APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 260 OF 2015
APPEAL NO. 261 OF 2015
APPEAL NO. 223 OF 2016
APPEAL NO. 292 OF 2016

Dated : 2nd November, 2020

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

IN THE MATTERS OF :

APPEAL NO. 260 OF 2015

M/s. National Aluminum Company Limited
P1, Nayapally,
Bhubaneswar
Odisha – 751013
Represented through its
Executive Director(P), Sanjib Kumar Roy. .... **APPELLANT**

Versus

1. **Odisha Electricity Regulatory Commission**,
Bidyut Niyamak Bhawan
Unit-VIII, Bhubaneswar,
Odisha – 751012.

2. **Chief Executive**
Odisha Renewable Energy Development Agency (OREDA)
S-59, Mancheswar Industrial Estate,

Bhubaneswar, Odisha – 751010.

3. **Green Energy Association**
Sargam, 143, Taqdir Terrance,
Near Shirodkar High School,
Dr. E. Borjes Road, Parle (E),
Mumbai – 400012. .... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Ashok K. Gupta, Sr. Adv.
Mr. Abhishek Gupta
Mr. Saurav Baveja
Mr. Harshil Gupta

Counsel for the Respondent(s) : Mr. G. Umapathy
Mr. Rutwik Panda
Ms. Anshu Malik
Ms. Nikhar Berry **for R-1**

Mr. Parinay Deep Shah
Ms. Ritika Singhal
Ms. Surabhi Pandey **for R-3**

APPEAL NO. 261 OF 2015

M/s. National Aluminum Company Limited
P1, Nayapally,
Bhubaneswar
Odisha – 751013
Represented through its
Executive Director(P), Sanjib Kumar Roy. .... **APPELLANT**

Versus

1. **Odisha Electricity Regulatory Commission**
Bidyut Niyamak Bhawan
Unit-VIII, Bhubaneswar,
Odisha – 751012.

2. **Chief Executive**
Odisha Renewable Energy Development Agency (OREDA)

S-59, Mancheswar Industrial Estate,
Bhubaneswar, Odisha – 751010. .... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Ashok K. Gupta, Sr. Adv.
Mr. Abhishek Gupta
Mr. Saurav Baveja
Mr. Harshil Gupta

Counsel for the Respondent(s) : Mr. G. Umapathy
Mr. Rutwik Panda
Ms. Anshu Malik
Ms. Nikhar Berry **for R-1**

APPEAL NO. 223 OF 2016

M/s. National Aluminum Company Limited
P1, Nayapally,
Bhubaneswar
Odisha – 751061
Represented through its
Executive Director(P), Sanjib Kumar Roy. .... **APPELLANT**

Versus

1. **Odisha Electricity Regulatory Commission**
Bidyut Niyamak Bhawan
Unit-VIII, Bhubaneswar,
Odisha – 751012.

2. **Chief Executive**
Odisha Renewable Energy Development Agency (OREDA)
S-59, Mancheswar Industrial Estate,
Bhubaneswar, Odisha – 751010. .... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Ashok K. Gupta, Sr. Adv.
Mr. Abhishek Gupta

Mr. Saurav Baveja
Mr. Harshil Gupta

Counsel for the Respondent(s) : Mr. G. Umapathy
Mr. Rutwik Panda
Ms. Anshu Malik
Ms. Nikhar Berry **for R-1**

APPEAL NO. 292 OF 2016

M/s Utkal Alumina International Limited
Registered office at J-6, Jayadev Vihar,
PO/PS: Bhubaneswar
District: Khurda, Odisha
Represented by its Director
and Authorised person Shri Rabindra Misra,
Residing at 53-Basant Vihar
Brahmeswar Patna, Tankapani Road,
Bhubaneswar, Odisha. - 751018 .... **APPELLANT**

Versus

1. **The Odisha Electricity Regulatory Commission**
Represented through its Secretary
Plot No. 4, Chunukoli, Saileshree Vihar
Chandrasekharpur, Bhubaneswar – 751023
Odisha.

2. **Orissa Renewable Energy Development Agency (OREDA),**
Represented through its Chief Executive,
S-59, Muncheswar Industrial Estate, Nayapalli,
Bhubaneswar – 751001
Odisha. .... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Syed Shahid Husain Rizvi
Mr. Zeeshan Rizvi

Counsel for the Respondent(s) : Mr. G. Umapathy
Mr. Rutwik Panda
Ms. Anshu Malik
Ms. Nikhar Berry for R-1

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

Appellant - National Aluminum Company Limited (in short "**NALCO**") is a company incorporated under the provisions of the Companies Act, 1956, having its Registered Office at P1, Nayapally, Bhubaneswar, Odisha having Alumina & Aluminium integrated complex at Damanjodi and Angul, Odisha. The Appellant has set-up an Integrated Alumina and Aluminium Plant Located at Damanjodi and Angul in the state of Odisha. The Appellant has also installed Captive Power Plant (CPP), Steam and Power Plant (SPP), a co- generation plant. The present capacity of the CPP is 1,200 MW (120 MW * 10 Units) and SPP is 74 MW (18.5 MW *4 Units).

2. Appellant - M/s Utkal Alumina International Limited (in short **"UAIL"**) is a company incorporated under the provisions of the Companies Act 1956 and is engaged in the refining of Bauxite, a major mineral, to produce Alumina which is an input material in the manufacturing of Aluminium. The Appellant has set up a cogeneration based captive power plant of 90 MW capacity,

comprising of three numbers of 30 MW turbo generators each. The three units were commissioned on various dates namely TG1 on 12.08.2013, TG2 on 25.04.2014 and TG3 on 01.07.2014 respectively after obtaining energisation permission from the Chief Electrical Inspectorate. The steam generated is used for meeting the production process requirement and simultaneously power is generated from the residual steam and thereby overall thermal efficiency is optimized to generate captive power.

3. Appeal No. 223 of 2016 is filed against Order dated 21.11.2013, passed by Orissa Electricity Regulatory Commission (in short **"OERC / Commission"**). The Commission rejected the contention of the Appellant that it shall be deemed to have fulfilled its RCPO obligation since the power consumption from its co-generation source is 5.59% and 5.5% of its total consumption against the total requirement of 5% and 5.5% for the financial year 2011-12 & 2012-13 respectively. The Appellant had placed reliance on the Judgment of this Tribunal in the case of ***M/s. Emami*** *in Appeal No. 54 of 2012* and ***M/s. Vedanta Aluminium*** *in Appeal No. 59 of 2012.* OERC held that the above Judgments are applicable only to the petitioners in those cases and, accordingly, directed appellant to purchase REC to fulfil its solar purchase obligations.

4. Appeal No. 261/2015 is directed against Order dated 07.08.215, passed by OERC in Case No. 59 of 2014 wherein the Commission reiterated that the reliance on earlier Judgments of the Tribunal in the case of M/s Vedanta and Century Rayon is of no consequences in view of the Judgment of the Hon'ble Supreme Court of India dated 13.05.2015 in the case of M/s. Hindustan Zinc Ltd. and therefore, held that the reasons for non-fulfilment of RPO obligation are not justified and that they must comply the said obligation).

5. Appeal No. 260 of 2015 is directed against Order dated 11.08.2015 of OERC in the case instituted by M/s. Green Energy Association. In the impugned order, the Commission-OERC reiterated the earlier Order dated 07.08.2015.

6. Appeal No. 292 of 2016 is filed against the impugned order of the OERC dated 30.07.2016 whereby the Commission has disposed of the Case No 36 of 2015 declaring the Appellant to be an obligated entity.

7. The facts of the case in brief are as under:

In accordance with the provisions of Section 86 (1) (e) and 181 of the Indian Electricity, 2003 (in short **"the Act"**), OERC vide its Notification

No. OERC- Engg- 02/2010 dated 30th September 2010 formulated OERC (Renewable and Co-generation purchase obligations and its compliance) Regulation, 2010 (in short **"OERC (RCPO) Regulation, 2010")**.

8. On 20.03.2013, on the basis of the Appellant - NALCO having met its co-generation obligation for the year 2011-12 and 2012-13 (its co-generation being 5.59% & 5.56%), the appellant filed an application before the OERC seeking waiver/ exemption from its renewable and co-generation energy obligation.

9. On 21.11.2013, OERC rejected the said application. One of the instant **Appeal**s **No. 223 of 2016 is filed against this order**.

10. On 14.08.2014, Green Energy Association (Respondent No. 3 in Appeal No. 260 of 2015) claiming to be a non-profit organization filed an application before the Commission against the Appellant complaining of non-compliance of order dated 21.11.2013 in Petition No. 21/2013 seeking immediate action in the event of failure.

11. 20.10.2014, OREDA (Respondent No. 2 in Appeal Nos. 260 of 2015 & 261/2015 herein) filed an application under section 142 of the Act for alleged non-compliance of OERC regulations against a large number of companies, including the Appellant.

12. On 15.07.2015,the Appellant filed a Review Petition before the OERC seeking review of the above order dated 21.11.2013. The review application is dismissed.

13. On 07.08.2015, OERC by order dated 07.08.2015 in case no. 59/2014 directed that the Appellant must comply with the obligation in full by 31.08.2016 and that all shall submit compliance report to OREDA. **Appeal No. 261 of 2015 is filed against this order dated 07.08.2015**.

14. On 11.08.2015, OERC disposed of case No. 54/2015 filed by Green Energy Association (in short **"GEA"**) in the light of order dated 07/08/2015 in case No. 59/2014. One of the instant **Appeals No**. **260 of 2015 is filed against the order dated 11/08/2015** in case No. 54/2014.

15. The Commission in one of the impugned orders dated 21.11.2013 held that the order of the Tribunal in the case of ***M/s. Vedanta Aluminum Ltd.*** is applicable only to the petitioner in that case and Appellant can take no benefits from the order passed in the case of ***M/s. Vedanta*** in Appeal No. 59 of 2012 disposed of on 31.01.2013, and so also judgment dated 30.01.2013 in Appeal No. 54/12 in the case of ***M/s. Emami Paper Mills Ltd.*** The Commission further held that the said judgment of the Tribunal shall be of no avail as the Commission has filed Appeal before the Hon'ble Supreme Court being Civil Appeal No. 5466-5467 of 2013. The Appellant

was therefore, directed to purchase REC to fulfil its Solar Purchase Obligation and the Appellant is not allowed to carry forward the surplus non-solar REC purchased by them.

16. Appellant – NALCO contends that as per provisions in Section 2(h) (2) of the said notification, the petitioner cannot be said to be an "Obligated Entity" consuming electricity generated from Captive Power Plant at Angul and Steam and Power Plant at Damanjodi having capacity of 1200 MW and 74 MW respectively.

17. As per Clause 3 of Renewable and Co-generation purchase Obligation (RCPO), 2010, the petitioner shall purchase not less than 5% of its total annual consumption of energy from co-generation and renewable energy sources under the RCPO Regulation from 2011-12 onwards with 0.5 percentage increase every year thereafter, till 2015-16 or as reviewed by the Commission even earlier, if any.

18. Accordingly, the year and source wise RCPO would be as indicated below:

Year- wise Target	**Minimum quantum of purchase in percentage (in terms of energy consumption in the State in KHW)**			
	Renewable		**Cogeneration**	**Total**
	Solar	**Non- Solar**		

2009-10 **(actual)**	-	0.80	3.45	4.25
2010-11	-	1.0	3.50	4.5
2011-12	**0.10**	**1.20**	**3.70**	**5.0**
2012-13	**0.15**	**1.40**	**3.95**	**5.5**
2013-14	0.20	1.60	4.20	6.0
2014-15	0.25	1.80	4.45	6.5
2015-16	0.30	2.00	4.70	7.0

19. Appellant further contends that, as the Appellant's unit is having Co-generation plant as per definition of "Co-generation" under Section 2 (12) of Electricity Act 2003 and in terms of clause 2(1) of Resolution No. A-40/95/IPC-1 dated 6th November 1996 issued by Ministry of Power, Govt. of India. The Appellant's unit is generating power by supplementing heat from coal under topping cycle, in terms of clause 5.1(i). In terms of the definition of cogeneration under clause 2(1) as stated above under the Resolution, the Applicant company is not liable to purchase RECs in respect of 3.7% and 3.95% of their total annual consumption from Captive Power Plants for the year 2011-12 and 2012-13, which is met from the captive co-generation plant (SPP) at Damanjodi. Further, in view of the quarterly reports for the years 2011-12 and 2012-13 (up to February 2013), the Appellant's unit having Co-generation facility is not liable to purchase certificates with respect to 3.7% for 2011-12 and 3.95% for 2012-13 of their consumption as their energy from Co-generation is more

than the specified target in terms of regulation, is the stand of the Appellant.

20. According to Appellant, during the year 2011-12, the Appellant has not met its renewable solar obligation and has met partly its Non-solar obligation by purchasing 30,694 Nos. of REC Certificates from the Power Exchanges. Seeking waiver of Solar Obligation along with carry forward of the Non-Solar obligation to next year and beyond, the Appellant - NALCO has filed a petition before OERC in case No. 28 of 2012 praying for waiver of Solar Purchase obligation and carry forward the balance of Non-solar RPO obligation of 2011-12 to the next year. The said petition is still pending disposal by OERC.

21. The Appellant also contends that as regards the total RPO compliance target by any obligated entity, this Tribunal in its orders dated 30th and 31st January, 2013, passed in Appeal Nos. 54 (Emami) and 59 (Vedanta) of 2012 respectively, has observed that *"the definition of the obligated entity would not cover a case where a person is consuming power from co- generation plant" and "the same relaxation must have been allowed in respect of consumers meeting electricity consumption from captive Co- generation plant in excess of the total specified RCPO obligation i.e. the Solar and Non- solar RPO obligation*

can be met from the excess co-generation power consumed by the obligated entity and will be exempted from obtaining electricity from Solar and Non- Solar sources of renewable energy for meeting the respective RPO obligation."

22. Besides the above, the Tribunal's findings in Appeal No. 59 of 2012 tantamount to declaration of law and are obviously binding on all, including the respondent - OERC. Appellant contends that accordingly, as per OERC RCPO Regulation, 2010, the power consumption from its cogeneration sources were 5.59% and 5.5% of the total consumption as against the requirement of 5% and 5.5% for the financial year 2011-12 and 2012-13 respectively. The Appellant has thereby already met its cogeneration obligation which is in excess of the specified RCPO target of 5% for 2011-12 and 5.5% for 2012-13. Therefore, following the aforesaid findings of the Tribunal, Appellant being a fully compliant obligated entity will not be required to purchase further RECs for the year 2011-12 and 2012-13 for allegedly having not met its specified RCPO obligation from renewable sources of energy. In Appeal No.112/2014 also in the case of ***India Glycols Ltd.*** this Tribunal reiterated its earlier views.

23. Appellant contends that, since the Appellant has already purchased Non-solar REC of 30,694 Nos. in the year 2011-12; the Appellant

expected the same to be carried forward as compliance of the Financial Year 2013-14.

24. According to Appellant, its contention is supported by series of cases decided by this Tribunal vide (i) ***Century Rayon Vs. Maharashtra Electricity Regulatory Commission*** (Appeal No. 57 of 2009); (ii) ***Hindalco Industries Ltd. Vs. Uttar Pradesh Electricity Regulatory Commission*** (Appeal No. 125 of 2012)**;** (iii) ***India Glycols Ltd. Vs. Uttarakhand Electricity Regulatory Commission*** (Appeal No. 112 of 2014); (iv) ***Emami Paper Mills Ltd. Vs. Orissa Electricity Regulatory Commission and Ors.*** (Appeal No. 54 of 2012); (v) ***Vedanta Aluminium Ltd. Vs. Orissa Electricity Regulatory Commission*** (Appeal No. 59 of 2012)**; and** (vi) ***Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission*** (Appeal No. 53 of 2012)**.**

25. Appellant further contends that the Judgment dated 13.05.2015 by the Hon'ble Supreme Court in the case of ***Hindustan Zinc Ltd***. has no application to the controversy on hand and the Judgments of this Tribunal are neither dealt with nor referred to, since the question involved therein was entirely different. Further, the earlier judgments of this Tribunal in ***Century Rayon***, ***Hindalco***, ***Vedanta*** etc. have been re-affirmed by this Tribunal in its judgment dated 02.01.2019 in ***M/s JSW Steel Ltd***, and

judgment dated 09.04.2019 in the case of ***M/s Ultratech Cement vs. Karnataka Electricity Regulatory Commission & Ors.***

26. According to Appellant, in all the instant Appeals, the question requiring consideration may be whether the Appellant has fulfilled the RCPO obligation as the percentage of its energy consumption from the captive cogeneration plant is equal to or in excess of the total RCPO obligation as per OERC Regulation, 2010.

27. Appellant contends that in view of the above, the Appellant is under no legal obligation to purchase RECs in respect of solar and non-solar obligation for the year 2011-12 and 2012-13 as it has consumed cogeneration power from its captive cogeneration plant in excess of the RCPO obligation for the said years.

28. According to Appellant – UAIL, this Tribunal vide its judgment dated 26.04.2010 in Appeal No 57 of 2009 in the matter of ***Century Rayon vs MERC & ors*** categorically held that co-generation in Section 86(1)(e) of Electricity Act, 2003 (hereinafter referred to as **"the Act"**) does not mean co-generation from renewable sources alone, but co-generation from other sources, including conventional sources such as fossil fuel is also covered under the purview of Section 86(1)(e) and ought to be promoted. The Tribunal also held that the Appellant co-generator was under no obligation

to purchase electricity from Renewable Energy Producer as it would defeat the object of Section 86(1)(e) of the Act. This Tribunal further held that "the Appeal being generic in nature, our conclusions in this Appeal will be equally applicable to all cogeneration based captive consumers who may be using any fuel."

29. According to Appellant - UAIL, the 90 MW cogeneration plant set up by the Appellant to meet its entire captive consumption of power is not a conventional power generating plant. The Appellant does not have any other source of power to cater to its requirement of captive power consumption. Its aforesaid captive power plant is a cogeneration based power plant inasmuch as it utilizes the thermal energy of coal to generate steam as a main product and in order to utilize the optimum heat energy generated from coal, part of enthalpy of steam is converted into electrical energy by passing it through a turbo-generator. The turbine involved in this process is basically an expanding turbine which in turn reduces the consumption of coal as compared to conventional turbines due to minimum condensation loss and higher thermal efficiency. The cycle efficiency of this process is much higher as compared to conventional condensing type steam turbine on account of minimum condensation loss. Instead of generating steam only for the purpose of refining Bauxite to convert it to Alumina, the available enthalpy of steam is simultaneously

utilized to generate power for captive consumption. Thus, the total calorific value of coal is fully utilized.

30. The Appellant further contends that the electrical power requirement of different Industrial, domestic and agricultural sectors is met normally by electricity generated by conventional power plants. Under the conventional power plant cycle maximum energy loss takes place in the turbine condenser for condensing the turbine exhaust steam and total cycle efficiency works out to be in the range of 34-36%. In contrast, the Appellant's cogeneration based captive power plant utilizes the energy stored in coal and other fossil fuels to convert water into steam and the thermal energy of steam is in turn utilized in the Turbine-Generator set to transform mechanical energy into electrical energy and the exhaust steam is further utilized in production process. The system efficiency is much higher compared to the conventional power plant.

31. The Appellant further contends that even though this Tribunal in ***Century Rayon*** has categorically held that captive co-generating plants are not required to purchase electricity from Renewable Energy Producer, the OERC in Suo Moto Case No 111 of 2011 vide order dated 13.02.2012 held that captive co-generation units are also included in the definition of

"Obligated entity". Therefore, what was explicitly not provided under the Regulations was sought to be covered by the said order. OERC distinguished the binding and categorical judgement of this Tribunal in ***Century Rayon*** by holding that the said judgment was rendered on the basis of the Regulations framed by the Maharashtra State Commission and the same would not apply to OERC. The aforesaid judgment of OERC was appealed against before this Tribunal. The Tribunal vide its judgment dated 30.01.2013 in Appeal No. 54 of 2012 ***(Emami Paper Mills Ltd. vs. Odisha Electricity Regulatory Commission)*** not only set aside the said judgment of OERC but also showed its anguish about the manner in which OERC has dealt with by ignoring the binding and categorical directions of this Tribunal in ***Century Rayon***'s case. While interpreting the relevant provisions of the Regulations, 2010, this Tribunal categorically held that a cogeneration based captive power plant is not a conventional captive power plant and hence an entity sourcing its requirement of captive power consumption from such cogeneration based power plant is not an "obligated entity" within the meaning of Clause 2 (h) of the Regulations, 2010 and consequently is not obligated to discharge the purchase obligations as mandated by Clause 3 of the Regulations, 2010.

32. According to the Appellant, this Tribunal again in Appeal No 59 of 2012 in the matter of ***Vedanta Aluminium Ltd vs OERC*** reiterated the

said principles as held in Appeal No 54 of 2012, by holding that the definition of the obligated entity would not cover a case where a person is consuming power from co-generation plant. Relying on the judgments of this Tribunal in Appeal No 54 of 2012 in ***Emami Paper Mills Ltd***, and Appeal No 125 of 2012 in ***Hindalco Industries Ltd***, the Appellant filed the Case No 36 of 2015 before OERC seeking a declaration/clarification that the Appellant is not an obligated entity and hence is not required to discharge purchase obligation in terms of Clause 3 of the said Regulations. The OERC has disposed of the said Case No. 36 of 2015 in gross violation of judicial discipline by refusing to follow the law laid down by this Tribunal in Appeal No 54 of 2012 in the matter of ***Emami Paper Mills Ltd,*** and in Appeal No 59 of 2012 in the matter of ***Vedanta Aluminium Ltd vs OERC*** and judgment dated 10.04.2012 delivered in Appeal No.125 of 2012 in the matter of ***Hindalco Industries Ltd v UPERC & ors.*** Even though the law laid down by this Tribunal was unambiguous and clear, but by way of abundant caution relying on the various judgments of this Tribunal particularly its judgments in Appeal No 54 of 2012 and Appeal No 59 of 2012, the Appellant filed the Case No 36 of 2015 under section 86 (1) (e) of the Electricity Act, 2003 read with Clause 2 (h) of the OERC (RCPO) Regulations, 2010.

33. The Appellant also contends that the judgment of this Tribunal in ***Century Rayon***'s case became final and binding on all the State Commissions as no Appeal against this judgment was filed in the Hon'ble Supreme Court of India. According to Appellant, in yet another case of ***Hindalco Industries Ltd***, the parent company of the Appellant who has a cogeneration plant at Renukoot in Uttar Pradesh and whose petition for relaxation of RPO obligation in respect of its captive cogeneration plant at Renukoot was rejected by the Uttar Pradesh Electricity Regulatory Commission (UPERC), this Tribunal vide its judgment dated 10/04/2013 in Appeal No 125 of 2012 filed by Hindalco decided in favour of Hindalco and directed the State Commission to exempt the captive consumers from RPO obligations, who meet the specified percentage of energy from the captive co-generation plant in respect of which fuel is used.

34. The Appellant also contends that a Full Bench of this Tribunal in Appeal No 53 of 2012 in the case of ***Lloyds Metal & Energy Ltd v MRC & Ors*** on a reference by a Division Bench dealt with another issue namely "Whether the Distribution /Licensees could be fastened with the obligation to purchase a percentage of its consumption from co-generation irrespective of the fuel used under Section 86(1)(e) of the Act, 2003". This issue arose in the background of the fact that the Appellant therein filed a

Petition before the MERC for determination of tariff for supply of electricity from its fossil fuel based co-generation plant to the Distribution Licensees in Maharashtra and for fixation of purchase obligation of the Distribution Licensees from electricity produced from fossil fuel based co-generation plant under Section 86(1)(e) of the Electricity Act, 2003 which was rejected by the MERC. While deciding the issue against the Appellant vide comprehensive judgment dated 02.12.2013, the Full Bench noted that the captive users consuming power from grid connected fossil fuel based cogeneration plants have been exempted from applicability of Renewable Purchase Obligation target.

35. The Appellant further contends that while interpreting the relevant provisions of the OERC (RCPO), Regulations, 2010 in respect of co-generation, this Tribunal in Appeal Nos. 54 and 59 of 2012 categorically and unambiguously held that a cogeneration based captive power plant is not a conventional captive power plant and hence an entity sourcing its requirement of captive power consumption from such co-generation based power plant is not an "obligated entity" within the meaning of Clause 2 (h) of the Regulations, 2010 and consequently is not obligated to discharge the purchase obligations as mandated by Clause 3 of the Regulations, 2010. After setting aside the contra view taken by the OERC in the impugned order therein, this Tribunal further directed the

State Commission "to pass the consequential orders in terms of the conclusions arrived by this Tribunal in the Appeal". In the aforesaid judgment, this Tribunal had expressed its "*anguish to remark that unfortunately the State Commission has not followed the judicial propriety by ignoring well laid down principles contained in the judgment of this Tribunal, which is binding on the authority"*

36. According to the Appellant OERC reiterated its position taken in its old decisions which were specifically and unequivocally set aside by this Tribunal in its judgments in Appeal No 54 of 2012 and Appeal No 59 of 2012 regarding interpretation of the provisions of the same OERC (RCPO), Regulations, 2010 in respect of purchase obligation of cogeneration under the said Regulations.

37. According to the Appellant, the law laid down by this Tribunal vide judgment in Appeal No 54 of 2012 ***(Emami Paper Mills Ltd v OERC & ors)*** dated 30.01.2013 delivered in identical situation in respect of the same OERC (RCPO) Regulation, 2010 which is generic in nature and is binding on the OERC, which on interpretation of the provisions of the Regulations, 2010 categorically and unambiguously holds that co-generation based power plant is not an obligated entity within the meaning

of clause 2(h) of the Regulations, 2010 and consequently is not obligated to discharge the purchase obligations as mandated by Clause 3 of the Regulations, 2010.

38. The Appellant contends that in gross violation of judicial discipline, the OERC refused to follow the law laid down by this Tribunal by distinguishing it in paragraph 11 of its impugned judgment that "the decision of the APTEL was different from the position adopted by Commission. While commission interpreted the provisions of 86(1)(e) linked to Renewable Energy, APTEL held that cogeneration and generation from renewable energy are two different aspects. This led to divergent conclusions on applicability of "obligated entities" status." Further, the OERC in paragraph 12 erroneously reiterated its old decisions and held that "the Commission does not have any other reason placed before it afresh by the petitioner to reconsider and depart from our old decisions".

39. Based on the above pleadings, the following questions of law arise according to Appellants:

A. Whether the Appellants, the co-generation plants are under a legal obligation to purchase power from the renewable sources

of energy for meeting the Renewable Purchase Obligation of its captive load?

B. Whether the Commission can issue binding directions even as this Tribunal and the Hon'ble Supreme Court are already seized of the matter?

C. Whether the reliance placed by the Commission on the judgment of the Hon'ble Supreme Court in the case of ***Hindustan Zinc Ltd. Vs. RERC*** **(C.A No. 4417/2015)** is not erroneous?

D. Whether the definition of "Obligated entity" under Clause 2 (h) of the Regulations, 2010 includes a consumer consuming electricity from its Captive Cogeneration plant?

E. Whether judicial propriety and discipline required the OERC to follow the interpretation of the relevant provisions of the OERC (RCPO) Regulations, 2010 by this Tribunal in Appeal No. 54 of 2012 in the matter of ***Emami Paper Mills Ltd.*** **Vs.** ***OERC & Ors*** and Appeal No. 59 of 2012 in the matter of ***Vedanta Aluminium Ltd.*** **Vs.** ***OERC & Ors*** until the said judgments are set aside by the Hon"ble Supreme Court?

F. Whether the impugned judgment of the OERC is arbitrary, whimsical, lacks judicial propriety and in destructive of one of the basic principles of administration of justice?

G. Whether in the facts and circumstances of the case and on the interpretation of clause 2 (h) of the Regulations, 2010, the Appellant is an obligated entity?

40. **Being aggrieved by the impugned Orders passed by OERC, the Appellants have filed the present appeals seeking the following reliefs:**

A. Set aside the orders dated 21.11.2013 in case No. 21/2013, dated 07.08.2015 in case No. 59/2014 and dated 11.08.2015 in case No. 54/2014 passed by the Odisha Electricity Regularity Commission.

B. To quash and set aside the Order dated 30.07.2016 passed by the Respondent No 1 - the Odisha Electricity Regulatory Commission in Case No 36 of 2016.

C. Grant such other reliefs as deemed just and necessary in the facts and circumstances of the case.

41. ***Per contra,*** **Respondent No.1 – Orissa Electricity Regulatory Commission filed counter affidavit, in brief as under:**

According to Respondent No. 1 – OERC, to arrest climate change, the Government of India has embarked upon an action plan called National Action Plan for Climate Change to save the humanity from future climatic catastrophe. The promotion of Renewable energy and Co-generation is a step in this direction. This will reduce and eventually eliminate fossil fuel based power plants which emit green house gases and is responsible for global warming.

42. According to Respondent No. 1- OERC, Section 3 (1) of the Act provides that the Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilization of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy. Section 4 of the Act which deals with National Policy provides that the Central Government shall, after consultation with the State Governments, prepare and notify a National Policy, permitting stand alone systems (including those based on renewable sources of energy and non-conventional sources of energy) for rural areas. In Compliance with Section 3 of the Act,

the Central Government notified the National Electricity Policy dated 12.02.2005. Clause 5.2.20 of the National Electricity Policy deals with non-conventional energy sources. Clause 5.2.20 of National Electricity Policy read with Section 3 and 4 of the Act mandate that efforts should be made to encourage private sector participation through suitable promotional measures. Govt. of India has framed Rural Electrification Policy vide Resolution dated 23.08.2006 and also formulated National Electricity Policy vide Resolution dated 12.02.2005.

43. According to Respondent No.1 – OERC, in terms of the provision of Section 86 (1) (e) of the Act, the Commission has made Regulation called OERC (RCPO) Regulations, 2010 in exercise of its power under Section 181 of the Act. Regulation 3 of the said Regulations provides for procurement of certain percentage of energy requirement for renewable and Co-generation sources by obligated entities only.

44. Respondent No.1 - OERC contends that before framing of the Regulation, the Commission made pre-publication of the Regulation under Section 181 (3) of the Electricity Act, 2003 inviting suggestions and objections from the general public, stakeholders etc. thereon in Case No. 59 of 2010. After obtaining the views from the stakeholders and after conducting public hearing in Case No. 59 of 2010, the Commission framed

the said Regulation called as OERC Regulations, 2010 (in short **"RCPO Regulation**").

45. The Appellants have been given sufficient opportunity to present its objections/views, if any, at the time of framing of the Regulation and the Appellant – NALCO had participated in the same. The Regulation has been laid before the Odisha Legislative Assembly as per Section 182 of the Act. Therefore, the Appellant has wrongly stated that the OERC is not empowered to create compulsory obligation upon a person to purchase certain quantity or percentage of electricity from Renewable and Co-generation sources.

46. Respondent No.1 - OERC further contends that the co-generation based CGPs of the Appellant use coal as fuel for generating electricity. Therefore, the Appellant is not eligible for any exemption under the Regulation for consuming such electricity. The electricity consumed by Appellant from such CGPs should be treated similar to any other conventional power plant.

47. According to Respondent No.1 - OERC, the Hon'ble Supreme Court of India has pronounced a land mark Judgment on 13.05.2015 on the applicability of Renewable Purchase Obligations (RPO) regulations in

Civil Appeal No. 4417 of 2015 in the case of ***Hindustan Zinc Ltd. Vrs. Rajasthan Electricity Regulatory Commission & 10 others*** arising out of S.L.P. No. 34063 of 2012. The Hon'ble Apex Court dismissed the appeals preferred by the petitioners and upheld the Renewable Purchase Obligation (RPO) Regulations framed by the State Regulatory Commissions under Section 181 of the Electricity Act,2003. The Regulation 3 (1) of OERC (RCPO) Regulations, 2010 provides every obligated entity shall purchase not less than 5% of its total annual consumption of energy from co-generation and renewable energy sources under the RPO Regulation from 2011-12 onwards with 0.5% increasing in every year thereafter till 2015-16 or as reviewed by the Commission even earlier. Regulation 6 (3) of OERC (RCPO) Regulations, 2010 provides that Respondent No.1- OERC shall designate an agency as State agency inter alia for submitting quarterly status to the Respondent No.1 (Commission) in respect of compliance of Renewable Purchase obligation by the obligated entities and suggests appropriate action to the Respondent No.1, if required for its compliance. Accordingly, OERC - Respondent No.1 has designated Odisha Renewable Energy Development Agency (OREDA) as State designated agency on 18.11.2010 to undertake function under the Regulation.

48. According to Respondent No.1 – OERC, the contention of the Appellant that since the two judgments of this Tribunal in Appeal Nos. 54 & 59 of 2012 have not been set aside or stayed by the Hon'ble Supreme Court, it is binding on the State Commission to allow carrying forward of surplus non-solar RECs purchased by them during the past period i.e. 2011-12 and utilize them as a renewable purchase compliance requirement for FY 2013-14 is not based on the Regulation of the Commission framed as well as latest judgements of the Tribunal. From Para-39 of the Judgment in Appeal No. 53/2012 dated 02.12.2013 (***Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission & Others***) which is the latest full Bench judgement, it is clear that the fossil fuel based co-generation does not qualify for exemption under Renewable Purchase Obligation Regulation of the Commission.

49. Respondent No.1 also contends that the RCPO Regulation, 2010 is the subject matter in W.P.(C) Nos.5243 of 2012, WP(C) No.5515 of 2013 & W.P.(C) No.3824 of 2015 pending before the High Court of Orissa. The petition of M/s. NALCO in Case No. 28/2012 is pending before the Commission (Respondent No.1) due to interim stay order of High Court of Orissa in WP(C) No. 5243/2012 (***M/s. Hindalco Vrs. OERC & others***). The judgments of the High Court of Orissa in all the above writ petitions

shall also be applicable to the present Appellant since the validity of the Regulation is under challenge before the said Court.

50. Respondent No. 1 - OERC also contends that its impugned order in the Case No.59 of 2014 has been stayed by interim orders of the High Court of Orissa in several writ petitions and unless the stay order is vacated which was passed in the said writ petitions along with the writ petition of ***M/s. Action Ispat & Power Pvt. Ltd.*** by High Court of Orissa and the above Appeals are not dismissed by this Tribunal as redundant/ infructuous in terms of the above judgment of the Hon'ble Apex Court, the policy formulated by Govt. of India mandates to arrest the climate change shall be frustrated. Almost all the States in India in compliance to statutory provisions have framed the Regulation and the same has been implemented by all the obligated entities. Furthermore, there are quite a large number of Industries in the states (numbering about 100) having fossil fuel based Captive Power Plant which are designated as 'Obligated Entity'. The process of Regulation is applicable to all of them. Most of the Obligated Industries are interested to enjoy Odisha Regulation by buying "Renewable Energy Certificate" (REC) from power exchange. The dismissal of the instant Appeals by the Tribunal would help the obligated entities, at large, is the stand of Respondent No. 1 – OERC.

51. Responder No. 1 – OERC contends that the Appellant – UAIL is engaged in the refining of Bauxite to produce Alumina. Electrical Power & Steam are two basic inputs in the process of refining of Bauxite to Produce Alumina. The Appellant has established a Co-generation based Captive Generating plant of 90 MW capacity for meeting its power requirement for refining bauxite to produce alumina. The Appellant submitted that the power plant owned by it is a Co-generating plant as it utilizes the thermal energy of coal to generate steam as a main product and electricity as a part by product. What the Appellant seeks to achieve is that their plant need to be excluded from the category of obligated entity required under RCPO Regulations, 2019 because of its "co-generation" status leading to exemption from procurement of renewable energy as obligated entity. The reason urged by the Appellant is on the basis that their plant is a co-generation plant and therefore, not required to purchase renewable energy by virtue of orders in Appeal No. 57 of 2012 and Appeal No. 54 of 2012 of this Tribunal. Respondent No. 2 – Orissa Renewable Energy Development Agency (in short **"OREDA"**) submitted before the OERC that the provisions of Section 86(1)(e) of the Electricity Act, 2003 is to be interpreted what it says and co-generation is to be construed as co-generation from RE sources only and therefore, the Appellant is an obligated entity.

52. According to Respondent No.1, the power generated from the said Captive Power Plant is solely and exclusively used for Alumina production. The process followed by the Appellant to produce energy through its captive power plant is based on fossil fuel i.e., coal as fuel.

53. Respondent No.1 further contends that the Appellant – UAIL has been given sufficient opportunity to present its objections/views, if any, at the time of framing of the Regulation by OERC and the Appellant had not participated in the proceeding for framing of the OERC RCPO Regulations, 2010. One of the definitions of the obligated entity as given in the Regulation 2 (h) is *"2(h) (2): Any other person consuming electricity (i) generation from conventional Captive Generating plant having capacity of 5 MW and above for his own use and / or (ii) procured from conventional generation through open access and third party sale."* The present Appellant comes under this category as per the above definition of the said RCPO Regulations. The Regulation is applicable to the industry (any other person) consuming electricity from conventional Captive Generating Plant having capacity of 5 MW and above. The Appellant has misinterpreted the said Regulation stating that it being a Co-generation plant is beyond the purview of obligated entity. On the other hand, it is a

consumer industry having a conventional captive generating plant of capacity of more than 5 MW is an obligated entity.

54. According to Respondent No.1, it is clear from the above Judgment of the Hon'ble Apex Court that the Regulation framed by the Commission has its application to the industry having CGP as well as to Co-generation plant. What is important from the observations of the Hon'ble Supreme Court in the above Judgment is that development of Renewable Energy through purchase from such sources through implementation of RCPO Regulations, 2010 is a mandate under the Electricity Act, 2003 and it has been appropriately promoted by the Commission through the RCPO Regulations, 2010 and its subsequent Regulations.

55. Respondent No.1 further contends that because of divergence on the issue with this Tribunal, Respondent No. 1 – OERC has preferred appeals in SLP No. 5466 of 2013 and 5467 of 2013 before the Hon'ble Supreme Court challenging the Judgment of this Tribunal regarding Renewable Purchase Obligations in Appeal Nos. 54 & 59 of 2012. Also some other entities have approached the High Court of Orissa for excluding from the ambit of the above obligations since they are consuming electricity from fossil fuel co-generation plant. The decisions of the High Court of Orissa and the Hon'ble Apex Court are awaited.

56. Respondent No.1 further contends that in case of non-availability of renewable power, the obligated entities can buy Renewable Energy Certificate (REC) from the Power Exchange which is specified under the Regulation. Some of Renewable Solar & non-Solar generators (Bio-mass Project) have installed / in the process of installing their power plants to supply renewable energy under Open Access to the Obligated Entities. Their huge investments are not getting the due result due to this type of interpretation of Regulation.

57. According to Respondent No.1, contention of the Appellant that it is a Co-generation power plant under Section 2 (12) of the Electricity Act is not correct. This is because the steam utilized for power generation is created by burning coal which is a fossil fuel. The OERC is to be guided by Tariff Policy notified under Section 3 (1) of the Electricity Act. The new Tariff Policy dated 28.01.2016 (Para 6.4 (1)) clarifies that the industries having co-generation plant based on sources other than renewable sources has obligation to purchase renewable energy or has applicability of RPO. It means that industries with CGPs having co-generation based on fossil fuel have to comply with Renewable Purchase Obligation (RPO).

58. According to Respondent No.1, by considering the Judgment of this Tribunal in Appeal No. 53/2012 dated 02.12.2013 (***Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission & Others***), so also the Judgment of the Hon'ble Supreme Court in Civil Appeal No. 4417/2015 that the industries having fossil fuel based co-generation (Captive power consumers) cannot be exempted from compliance of consumption from renewable sources. Also is clear from the provisions of the above Tariff Policy and the Judgments of this Tribunal that Co-generation based on fossil fuel cannot be treated for exemption from obligation to purchase renewable power.

59. Respondent No.1 - OERC contends that in view of the above facts and circumstances this Tribunal may be pleased to dismiss the instant Appeals filed by the Appellants basing on the judgment dated 13.05.2015 of the Hon'ble Apex Court passed in Civil Appeal No. 4417 of 2015 and judgements of this Tribunal in Appeal No. 53 of 2012 dated 02.12.2013 passed in ***Lloyds Metal and Energy Ltd. Vs. MERC & Others***.

60. **Appellant filed rejoinder to the counter affidavit of Respondent No. 1, in brief, as under:**

According to Appellant - NALCO, the contention of Respondent No.1 – OERC is not correct that the judgments of this Tribunal in the case of ***Vedanta Aluminium*** and ***Emami Paper Mills*** stand reversed. This is the basic fallacy in the case of the Respondent. Further, the law laid down by this Tribunal has not been disturbed, much less reversed by any subsequent Judgment of the Tribunal and / or by the Judgment of the Hon'ble Supreme Court in the case of ***Hindustan Zinc.*** In Appeal No.53/2012 i.e. ***M/s. Lloyds Metal & Energy versus MERC*,** observation of the Tribunal was in a different context and not relevant to this Appeal. Even at a later date, in its Judgment on 01.10.2014 in Appeal Nos.112, 130 & 136 of 2014 (***M/s. India Glycols Ltd. & others Vs. UERC***), this Tribunal has again reiterated and given emphasis on the order passed by this Tribunal on 26.04.2010 in Appeal No.57 of 2009 in the Case of ***Century Rayon Vs. MERC***.

61. Appellant – UAIL contends that to cater to the requirements of captive power in the process of refining Bauxite while achieving better efficiency and optimum utilization of natural resources, the Appellant has set up a cogeneration based captive power plant of 90 MW capacity comprising of three numbers of 30 MW Turbo Generators each. The steam generated is used for meeting the production process requirement as well as generation of captive power. For refining of Alumina from

Bauxite there is a requirement of steam at low temperature and pressure. However, generating steam at low temperature and pressure is an uneconomical process with very low thermal efficiency. Hence, steam is generated at high temperature and pressure which passes through a turbine before being fed for alumina refining, thereby generating power for captive consumption and also catering to the process requirement which improves the overall thermal efficiency.

62. Appellant further contends that the cogeneration plant of the Appellant is different and distinct from the conventional power plants. The Electrical power requirement of different industrial, domestic and agricultural sectors is met normally by electricity generated by Conventional power plants. Under the conventional power plant cycle maximum energy loss takes place in the turbine condenser for condensing the turbine exhaust steam and total cycle efficiency works out to be in the range of 34-36%. In contract, the Appellant's cogeneration based captive power plant utilizes the energy stored in coal and other fossil fuels to convert water into steam and the thermal energy of steam is in turn utilized in the Turbine-Generator set to transform mechanical energy into electrical energy and the exhaust steam is further utilized in production process. The system efficiency is much higher compared to the conventional power plant.

63. The Appellant reiterates that this Tribunal in its judgment dated 30.01.2012 passed in Appeal No. 54 of 2012 in the matter of ***Emami Paper Mills Ltd.*** **Vs.** ***OERC & Ors*** and reiterated in its judgment dated 31.01.2012 in Appeal No. 59 of 2012 in the matter of ***Vedanta Aluminium Ltd.*** **Vs.** ***OERC & Ors.*** interpreting the relevant provisions of the OERC (RCPO), Regulations 2010 in respect of co-generation and categorically and unambiguously held that a cogeneration based captive power plant is not a conventional captive power plant and hence an entity sourcing its requirement of captive power consumption from such co-generation based power plant is not an "obligated entity" within the meaning of Clause 2 (h) of the Regulations, 2010 and consequently is not obligated to discharge the purchase obligations as mandated by Clause 3 of the Regulations, 2010.

64. The Appellant further contends that since the Appellant came into existence only during 2013 to 2015, there was no question of Appellant being given sufficient opportunity to present its objections/views in 2010 or prior thereto which was the contention of Respondent No. 1. The provision 2 (h) of Regulation quoted by Respondent No. 1 itself shows that it applies to any other person consuming electricity generated from 'conventional Captive Generating plant' having capacity of 5 MW or above

for its own use. The Appellant's plant is not a conventional captive generating plant and hence is not covered by the said provisions.

65. The Appellant further contends that in the judgment delivered by the Hon'ble Supreme Court on 18.05.2015 in SLP No. 4417 of 2015 (***Hindustan Zinc vs. RERC***), the only issue under challenge adjudicated by the Hon'ble Supreme Court was that whether the State Regulatory Commission (Rajasthan Regulatory Commission) have jurisdiction to impose renewable energy purchase obligations upon Captive Power Plants under the provision of Section 86(1)(e) of the Electricity Act, 2003 when under the scheme of the Act, the captive power plants have been made free from the controlling authority of the State Commissions. Renewable energy purchase obligation is imposed upon consumption of electricity, may be from its own captive power plant or through open access. It is not imposed on persons in their capacity as owners of captive power plants. Thus in such facts and substance, persons consuming electricity from captive power plants are liable under renewable energy purchase obligations. The issue squarely related to captive power plants and not related to a consumer consuming its power requirement through its cogeneration plant. Hence the Judgment of the Hon'ble Supreme Court is inapplicable in the fact situation of the present case, is the stand of the Appellant.

66. The Appellant also contends that there was no divergence in interpretation of definition of cogeneration plant in the judgments delivered by this Tribunal. It is an admitted fact that the Hon'ble Supreme Court has not granted any stay of the observation of this Tribunal. The OERC has failed to understand that the judicial discipline requires that unless the judgment of APTEL is set aside by the Hon'ble Supreme Court, the same is binding on the lower authority (i.e. OERC). In the present case, not only did the OERC not implemented the directions given by this Tribunal but in gross violation of judicial discipline, the OERC refused to follow the law laid down by this Tribunal by distinguishing it in the most cursory manner in paragraph 11 of its impugned judgment so also in paragraph 12 erroneously reiterated its old decisions.

67. Appellant also contends that the views taken and interpretation placed by this Tribunal on the provisions of the Regulations 2010 in the Judgments in Appeal No. 54 of 2012 and 57 of 2012 are holding the field and any view contrary thereto is untenable in law. With these contentions, the Appellant submits that the Appeal deserves to be allowed.

***68. Per contra,* Respondent No. 3 – Green Energy Association filed reply, in brief, as under:**

Respondent No. 3 – GEA contends that the Appellant's submission that it has preferred an Appeal against the order dated 21.11.2013 which is currently pending, however neither has the Appellant provided any appeal number or order of the Appeal nor has the Appellant placed on record any stay on the order dated 21.11.2013. Therefore, admittedly there is no stay on order dated 21.11.2013. The powers of the Commission under Section 142 of the Act are akin to that of a court of contempt. It is an established principle of law that appeal does not amount to an automatic stay on the order under challenge. Every order which has not been stayed has to be complied with under the law. Therefore, the Appellant is bound to comply with order dated 21.11.2013 which has not been stayed.

69. They further contends that the order dated 11.08.2015 which has been challenged by the Appellant in the present Appeal has been passed by the Commission for compliance of Order dated 21.11.2013. In proceedings under Section 142, the merits of the main order cannot be looked into. While exercising its jurisdiction under Section 142 of the Act, the only question the Commission can look into is whether there has been a violation of its directions. Under the garb of the present Appeal, the Appellant is actually challenging the Order dated 21.11.2013, which the Appellant is claiming to have already challenged in a separate proceeding

and on which there is no stay. Therefore, the present Appeal is not maintainable and has to be dismissed with heavy costs.

70. Respondent No.3 – GEA also contends that the principal ground of the present Appeal is that the Appellant has satisfied its Solar and Non-Solar Renewable energy obligations by consuming power from its co-generation plant based on conventional source. The position of law stated in the two Judgments in the case of ***Vedanta Aluminium Ltd.*** on 31.01.2013 and ***M/s Emami Paper Mills Ltd*** on 30.01.2013 have been reversed by a Full Bench of this Tribunal and the Hon'ble Supreme Court; therefore the present Appeals' merits to be dismissed with heavy costs. The prevailing position of law is that the Co-generation provided under Section 86(1)(e) of the Act, 2003 is not co-generation stand alone, but it is co-generation and generation of electricity from renewable sources of energy. Promotion of co-generation and generation from renewable sources of energy cannot be put on par with Captive Power Plant/cogeneration from conventional sources.

71. Respondent No.3 – GEA further contends that to see the folly in assertions made by the Appellant one has to interpret Section 86(1)(e) of the Act correctly. This Section reads that the appropriate State Commission shall promote co-generation and generation of electricity from renewable sources of energy. A bare perusal of the Section shows that it

is not only for promoting co-generation standalone system but it is for co-generation and generation from renewable sources of energy. The “or” is normally disjunctive and “and” is normally conjunctive. The reading of “or” as “and” is not to be resorted to unless one is obliged or some other part of the statute or the clear intention of it requires it to be done. In the present case the intention of the legislature is crystal clear. Reading the word “and” as “or” would lead to an absurd result that will defeat the purpose with which the relevant provisions of law have been drafted. It is submitted that as per the rule of literal interpretation words of a statue have to be understood in their natural sense unless it leads to unintelligible results. Thus, the word “and” appearing between co-generation and generation in this section is conjunctive and should be interpreted accordingly. These are further strengthened by the use of word “sources” as qualifying both generation and co-generation of electricity. The emphasis of the section is on word “sources” and not on technology used for production. The intention behind Section 86(1)(e) is to promote non-conventional and renewable sources of energy. Hence the energy source which is input to co-generation is important to decide whether the same is qualifying for promotion under Section 86(1)(e).

72. Respondent No. 3 - GEA also contend that it is evident from various provisions of the National Electricity Policy, Tariff Policy and National

Action Plan on Climate Change (NAPCC) that the main thrust of the Commission must be on promotion of generation of electricity from renewable sources of energy. The National Electricity Policy and the Tariff Policy recognize that non-conventional electricity generators will take some time to be able to compete with the conventional sources of generations and therefore; the appropriate commissions may take necessary steps to promote the same. Also the Electricity Act, 2003 and the Tariff Policy prescribe that both the Central Electricity Regulatory Commission and the State Commissions must notify a certain percentage of total power to be purchased from renewable based sources.

73. According to Respondent No. 3 – GEA, Para 5.12.2 of the National Electricity Policy provides that under the Act, the Commission should promote co-generation and generation of electricity from non-conventional sources. Clauses 5.12.1 and 5.12.2 of the Tariff Policy provide for promotion of generation based on non-conventional sources of energy. These clauses categorically bring out that the intent behind Section 86(1)(e) of the Act which contemplates promotion of both generation and co-generation only from non-conventional and renewable sources of energy. Clause 5.12.3 when read in conjunction with the two earlier clauses makes it clear that the cogeneration being discussed in the subject of promotion is for cogeneration in the Sugar Industry (bagasse)

which would indicate that even the cogeneration mentioned in Section 86(1)(e) of the Act is meant to be from renewable source. Similarly Clause 6.4(1) of the Tariff Policy also envisages promotion of non-conventional sources of energy generation including co-generation. Therefore, RE obligations have been imposed on the Appellant in furtherance of the aforesaid objective. Section 86(4) of the Electricity Act, 2003 provides that in discharge of its functions the Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy as published under Section 3.

74. Respondent No.3 – GEA also contends that the objective of the RPO Regulations upon captive power plants is to promote generation of electricity from renewable sources as it would have a long lasting impact on environment. It is in the interest of the people to protect the environment by boosting the production of electricity through renewable sources of energy.

75. Respondent No. 3 – GEA further contends that the Appellant incorrectly states that it has met its total RPO target for 2011-12 and 2012-13 from captive co-generation sources and as such will not be required to purchase further RECs. This is incorrect in as much as the Appellant cannot satisfy its Solar and Non-Solar renewable energy targets by

consumption from its captive co-generation plant and they should have purchased RECs in terms of the Order dated 21.11.2013 and 11.08.2015.

ANALYSIS & CONCLUSION

76. We have carefully gone through the pleadings and arguments of the parties.

77. According to the Appellants they are not obligated entities in terms of OERC Regulations. All the Appellants contend that they are consuming electricity from their captive power plants i.e., Steam and Power Plant. The Appellant-National Aluminum Company contends that it has not met renewable solar obligation for the year 2011-12, however, it partly had met its non-solar obligation. It had sought waiver of solar obligation along with carry forward of the non-solar obligation to next year and beyond. A Petition came to be filed in this regard is still pending before the OERC.

78. According to Appellants-National Aluminum Company and Utkal Alumina International Limited, they are not obliged to purchase RECs for the year 2011-12 and 2012-13. Both the Appellants-Utkal Alumina International Limited and National Aluminum Company Limited place reliance on the judgments of this Tribunal in Appeal No. 54 and 59 of 2012. They categorically contend that in terms of these Judgments, the definition of the 'obligated entity' would not cover a case where a person is

consuming power from co-generation and further this Tribunal opined that all such consumers meeting electricity consumption from captive co-generation plant in excess of the total specified RPO Obligation both solar and non-solar can be met from the excess co-generation power used by the obligated entity. Therefore, such entities are not required to obtain electricity from solar and non-solar renewable sources for meeting their respective RPO obligation. Therefore, Appellants contend that this Tribunal declared such law exempting RPO Obligation if excess power was consumed from co-generation plant as captive user. They further contend that this Tribunal opined that in terms of Section 86(1)(e) of the Act, co-generation has to be promoted, therefore, co-generator was under no obligation to purchase electricity from renewable energy producer. The Appellants' counsel pointed out that in Century Rayon case this Tribunal opined that the said appeal was generic in nature, therefore, the law declared in Century Rayon would equally apply to all co-generation based captive consumers irrespective of the nature of fuel used by them.

79. They also pointed out that the Appellants' co-generation based captive power plants utilizes the energy stored in coal and other fossil fuels, which convert water into steam and the thermal energy of steam is in turn is being utilized in the turbine generators, which converts mechanical energy into electrical energy. Further, the exhausted steam is

utilized in the production process. Appellants claim that such system is much more efficient when compared to conventional power plants.

80. One cannot dispute that in the National Action Plan for Climate Change to save the humanity from future climatic problems, Government of India brought promotion of renewable energy and co-generation as a step in that direction. National Electricity Policy also mandates that all efforts must be made to encourage private participation through suitable promotional measures. In terms of provisions of Section 86(1)(e) of the Act, OERC has made Regulations known as OERC (RCPO) Regulations of 2010 by virtue of powers vested in them under Section 181 of the Electricity Act. Regulation 3 of the said Regulations provides for procurement of certain percentage of energy requirement from renewable and co-generation sources by obligated entities.

81. The issue involved in these appeals is "whether the Appellants, who are having co-generation units, are required to comply with RPO Obligations or not"? The relevant judgments relied upon by the parties are "***Century Rayon Vs. Maharashtra Electricity Regulatory Commission"*** (Appeal No. 57 of 2009) so also ***"Emami Paper Mills Ltd. Vs. Orissa Electricity Regulatory Commission and Ors."*** (Appeal No. 54 of 2012), ***Vedanta Aluminium Ltd. Vs. Orissa Electricity Regulatory***

Commission (Appeal No. 59 of 2012), ***Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission"*** (Appeal No. 53 of 2012) and ***Hindustan Zinc Ltd. vs. RERC"*** (Civil Appeal No. 4417/2015).

82. Appellants contend that there is no such obligation since Section 86(1)(e) of the Electricity Act imposes obligation on all regulatory commissions to promote not only renewable sources of energy but also generation of electricity from co-generation.

83. In order to appreciate what the Act contemplate, we must see what co-generation means and so also what Section 86(1)(e) of the Act contemplates. Section 2(12) of the Act defines co-generation. Section 2(12) and Section 86(1)(e) of the Act read as under:

> *"**Section 2(12)***
> *"Cogeneration" means a process which simultaneously produces two or more forms of useful energy (including electricity)."*
>
> *"**Section 86(1)(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;"*

84. The first case that is relevant for our consideration is ***Century Rayon Vs. Maharashtra Electricity Regulatory Commission.*** Paragraphs 45 & 46 thereof are relevant, which read as under:

"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."

85. From the above judgment, it is crystal clear that in terms of Section 86(1)(e) co-generating plants have to be treated on par with renewable energy generating plants. This Tribunal opined that the captive consumers of power from their own generating plants cannot be imposed with the obligation of procuring electricity from renewable energy sources. This judgment was followed consistently by this Tribunal in several cases including Emami Paper Mills Limited's case.

86. This Tribunal in the judgment of "***JSW Steel Limited vs. Tamil Nadu Electricity Regulatory Commission***" (Appeal No. 278 of 2015) did point out that in spite of this consistent view of the Tribunal about the obligation of co-generating plants to purchase renewable energy, the Regulatory Commissions consistently failed to take judicial note of the precedent and still proceeded to pass judgments without evaluating the facts available in a particular matter.

87. Then coming to the Full Bench judgment of this Tribunal in "***Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission & Others"*** on more than one occasion this Tribunal opined that the Full Bench after hearing all the parties at length had set aside only para 45(ii) of the Judgment in Century Rayon's case and not the entire judgment of Century Rayon's case. Therefore, the Appellants are justified to contend that the Respondent-Commission was not justified in opining that in Lloyds Metal & Energy Limited's case entire judgment of Century Rayon was set aside. This opinion of the Appellants seems to be valid since subsequent to the judgment of the Full Bench in Lloyds Metal & Energy Limited's case, this Tribunal continued to place reliance on the opinion expressed in the Century Rayon Case on the point that co-generation based captive power plants cannot be fastened with the liability

of RPO. One such judgment is in "***India Glycols Ltd. Vs. Uttarakhand Electricity Regulatory Commission"*** (Appeal No. 112 of 2014). Relevant paragraphs at 10, 20, 21, 22 & 23 thereof read as under:

> *"10. The only issue that arise for our consideration is whether cogeneration based captive power plant can at all be fastened with Renewable Purchase Obligation (RPO) and whether the Notification, dated 3.11.2010, could have at all fastened on each of the Appellants, in defiance of the statutory mandate of Section 86(1)(e) of the Electricity Act, 2003 as also ignoring the decision dated 26.4.2010 of this Appellate Tribunal in Century Rayon case?*
>
> *……..*
>
> *20. In view of the above considerations and analysis, we note that the impugned order passed by the State Commission suffers from the vice of illegality and the same is against the legal proposition laid down by this Appellate Tribunal in its judgment, dated 26.4.2010, in Appeal No. 57 of 2009 in the case of Century Rayon vs MERC. The approach of the State Commission in passing the impugned orders appears to be quite illegal, invalid and unjust, which cannot be appreciated by this Appellate Tribunal by any stretch of imagination.*
>
> *21. Consequently, we observe that the impugned orders, dated 13.3.2014 (subject matter in Appeal No. 112 of 2014) and, dated 10.4.2014 (subject matter in Appeal Nos. 130 and 136 of 2014), suffer from illegality and perversity. We find force in the submissions of the Appellants and they are entitled to the relief claimed by them before the State Commission in the form of filing reply to show cause notices and also by filing petitions. The findings recorded by the State Commission in the impugned order, are illegal, perverse and are based on improper and erroneous appreciation of the facts and*

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

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

23. ***Summary of our findings:***

The Co-generation based Captive Power Plant/Captive user cannot be fastened with renewable purchase obligation as provided under UERC (Compliance of RPO) Regulations, 2010, as subsequently, amended by UERC (Compliance of RPO) (First Amendment) Regulations, 2013. The judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs.

MERC, whereby the provisions of Section 86(1)(e) of the Electricity Act, 2003 were interpreted and in compliance of which the learned State Commission has amended the definition 'Obligated entity' as was then existing in UERC (Compliance of RPO) Regulations, 2010 by UERC (Compliance of RPO) (First Amendment) Regulations, 2013, shall be held to be applicable from the date of the judgment itself. Though, in compliance of the said judgment, dated 26.4.2010, the Regulations were amended in the year 2013 by the State Commission. It was a fit case where the State Commission should have exercised its power to relax according to its own Regulations in order to give effect to the judgment, dated 26.4.2010, passed by this Appellate Tribunal in Appeal No. 57 of 2009, in the case of Century Rayon vs. MERC in letter and spirit, in order to give relief to the Co-generation based Captive Power Plants/Captive users entitled to it."

88. Coming to the contention of the Respondents that in the light of judgment of the Apex Court in "***Hindustan Zinc Ltd. vs. RERC"*** (C.A No. 4417/2015)**,** none of the above mentioned judgments would be of any help to the Respondents. We note what exactly was involved in Hindustan Zinc Limited's case. In the said case the issue which came up for consideration before the Apex Court was "whether (Renewable Energy Obligation) Regulations, 2007 and Rajasthan Electricity Regulatory Commission (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010 brought by Rajasthan Electricity Regulatory Commission were violated or not." In that context only, Hon'ble Apex Court was considering the case on hand. In other

words, the Hon'ble Apex Court was not considering the controversy like that of these appeals i.e., whether captive generating plants are obliged to comply with RPO obligation.

89. In the instant appeals, none of the Appellants are questioning the validity of any of the Regulations. The Appellants are claiming exemption from RPO, who are taking protection under Section 86(1)(e) of the Electricity Act. This Tribunal consistently has opined that co-generating plants are exempted from complying with RPO Regulations in the light of having special status/protection under Section 86(1)(e) of the Act.

90. It is pertinent to mention that this Tribunal has further opined that even if Regulations impose renewable purchase obligation on co-generation plants, in such a situation, those Regulations have to be read down in view of protection/special status granted to co-generation plants under statute i.e., Section 86(1)(e) of the Act.

91. In the recent times, this Tribunal on more than one occasion, in the following appeals opined that a co-generation facility irrespective of nature of fuel used in such plants has to be promoted and encouraged in terms of Section 86(1)(e) of the Act.

a) Judgment dated 02.01.2019 in Appeal No. 278/15 titled "***JSW Steel Limited & Ors., vs. Tamil Nadu Electricity Regulatory Commission & Ors***.,"

b) Judgment dated 09.04.2019 in Appeal Nos. 322 of 2016 and 333 of 2016 titled "***M/s Ultratech Cement Limited vs. Karnataka Electricity Regulatory Commission***."

92. In the light of our discussion and reasoning, we are of the opinion that all the Appellants being co-generation plants cannot be fastened with liability of purchasing power from renewable sources to meet RPO obligation. Accordingly, the Appeals are allowed by setting aside the orders impugned in these appeals.

93. There shall be no order as to costs. Needless to say that all the pending IAs, if any, shall stand disposed of.

94. Pronounced in the Virtual Court on this **2nd day of November, 2020.**

(Ravindra Kumar Verma)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

Tpd/ts