors. [(2017) 14 SCC 80]*. Reliance is also placed on the judgment of the High Court of Meghalaya in the case of *Byrnlhat Industries Association & Ors v State of Meghalaya & Ors*. dated 02.07.2015 *[(2015) 4 GLT 379],* and the judgment of this Tribunal dated 05.07.2007 in Appeal No. 169 of 2005 in the case of *RVK Energy Pvt. Ltd v Central Power Distribution Co. of Andhra Pradesh Ltd & Ors*.

29. On the other hand, the counsel for the Appellant was at pains to claim that the appeal does not challenge the Regulations, the relief claimed being possible to be granted "without amendment to the Regulations", it also being his argument that any regulation which is "not consistent" with the Electricity Act must be "read down". It was his submission that reliance placed on Tariff Policy, 2006 is erroneous, untenable and though conceding that it is "subordinate legislation", it could be ignored because of inconsistency with Section 86(1)(e) as interpreted in the earlier decision of 2010 in *Century Rayon* (supra). For persuading us to take this course, the Appellant would press in aid the decisions of

the Hon'ble Supreme Court in the cases of *Bhartidasan University and Another v All-India Council for Technical Education [2001 (8) SCC 676] and Shree Bhagwati Steel Rolling Mills v Commissioner of Central Excise & Anr [(2016) 3 SCC 643]*.

30. The counsel for the Appellant further submitted that there has to be consistency in the Electricity Act and orders passed thereunder across India. It was stated that the view taken by MERC leading to the present dispute which is subject matter here, is contrary to the Regulations framed by six other State Electricity Regulatory Commissions whereby co-generators are granted exemption from RPO "irrespective of usage of fuel".

31. The Appellant, by written submissions dated 13.01.2020, brought out an additional plea, it being based on a communication addressed by Ministry of Power, Government of India vide No. 30/04/2018-R&R dated 01.02.2019 giving clarification on Orders related to renewable purchase obligation. The relevant part of the said communication reads thus:

> *"……*
>
> *2. The request of various stakeholders regarding capping of RPO for Captive Power Plants (CPP) has been examined in consultation with Ministry of New and Renewable Energy and it is clarified that RPO of the CPP may be pegged at the RPO level applicable in the year in which the CPP was commissioned. As and when the company adds to the capacity of the CPP, it will have to provide for additional RPO as obligated in the year in which new capacity is commissioned. There should not be an*

increase in RPO of CPP without any additional fossil-fuel capacity being added.

3……."

32. It is the submission of the Appellant that since its CPP was commissioned in 1978, there being no RPO in vogue qua it at that stage, the same dispensation would prevail for the subsequent periods including the period in question here and consequently the Appellant would continue to be exempted from RPO targets.

33. On careful scrutiny, we do find some inconsistency between the provision contained in Section 86(1)(e) of the Electricity Act, 2003, as interpreted by this Tribunal in 2010 decision in the matter of *Century Rayon* (supra) and the Regulation 11.3 of MERC (RPO) Regulations, 2016 on account of the then existing proviso in the corresponding part of the previous regulations having been omitted. By the said change, a co-generator must also satisfy the RPO targets the exception being the co-generation process based on generation of electricity from renewable sources of energy. As was highlighted in 2010 decision of this Tribunal in *Century Rayon* (supra), the legislature has considered both the generation of electricity from renewable sources of energy and co-generation (of electricity) as areas that require to be promoted. We have briefly set out justification for legislative policy. Both these sources of generation of electricity merit impetus on account of benefits that the society as a whole derives from them. There seems to be a strong case made out for

arguing that one area meriting promotion cannot be at the cost of other area equally meriting similar promotion. To do otherwise would defeat the larger objective of such policy and may not be an advisable approach.

34. But, the Appellant is not truthful in submitting that it has not challenged the Regulations. The entire case of the Appellant before MERC was founded on challenge to the modified RPO Regulations, 2016. Prayer clause (a), as quoted in the initial part of this judgment, only needs to be referred in this context. It has to be borne in mind that the appeal is continuation of the *lis* before the forum of first instance. Further, prayer clause (c) in the appeal as also quoted verbatim earlier, nails the hollowness of the argument now raised.

35. The prerogative to formulate, notify and enforce the National Electricity Policy, National Electricity Plan and Tariff Policy is within the domain and prerogative of the Central Government in terms of Section 3 of the Electricity Act, 2003. It is not for such adjudicatory authority as this Tribunal to sit in judgment on correctness of "policy" which subject is delineated and reserved for the executive branch of the State, also for the reason that this Tribunal does not have any advisory role. The State Electricity Regulatory Commission carries and discharges multifarious responsibilities and functions, one of which – under Section 86(1)(f) – is to "*adjudicate upon the disputes*". In that sense of the frame work, the Electricity Regulatory Commission is an adjudicatory forum whose

decisions are subject to correction in appeal by this Tribunal. But, it has to be remembered that State Electricity Regulatory Commissions, as indeed the Central Electricity Regulatory Commission, also perform (besides others) legislative functions. To frame and notify Regulations is a legislative function. The Regulations framed by the State Electricity Regulatory Commissions in exercise of the power vested in them by Section 181, are in a nature of subordinate legislation and thus have the force of law. It is well settled that challenge to the *vires* of the Regulations is not permitted before this Tribunal, it being a subject of judicial review, which power is vested elsewhere. For this, we only need to quote the decision of the Hon'ble Supreme Court reported as *PTC India Limited v Central Electricity Regulatory Commission (2010) 4 SCC 603*.

36. We are not impressed by the submissions that the modified Regulations, 2016 being in teeth of the 2010 decision of this Tribunal in the case of *Century Rayon* (supra), the modification brought about by omission of the proviso existing in the preceding regulations be ignored or modified so as to have clause (b) "read down". The decision of an adjudicatory authority cannot impinge upon power and prerogative of the statutory authority vested with the competence to lay down modified State Policy. The State Regulatory Commission while framing the regulations in discharge of its functions under Section 86 is statutorily *"guided by"* the National Electricity Policy, National Electricity Plan and Tariff Policy

published under Section 3. If the said Policies, or Plan or the Regulations framed by the State Electricity Regulatory Commission under such guidance, fall foul of the letter and spirit of the statutory scheme, the validity can be challenged but only by way of judicial review before the appropriate Court of competence, definitely not before this Tribunal.

37. We are not persuaded in the present case to read down the modified regulations. So long as the modified Regulations of 2016 stand, no relief can be granted to the Appellant in terms of prayer clauses (a) & (b) in the appeal as quoted above.

38. We refrain from making any comment on the submission about inconsistency between the Regulations which are subject matter of the present appeal and similar Regulations of other State Commissions as that will not be appropriate.

39. At the hearing, it was pointed out that by prayer clause (b) in the petition before MERC, the Appellant had also requested for the power to relax/waive to be exercised by the State Commission in terms of Regulations, 2016. We note that the door for granting some relief has been opened by the Commission by observations in (para 23) the impugned decision as has been quoted earlier. We do not wish to interfere in the discretion exercised by the Commission in such regard by bringing in any further modification on that score.

40. The submissions of the Appellant based on the clarificatory order issued by the Ministry of Power on 01.02.2019, brought in as an additional ground in additional written submissions dated 13.01.2020, cannot result in any direction by us in the present proceedings. The said clarificatory order is a development subsequent to the conclusion of the proceedings before MERC and its effect was never considered by the said forum. At its best, such clarificatory order gives rise to (if any) a fresh cause of action. The Appellant is free to raise its contentions on such basis by taking out appropriate proceedings before the State Commission. We must at the same time, clarify that we are neither encouraging nor inviting nor granting any such liberty. The permissibility of such fresh challenge on the basis of the said clarificatory order would have to be considered and decided upon by the concerned authorities as and when such claim is brought.

41. For the foregoing reasons, we are not persuaded to grant any relief to the Appellant. The instant appeal, being Appeal No.252 of 2018, and pending applications are dismissed.

PRONOUNCED IN THE OPEN COURT ON THIS 28TH DAY OF JANUARY, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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