IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 176 of 2020 &
IA No. 1298 of 2020

Dated : 2nd August, 2021

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member

In the matter of:

JSW Steel Limited
(a company registered under the Companies Act, 1956)
JSW Centre,
Bandra Kurla Complex,
Bandra (East),
Mumbai – 400 051 …Appellant

VERSUS

1. **Maharashtra Electricity Regulatory Commission**
Through its Secretary,
World Trade Centre, Centre No.1,
13th floor, Cuffe Parade, Colaba
Mumbai – 400 005

2. **Maharashtra Energy Development Agency**
Through its Director General,
MHADA Commercial Complex,
2nd Floor, Opp. Tridal Nagar,
Yerwada,
Pune – 411 006 …Respondents

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Ramanuj Kumar
Mr. Manpreet Lamba
Ms. Priyal Modi

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

Mr. J.V. Torane (Rep.) for R.2

JUDGMENT

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

1. The present appeal is filed challenging the order dated 29.08.2020 ("Impugned Order") passed by Respondent No.1-Maharashtra Electricity Regulatory Commission ("MERC/Commission") in Case No. 335 of 2019 whereby Respondent No. 1-Commission has rejected the Appellant's Petition seeking exemption from the applicable RPO Regulations for FY 2010-11 to FY 2013-14 and subsequent years in respect of the Appellant's manufacturing unit located at Dolvi in the State of Maharashtra on the ground that the Appellant's consumption from its cogeneration plants being in excess of the presumptive RPO Targets for the relevant years ending up to March 31, 2019.

2. The Respondent No. 1 is the Maharashtra Electricity Regulatory Commission. Respondent No.2 is Maharashtra Energy Development Agency.

3. The facts, in nutshell are narrated herein below:

The Appellant is one of the leading manufacturers of steel and allied products in India and owns a steel manufacturing unit located at Dolvi in the State of Maharashtra. The Appellant has established the following Captive Power Plant(s) ("**CPP**") at its Dolvi unit:

a) Gas Expansion Turbine (hereinafter referred to as "**GET**"): 14 MW (Differential Pressure based) (previously 6.5MW); and

b) Waste-gas based co-generation plant: 53.5 MW.

4. The Appellant at the said Dolvi Unit has one blast furnace of 4323m^3 capacity, which operates at a pressure of 3.5 bar and the pressure of the gas coming out of the blast furnace has energy generating potential. The blast furnace gas leaves from the furnace top with high pressure at approximately 1.98 bar and has volume of approximately 560 KNm3/hr. The kinetic energy of this gas is utilized to rotate turbine and to generate power. A GET/TRT unit has been installed in the blast furnace to harness this exhaust gas pressure energy and the same is converted into 14 MW power through mechanical turbine. This GET / TRT does not consume any fuel, has no middle transportation of raw material, and does not produce pollution in the movement process. That apart, the exhaust flue gases produced during the iron making process, has its own inherent heat

capacity, which is utilized through Boiler Turbine Generator route to produce 53.5 MW. In absence of 53.5MW CPP, waste heat energy of Blast Furnace gases would be wasted and the equivalent power requirement would be met through fossil fuel based power plants. Accordingly, the Appellant's plant at its Dolvi Unit came to be categorised as a cogeneration CPP under the Act, which is mandated to be promoted by Respondent No. 1 by providing suitable measures.

5. According to the Appellant, in terms of the Act it is the mandate given to the concerned State Commissions to promote cogeneration and renewable energy. Section 86 of the Act has empowered the State Commissions to take suitable measures for promotion of both, cogeneration as well as renewable energy.

6. Therefore, in September 2013, the Appellant had submitted a Petition in Case No. 134 of 2013 before the Commission seeking to declare the electricity produced and consumed by it from its cogeneration plants of 6.5MW and 53.5 MW would meet/offset the corresponding RPO target of the petitioner and its group companies in respect of units located in Maharashtra, under the MERC RPO Regulations.

7. Respondent No. 1 disposed of the Petition in Case No. 134 of 2013 by order dated 12.04.2018 by holding that RPO targets specified under

the RPO Regulations, 2010 are applicable to Obligated Entities, i.e. Distribution Licensees, OA consumers and captive consumers.

8. According to the Appellant, while Respondent No. 1 upholding the Appellant's legal contention regarding cogeneration plant being exempted from the RPO targets (as specified in the MERC RPO Regulations, 2010), the actual verification of consumption data for the relevant years and final findings of the Commission were deferred to be decided in Case No. 101 of 2017. However, on 04.05.2018, Respondent No. 1 passed an order in Case No. 101 of 2017 stating the following:

> *"… Based on the data submitted by MEDA, the Commission finds a shortfall against the cumulative RPO target to the extent of OA consumption. The Commission directs the OA Consumer to fulfil its target cumulatively for the period from FY 2010-11 to FY 2013-14 by the end of FY 2018-19.*"

9. It is the grievance of the Appellant that no opportunity was granted by Respondent No. 1 or the Respondent No. 2 to the Appellant to explain its compliance with the RPO targets for FY 2010-11 to FY 2013-14. It seems that Respondent Nos. 1 and 2 chose not to consider the consequences flowing from the order dated 12.04.2018 issued by the MERC.

10. Further, under the Act, it is the mandate given to the concerned State Commissions to promote cogeneration and renewable energy. Section 86 of the Act has empowered the State Commissions to take suitable measures for promotion of both, cogeneration as well as renewable energy. For ease of reference, Section 86(1)(e) of the Act states as follows:

> *"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;"*

11. It was in furtherance of this mandate, the MERC had framed RPO Regulations, 2010 which had exempted cogeneration plants from the RPO Targets under the Proviso to Regulation 11.3. According to the Appellant, contrary to the mandate given in Section 86(1)(e) of the Act, the MERC chose to delete the proviso to Regulation 11.3, in the RPO Regulations 2016, which replaced the RPO Regulations, 2010. In its petition before the MERC, the Appellant had sought relief for two periods:

(i) for FY 2011-12 to 2013-14 and subsequent periods (which would be covered under the RPO Regulations, 2010, i.e., until March 31, 2016); and

(ii) the period covered under the subsequent regulations, i.e., MERC RPO Regulations, 2016 and MERC RPO Regulations, 2019.

12. As per the Appellant, its plant at Dolvi Unit being a cogeneration plant ought to have been treated at par with renewable sources of energy, notwithstanding the fact that the heat generated in the steel making process is derived from fossil fuels. The term 'cogeneration' as defined under Section 2(12) of the Act reads as under:

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

13. In terms of the orders issued by Respondent No. 1, the Appellant, by its letter dated 21.11.2018 requested Respondent No. 2 to certify Dolvi Unit's compliance or, in the alternative, exemption from the RPO targets. That while the Appellant awaited the response of the Respondent No. 2 to the aforesaid letter, this Hon'ble Tribunal on 02.01.2019 in the matter of "***JSW Steel Limited v. Tamil Nadu Electricity Regulatory Commission***" [Appeal No. 278 of 2015 and 293 of 2015], reiterated the principles laid down in the case of **"*Century Rayon v. Maharashtra Electricity Regulatory Commission*"** (Appeal No. 57 of 2009) decided on April 26, 2010 (hereinafter referred to as **"Century Rayon Case 1"**).

14. Subsequent to the order of this Tribunal dated 02.01.2019, the Appellant *vide* its letter dated 02.04.2019 to Respondent No. 2 once again sought its confirmation regarding compliance or, in the alternate exemption from RPO targets for its cogeneration plants at Dolvi. Post issuance of the aforementioned letter by the Appellant, this Tribunal *vide* its order dated 09.04.2019, on similar issues, in Appeal No. 333 of 2016 "***M/s JSW Steel Limited v. Karnataka Electricity Regulatory Commission***" further examined the applicability of RPO to cogeneration plants and unambiguously held that the cogeneration plants (such as the one set up by the Appellant, albeit deriving heat generated from fossil fuel used in steel making process) cannot be fastened with any RPO so long as the cogeneration is in excess of the RPO.

15. Therefore, in terms of the aforementioned judgments of this Tribunal, no consumer (such as the Appellant) owning and operating a cogeneration based CPP is liable to be fastened with the RPO obligations so long as the electricity generated from its co-generation plant is in excess of the presumptive RPO target (qua the OA consumption) for the relevant years. It is submitted that the Appellant's consumption from its cogeneration plant is in excess of its presumptive RPO targets for each of the relevant years.

16. Since the Appellant did not receive any response from Respondent No. 2, the Appellant again wrote several letters to Respondent No.2 bringing to its notice, the two orders issued by this Tribunal regarding non-applicability of RPO targets to cogeneration plants and requesting Respondent No. 2 to submit a compliance report to Respondent No. 1, MERC, in relation to the Appellant's Dolvi unit. Despite the repeated requests of the Appellant, Respondent No. 2 remained completely unmoved to certify the Appellant's compliance with or exemption from the RPO obligations for the relevant years. Therefore, the Appellant was constrained to approach the MERC in Case No. 335 of 2019 under Sections 61, 86(1)(e) and 86(1)(k) of the Act seeking exemption from the requirement to meet RPO targets for Dolvi unit.

17. Respondent No. 1-Commission, rejected/dismissed the Petition of the Appellant, by its order dated 29.08.2020. Aggrieved thereby, alleging that the Commission has erroneously rejected the petition on the basis of the order issued by this Hon'ble Tribunal on 28.01.2020 in "***Century Rayon v. MERC & Ors."*** (Appeal No. 252 of 2018) (hereinafter referred to as "**Century Rayon Case 2**"), so also in complete contrast to a series of orders issued by this Tribunal beginning with the Century Rayon case, Emami Paper Mills case and then the two cases involving JSW Steel Ltd., and relying on the order dated 07.09.2020 of the Andhra Pradesh

Commission in the matter of "***UltraTech Cement Ltd. V. A.P. state Load Despatch Centre, Hyderabad"*** (O.P. No. 11 of 2020) holding that the cogeneration plants are not liable to be fastened with the RPO targets if their consumption from the cogeneration plants exceed the presumptive RPO from OA consumption, the Appellant has preferred this appeal praying for the following reliefs:

(a) "set aside the Impugned Order dated August 29, 2020 passed by the Respondent No. 1 in Case No. 335 of 2019 and the consequences flowing therefrom;

(b) hold and declare that the Appellant is exempt from the RPO targets in relation to its Dolvi Unit for the period FY 2010-11 to FY 2015-16 (i.e., the period covered by the MERC RPO Regulations, 2010) and also for the subsequent years (i.e., the period covered by the MERC RPO Regulations, 2016 and MERC RPO Regulations, 2019) as long as the cogeneration is in excess of presumptive RPO targets, dehors the provisions of the relevant regulations;

(c) hold and declare that the Appellant's Dolvi Unit is entitled to set-off its presumptive RPO targets qua the Open Access consumption against the electricity generated and consumed

from its cogeneration plants irrespective of the type of fuel utilized in such plants; and

(d) pass such further orders as this Hon'ble Tribunal may deem just and proper in the circumstances of this case."

18. Respondent No.1 has filed reply, in brief is as under:

With respect to MERC RPO Regulations 2010, the Appellant had submitted that the electricity produced and consumed from its co-generation plants shall offset the corresponding RPO target of the Appellant and its group companies in respect of units located in Maharashtra. However, MEDA, being a Respondent in that matter submitted that JSW's cogeneration plant is a fossil-fuel based plant, which is not recognized as source of RE by the Ministry of New and Renewable Energy (MNRE) and cannot be considered for fulfilment of RPO obligation. The Respondent Commission in the impugned Order has addressed this issue and gave its findings in terms of the technologies approved by the MNRE as RE sources, and has not allowed the Appellant to use its fossil fuel-based co-generation for meeting RPO on OA energy consumed by its group companies.

19. With respect to the allegation of the Appellant that the Commission has erred in ignoring the relief sought on application of MERC RPO Regulations 2016 and its subsequent amendments so also erred in ignoring the orders pronounced by this Tribunal in the matter of *"**JSW Steel Ltd. Vs TNERC***" (passed on 02.01.2019) and in "***JSW Steel Limited Vs. KERC***" (passed on 09.04.2019), which holds that cogeneration CPPs (irrespective of fuel sources) cannot be fastened with RPO targets to the extent of OA consumption, the Respondent states that the Appellant by highlighting various Judgements of this Tribunal stated that it cannot be fastened with RPO, as electricity generated from its captive co-generation plant is more than RPO requirement. The Appellant has further argued to ignore the provision of RPO Regulations, which are inconsistent with the provisions of the Electricity Act 2003. However, the Respondent Commission after considering all the aspects, held that it cannot accede to the request of the Appellant to ignore any provision of RPO Regulations which are in force. Thus, the Respondent Commission has aptly considered the observations of this Tribunal that the withdrawal of exemption of the RPO provided to the fossil fuel-based co-generation plants in MERC RPO Regulations 2016 was consistent with the Tariff Policy 2016. The Respondent further states that the Hon'ble Supreme

Court vide its Order dated 13.10.2020 has upheld this Tribunal's Order dated 28.01 2020 in A.No.252 of 2018.

20. In view of above, the Respondent Commission prays for dismissal of the appeal.

21. The Appellant has filed rejoinder denying the averments made and contentions raised by Respondent No. 1 in its Reply stating that they are contrary to or inconsistent with the submissions made on behalf of the Appellant and are accordingly denied. The Appellant further states as under:

Respondent No. 1 has completely overlooked and misinterpreted the object and ambit of Section 86(1)(e) of the Electricity Act, 2003 ignoring the consistent interpretation given to this provision by this Tribunal in a catena of judgments, wherein it has been held that a co-generation facility should be promoted in terms of Section 86(1)(e) of the Act irrespective of the nature of fuel used in the cogeneration plant.

22. Respondent No. 1 in its Reply has only dealt with three issues raised by the Appellant. On the first issue, Respondent No. 1 has simply reiterated Respondent No. 2/MEDA's stand that it did not allow the Appellant to set-off its presumptive RPO (qua the OA consumption) since only renewable energy (RE) sources approved by the Ministry of New

and Renewable Energy ("**MNRE**") are eligible for meeting the RPO without appreciating and applying its own regulations i.e., MERC RPO Regulations, 2010, which exempts captive users consuming power from grid connected fossil fuel based co-generation plants exemption from applicability of RPO target and other related conditions. Since there is no mention in the said proviso that the exemption is only up to the consumption of power from the captive cogeneration plant, there was no basis in the action of Respondent No. 1 to limit the scope of the proviso to captive consumption only.

23. Further, Respondent No. 1 failed to take into consideration the binding judgment of this Tribunal in the matter of ***Century Rayon vs. Maharashtra Electricity Regulatory Commission*** (Appeal No. 57 of 2009), which was also relied upon by this Tribunal in ***Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission*** (Appeal No. 54 of 2012), ***Vedanta Aluminium Ltd. Vs. Orissa Electricity Regulatory Commission*** (Appeal No. 59 of 2012), ***Hindalco Industries Limited vs. Uttar Pradesh Electricity Regulatory Commission*** (Appeal No. 125 of 2012), ***India Glycols Limited vs. Uttarakhand Electricity Regulatory Commission*** (Appeal No. 112 of 2014), ***JSW Steel Limited vs. Tamil Nadu Electricity Regulatory Commission*** (Appeal No. 278 of 2015) and ***JSW Steel Limited vs. Karnataka Electricity Regulatory Commission***

(Appeal No. 333 of 2016). It is a settled legal position that the State Commissions cannot (dehors the provisions of any State specific RPO regulations) impose any RPO on co-generators as long as the co-generation is in excess of the presumptive RPO (after taking into account any OA consumption).

24. Respondent No. 1, in the reply has emphasised that in terms of the MERC RPO Regulations, 2010, 'obligated entity' has to procure energy from RE sources as recognised and approved by the MNRE or purchase Renewable Energy Certificates (RECs) for meeting its RPO. In the judgment of *Vedanta Aluminium Ltd. Vs. Orissa Electricity Regulatory Commission*, this Tribunal also dealt with a similar definition of obligated entity under the Orissa Electricity Regulatory Commission (Renewable and Co-generation Purchase Obligation and its Compliance) Regulations, 2010 ("**OERC RPO Regulations**") and relied upon the Century Rayon's case (Appeal No. 57 of 2009). Therefore, the interpretation put forth by Respondent No. 1 on the definition of "Obligated Entity" is incorrect since the definition does not cover within its ambit captive cogeneration plants, it only covers conventional captive power plants. If the Appellant is not covered as an "Obligated Entity" in the MERC RPO Regulations, 2010 or, in the MERC RPO Regulations, 2016 and the subsequent iterations, it follows that the Appellant cannot be fastened with the RPO by the

Respondent State Commission. The Appellant's plea for exemption from the RPO was never premised on the fact that it was operating a RE-source based generating plant, rather it was based on the submission that under Section 86(1)(e) of the Act, a captive cogeneration plant cannot be fastened with any RPO obligation. The Respondent No. 1 completely failed to appreciate this submission of the Appellant.

25. As regards the issues that Respondent No. 1 has erred in ignoring the relief sought on application of MERC RPO Regulations, 2016 so also erred in ignoring the order pronounced by this Tribunal in the judgments of *JSW Steel Ltd. Vs. TNERC* (passed on January 2, 2019) *and in JSW Steel Limited Vs. KERC* (passed on April 9, 2019), which holds that co-generation CPPs (irrespective of fuel sources) cannot be fastened with RPO targets to the extent of OA consumption, Respondent No. 1 has placed reliance on the judgment of this Tribunal in the matter of *Century Rayon v. MERC & Ors.* (Appeal No. 252 of 2018) dated January 28, 2020 ("Century Rayon case 2"). It is submitted that the reliance placed by the Respondent No. 1 on the Century Rayon Case 2 is misplaced and erroneous. The Respondent No. 1 has ignored the fact that the question of law raised in the Century Rayon Case 2 and in the present Appeal are very different. In the Century Rayon Case 2, the only issue for determination was the scope and application of the MERC RPO

Regulations, 2016. No issue was raised qua the application of MERC RPO Regulations, 2010 to captive cogeneration plants.

26. Appellant states that it is not covered by the definition of "Obligated Entities" either under 2010 or 2016 RPO Regulations and therefore, it cannot be fastened with the RPO targets by the Respondent Commission.

27. Respondent No. 1 has stated that the order of this Tribunal in the matter of Century Rayon Case 2 has been upheld by the Hon'ble Supreme Court *vide* order dated October 13, 2020. However, it has already been submitted by the Appellant that the reliefs sought for and the issues examined in the Century Rayon Case 2 are completely different from the present Appeal. In the Century Rayon Case 2, this Tribunal never examined whether a captive cogeneration plant is covered as an "obligated entity" under the 2016 RPO Regulation. Further, in the Century Rayon Case, no issue or dispute was raised as regards the ambit and application of 2010 RPO Regulations. Therefore, dismissal of the appeal filed by Century Rayon by the Hon'ble Supreme Court in no way affects or prejudices the reliefs sought for by the Appellant in the present Appeal. Further, the Appellant refers to the decision of the Hon'ble Supreme Court in the matter of ***"ICICI Bank and Anr. Vs. Municipal Corporation of Greater Bombay and Others"*** (2005 6 SCC 404), pointing out that the decision given by the Hon'ble Supreme Court should be read in

accordance with the question of law raised before the court. Moreover, the law cannot afford to be always static in nature. Therefore, the order pronounced by the Hon'ble Supreme Court in the Century Rayon case will not serve as a binding precedent for this Tribunal when the reliefs sought for in the present Appeal are different. In any event, the findings and principles laid down by this Tribunal in the matter of *JSW Steel Limited vs. TNERC* and *JSW Steel Limited vs. KERC* have attained finality since the challenge to those decisions were never entertained by the Hon'ble Supreme Court and the Appellant has placed reliance on these and other prior decisions of this Hon'ble Tribunal which too have attained finality. Therefore, there is no merit in the contentions of Respondent No.1.

ANALYSIS & DISCUSSION

28. We have heard oral arguments of learned counsel appearing for the parties at length and we have also gone through the written submissions submitted by learned counsel appearing for the parties.

29. Admitted facts are that the Appellant is one of the leading manufacturer of Steel in India. It owns a steel manufacturing unit at Dolvi in the state of Maharashtra. For the purpose of running this steel manufacturing unit, the Appellant has established following Cogeneration Captive Power Plant at its Dolvi unit:

i. Gas Expansion Turbine (Differential Pressure based): 14 MW; and
ii. Waste-gas based co-generation plant: 53.5 MW.

30. The Cogeneration Captive Power Plants harness the heat capacity, which emerges in the blast furnace gases and exhaust gases generated during the process of steel making to run the turbines and also generate electricity. Therefore, the Appellant contend that there is no consumption of any fossil fuel in the CPPs to generate electricity as contended by the Respondents. There is no dispute that the Appellant's plant is recognised as a Cogeneration CPP in terms of Electricity Act of 2003.

31. There is no dispute pertaining to the proceedings of the Respondent Commission at the instance of Appellant in September 2013. Reference to these proceedings is relevant for the purpose of understanding the dispute now raised before us. In Case No. 134 of 2013, the Appellant herein approached the Respondent Commission seeking a declaration that its Dolvi unit requires to be exempted from the compliance of RPO targets under MERC (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificates Framework) Regulations, 2010 (hereinafter referred to as "**MERC RPO Regulations, 2010**").

32. By order dated 12.04.2018, the Respondent Commission opined as under:

"…Regulation 11.3 makes an Obligated Entity which does not fulfill its RPO liable to Regulatory Charges as specified in Regulation 12.1, with the following exception:

"…Provided further that captive user(s) consuming power from grid connected fossil fuel based co-generation plants, are exempted from applicability of RPO target and other related conditions as specified in these Regulations."

Thus, JSWSL is exempt from RPO to the extent that is consuming power from its fossil fuel-based Co-Generation CPP.

…

18. The Commission also notes that JSWSL has presented the following details in its Petition and during these proceedings:

-The Dolvi Unit is with JSWSL (earlier with JSW Ispat, now merged with JSWSL). Thus, JSWSL (and earlier JSW Ispat) is exempt from RPO to the extent of the consumption of its Dolvi Unit from the Dolvi Co-Generation CPPs. According to JSWSL, on the basis of the bill and documents furnished, in FY 2010-11, the Dolvi Unit obtained all its power from MSEDCL and, hence, no RPO is applicable. In FY 2011-12, it obtained power from its 6.5 MW CPP 1, and OA started from 19 January, 2012. If that is the case, JSWSL (earlier JSW Ispat) is exempt from RPO to that extent.

…

19. Some of these submissions and details provided by JSWSL are unclear, inconsistent or inadequate. However, the Commission is dealing separately in Case No. 101 of 2017 with the verification of RPO compliance by Obligated Entities other than Distribution Licensees for FY 2010-11 to FY 2013-14, and the factual matrix in this regard is outside the scope of the present proceedings. The RPO compliance verification shall take into account the Commission's conclusions recorded earlier in this Order.

The Petition of M/s JSW Steel Ltd. in Case No. 134 of 2013 stands disposed of accordingly."

33. By virtue of the above order, apparently, the verification of RPO compliance of the Appellant's unit was left open. Subsequently, in the year 2017, in suo-motu proceedings, the Respondent Commission without giving an opportunity to explain its position on the RPO compliance, passed an order on 04.05.2018 in Case No. 101 of 2017, which read as under:

"… Based on the data submitted by MEDA, the Commission finds a shortfall against the cumulative RPO target to the extent of OA consumption. The Commission directs the OA Consumer to fulfil its target cumulatively for the period from FY 2010-11 to FY 2013-14 by the end of FY 2018-19."

34. According to the Appellant, by letter dated 21.11.2018, the Appellant requested Respondent No.2-MEDA to certify that the Dolvi unit of the Appellant has complied with RPO obligation on the basis of generation and consumption of power from its cogeneration plant, since generation and consumption was in excess of the presumptive RPO corresponding to the open access consumption of said unit.

35. Before Respondent No.2 could respond to the request of the Appellant's letter, according to the Appellant, this Tribunal passed a judgment dated 02.01.2019 in JSW Steel Limited vs. Tamilnadu Electricity

Regulatory Commission (Appeal No. 278 and 293 of 2015). In this judgment, this Tribunal opined that captive consumers such as Appellant who has cogeneration plants were exempted from RPO obligation and that no RPO obligation could be fastened to such cogeneration based CPP consumers. They also place reliance on certain provisions of TNERC RPO Regulations of 2010, which was the backdrop for the above said judgment of the Tribunal. It is the case of the Appellant that in TNERC RPO Regulations, there is no specific provision like that of MERC RPO Regulations of 2010 i.e., Regulation 11.3, wherein an exemption to cogeneration CPPs is provided in the proviso. Therefore, the Appellant contends that the decision of this Tribunal *de hors* RPO Regulations made by the State Regulatory Commission based on the mandate envisaged under Section 86(1)(e) of the Act. In other words, they contend that irrespective of the fuel sources used, promotion of electricity from cogeneration sources is mandatory like renewable energy. According to the Appellant, the decision in the case of JSW vs. Tamilnadu Electricity Regulatory Commission, as stated above, applies to the present case *mutatis mutandis*. Therefore, as a result of the aggregate annual generation from the cogeneration CPP of the Appellant being in excess of presumptive RPO obligation, no question of the Appellant's Dolvi unit complying with RPO obligation would arise. This position squarely comes

within the proviso to Regulation 11.3 of the MERC RPO Regulations of 2010.

36. The Appellant's counsel further brings to our notice the judgment of this Tribunal in Appeal No. 333 of 2016 dated 09.04.2019 between M/s JSW Steel Limited vs. Karnataka Electricity Regulatory Commission, wherein this Tribunal once again had an occasion to consider applicability of RPO obligation by cogeneration CPPs. This Tribunal following the earlier judgment of JSW vs TNERC opined that cogeneration plants cannot be fastened with any RPO obligation so long as the cogeneration was in excess of its presumptive RPO obligations. The Appellant said to have, based on the opinion of this Tribunal in the above two judgments, wrote to Respondent No.2 that Appellant was not required to comply with any RPO targets, since for the relevant years the generation and consumption from CPPs was in excess of presumptive RPO targets. When Respondent No.2 did not choose to reply to the request letters and representation of the Appellant, the Appellant seems to have approached the Respondent Commission in Petition No. 335 of 2019 seeking for a direction that it has complied with MERC RPO Regulation of 2010 or in the alternate opined that Appellant's Dolvi unit has to be exempted from the requirement of compliance of RPO targets for the period between FY 2010-11 to FY 2015-2016 and the subsequent years. However, the

Respondent Commission rejected the claim of the Appellant and passed the impugned order.

37. As against this, Respondent No.2 contends that fossil fuel based cogeneration plant is not a recognised source of renewable energy in terms of the list of approved Renewable Energy sources by MNRE. Therefore, the question of considering the generation of power from such plant for the fulfilment of RPO obligation of obligated entities would not arise. So far as the Appellant-JSW, the generation from fossil fuel based cogeneration plant situated at Dolvi unit cannot be considered for RPO fulfilment.

38. They further contend that in terms of RPO Regulations of 2016 of MERC also applicable to fossil fuel based cogeneration plants, therefore, RPO Regulation of 2016 of MERC squarely applicable to the cogeneration plant of Appellant, hence, it cannot escape the fulfilment of RPO obligation.

39. Respondent Commission contends that the contention of the Appellant that the Respondent Commission ignored the applicable provisions of MERC RPO Regulations of 2010 and so also MERC RPO Regulations of 2016 are misplaced. In terms of submissions of Respondent No.2-MEDA that the Appellant-JSW being a cogeneration

plant is a fossil fuel based plant, which is not a recognised source of Renewable Energy by the MNRE, therefore, the Commission was justified in not considering generation of power from Appellant's CPP for compliance of RPO. The Respondent Commission has rightly considered the contentions and has opined in its impugned order on the basis of the submissions of Respondent No.2-MEDA and so also MERC Regulations of 2010 and 2016. According to the Respondent Commission, the Commission did consider various judgments of this Tribunal pertaining to fossil fuel based cogeneration plants and applicability of RPO Regulations. The Respondent Commission has placed reliance in the judgment of Century Rayon (Appeal No. 252 of 2018 dated 28.01.2020). In this judgment, according to Respondent Commission, this Tribunal has dealt with similar contentions and the Regulations. Therefore, the contention of the Appellant that if the Regulations of MERC are inconsistent with the Act, the Regulations have to be ignored may not be sustainable in the light of Century Rayon Case 2. The Respondent Commission placed reliance on the Century Rayon Case 2 i.e., paragraphs 26, 27, 29, 33, 35, 36 and 37 are relevant, which read as under:

> *"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).

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].

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 cogenerator must also satisfy the RPO targets the exception being the cogeneration 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

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."

40. Respondent Commission further brings to our notice para 10.3 & 10.4 of the impugned order, which read as under:

"10.3 Thus, after making observations that removal of exemption of RPO to fossil fuel-based co-generation plants is inconsistent with its earlier judgments in Century Rayon matter, Hon'ble APTEL has also observed that said withdrawal of exemption in 2016 Regulations was based on Tariff Policy 2016 notified by the Central Government. The APTEL has held that such policy framed under the provisions of the Electricity Act or Regulations framed by the appropriate Commission, if it is inconsistent with the statutory provisions, can be challenged before appropriate court of competence. Provisions of Regulations which are in force, need to be complied with. ***Said Judgment of APTEL has apparently been challenged before the Hon'ble Supreme Court in Civil Appeal No. 2714 of 2020, which is pending and no stay has been granted in the matter****.*

10.4 In view of the above quoted findings of the APTEL, the Commission cannot accede to the request of JSWSL to ignore any provision of RPO Regulations which are in force."

41. Therefore, according to Respondent No.1, in the impugned order it has aptly considered the observations of this Tribunal and ordered withdrawal of exemption of RPO provided to fossil fuel based

cogeneration plants in terms of MERC RPO Regulations of 2016. They further contend that the Hon'ble Supreme Court on 13.10.2020 upheld this Tribunal's judgment dated 28.01.2020, therefore the impugned order is sustainable.

42. As a rejoinder to the contentions of the Respondents, the Appellant contends that the Appellant is not covered by the definition of 'obligated entity'. They further rely upon the definition of 'obligated entity' as per MERC RPO Regulations of 2010. They place reliance in the case of Vedanta Aluminium Ltd. Vs. OERC (Appeal No. 59 of 2012), wherein this Tribunal vide order dated 31.01.2013 placing reliance on Century Rayon Case 1 held that obligated entity definition would not cover a person and/or entity consuming power from a cogeneration plant in terms of Orissa RPO Regulations. According to the Appellant, after lengthy discussion, this Tribunal opined in the said Vendanta Aluminium 's case that obligated entity will not take into its fold , if the entity is using the power from a cogeneration plant. Even otherwise, according to Appellant, the Appellant never pleaded exemption from RPO premised on the fact that it was operating as a RE-source based generating plant. The exemption was sought, based on the provisions of Section 86(1)(e) of the Act, under which a captive cogeneration plant cannot be fastened with any RPO

obligation. However, the Respondent Commission failed to appreciate the said submission of the Appellant.

43. Appellant further brought to our notice that after Century Rayon Case 1 by this Tribunal, following the said judgment, this Tribunal reiterated the same principle in a number of subsequent appeals, namely: i. *Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission* [Appeal No. 54 of 2012]; ii. *Vedanta Aluminium Ltd. Vs. Orissa Electricity Regulatory Commission* [Appeal No. 59 of 2012]; iii. *Hindalco Industries Limited vs. Uttar Pradesh Electricity Regulatory Commission* [Appeal No. 125 of 2012]; iv. *India Glycols Limited vs. Uttarakhand Electricity Regulatory Commission* [Appeal No. 112 of 2014]; v. *M/S. JSW Steel Limited v. Karnataka Electricity Regulatory Commission* [Appeal No. 333 of 2016]; vi. *JSW Steel Limited v. Tamil Nadu Electricity Regulatory Commission* [Appeal No. 278 and 293 of 2015].

44. Therefore, according to the Appellant, the Commission failed to consider the settled legal position laid down by this Tribunal in various judgments and passed impugned order, which severely prejudiced the interest of the Appellant.

45. Coming to the proviso to Regulation 11.3 of RPO Regulations of 2010, it was limiting the exemption from RPO to the extent of consumption

from the cogeneration plant, however, the proviso to Regulation 11.3 envisages complete exemption to the cogeneration plants from RPO targets i.e., not only exemption of consumption from the cogeneration plant but total generation of power from cogeneration plant. Though subsequently in the MERC RPO Regulation of 2016, the proviso was deleted/omitted, it would not make much difference is the stand of the Appellant. For this preposition, they contend that the law laid down by this Tribunal is binding on all Stakeholders including the Respondents, therefore, it has attained finality, since no appeal before the Hon'ble Supreme Court is pending.

46. So far as the contention of the Respondents that the Appellant cannot be allowed to get benefit of set off of its presumptive RPO target only from renewable energy source approved by MNRE is concerned, according to the Appellant, this submission is totally untenable in the light of the language employed in the wording of Section 86(1)(e) of the Act. In Century Rayon Case 1, this Tribunal categorically ruled that the mandate to promote cogeneration sources under Section 86 (1)(e) of the Act is irrespective of source of fuel. The mandate is not only to promote generation of energy from renewable energy source, but also to promote generation of energy from cogeneration, since it is an independent source unconnected to Renewable Energy source. Therefore, according to

them, the opinion of the Respondent Commission fastening with RPO obligation vis-a-vis notional RPO corresponding to the open access consumption is not correct.

47. They further contend that the impugned order has totally ignored the mandate to encourage harness in energy from cogeneration sources as envisaged under the Act. Over and above this, the Respondent Commission directed that the Appellant must compulsorily purchase a part of its energy requirement from Renewable sources of energy, which is in the teeth of the purpose of Section 86 (1)(e) of the Act. The Appellant contends that the phrase used in Section 86(1)(e) between the words 'cogeneration' and 'generation from renewable sources' would only mean that the State Commission is under an obligation to promote both types of generation sources equally. Therefore, according to them, even if at any stretch of imagination, RPO Regulations of MERC are applicable and they cannot be interpreted in a manner to defeat the objectives sought to be achieved in terms of provisions of statute qua cogeneration plants. This legal position is well settled in a number of cases stated as under:

a. *Bhartidasan University and Another v. All India Council for Technical Education* [2001 (8) SCC 676]

b. *State of Tamil Nadu vs. P. Krishnamurthy* [AIR 2006 SC 1622]

c. *Global Energy Ltd. vs. Central Electricity Regulatory Commission* [AIR 2009 SC 3194]

48. Therefore, according to the Appellant, the Respondent Commission ought to have considered that MERC RPO Regulations of 2016 made under the Act cannot defeat the objective of the Act so far as cogeneration plants. Therefore, the impugned order deserves to be set aside.

49. So far as the contention of the Respondent No.1 that Century Rayon Case 2 applies to the facts of the case from all angles, the Appellant contends that the facts involved and the relief sought in the Century Rayon Case 2 are totally different from Century Rayon Case 1. In Century Rayon Case 2, the issue, which fell for consideration was the scope and application of MERC PRO Regulations of 2016. At no point of time there was an issue vis- a-vis MERC RPO Regulations of 2010. That apart, the prayer in the Century Rayon Case 2 was for amendment or modification of MERC Regulations of 2016, which was rejected by this Tribunal. Therefore, according to the Appellant, Century Rayon Case 2 has no application to the present appeal. With these submissions they sought for setting aside the impugned order.

50. It is not in dispute that the Steel manufacturing unit of the Appellant situated at Dolvi gets its power requirement from cogeneration captive

power plant. There is a categorical statement that they are not using fossil fuel for the purpose of cogeneration. The Appellant mainly places reliance on Century Rayon vs. MERC (Appeal NO. 57 of 2009); JSW Steel Ltd. vs. TNERC (Appeal No. 278 of 2015 and 293 of 2015 dated 02.01.2019); JSW Steel Ltd. Vs. KERC (Appeal Nos. 336 of 2016) and M/s. National Aluminium Company Limited vs. OERC & Ors. [Appeal No. 260 & 261 of 2015]. The relevant paragraphs of the above said judgments is detailed as follows:

(i) *Century Rayon vs. Maharashtra Electricity* [Appeal No. 57 of 2009]

"20. As a matter of fact, the reading of the section 86 (1)(e) along with the other sections, including the definition Section and the materials placed on record by the Appellant would clearly establish that the intention of the legislature is to promote both co-generation irrespective of the usage of fuel as well as the generation of electricity from renewable source of energy.

…

22. When such is the intent of the legislature, the Appellant who is a co-generating unit, cannot be fastened with any obligation to purchase power generated by a renewable energy source particularly when the co-generation of power is also one of the power which is meant to be promoted by the same provision of law.

23. As indicated above, the expression used in section 86(1)(e) is to promote both co-generation and generation of electricity from

renewable source of energy. The clear meaning of these words is both are different and both are required to be promoted. Fastening of liability on one in preference to the other is totally contrary to legislative intent. The co-generation by different sources of fuel has not been distinguished by the Parliament either in section 2(12) or section 86(1)(e) of the Act."

…

45. Summary of our conclusions is given below:-

(I) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' mean 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.

(ii) *JSW Steel Limited vs. Tamil Nadu Electricity Regulatory Commission* [Appeal No. 278 of 2015 and 293 of 2015, January 2, 2019]

40. It is manifest on the face of the judgment, as stated supra, the Captive consumers having cogenerating plants cannot be fastened with the obligation to procure electricity from renewable energy sources, as that would defeat the object of section 86(1)(e) of the Electricity Act, 2003 and cogenerating plants have to be treated at par with renewable energy generating plants for the

purpose of RPO obligations. It is pertinent to note that the aforesaid judgment has been consistently followed by this Tribunal in several cases e.g. Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission in Appeal No. 54 of 2012 dated 30.01.2013 reported in 2013 SCC OnLine APTEL 23 : [2013] APTEL 74 (Para 5, paras 38 to 40, which reads hereunder:

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

38. As laid down by this Tribunal in Century Rayon case, we reiterate that the mere use of fossil fuel would not make cogeneration plant as a conventional plant. The State Commission cannot give its own interpretation on this aspect which is not available in the Regulations and which is against the ratio and the interpretation of provision given in the judgement by this Tribunal. 39. We feel anguished to remark that unfortunately, the State Commission has not followed the judicial propriety by ignoring the well laid principles contained in the judgement of this Tribunal, which is binding on the authority.

40. Summary of our findings: i) This Tribunal in its judgment in Appeal No.57 of 2009 has specifically observed that the intention of the legislature is to clearly promote the cogeneration also irrespective of the nature of the fuel used and fastening of the obligation on the cogenerator would defeat the object of Section 86(1)(e). The Tribunal also mentioned in the above judgment that the conclusion in Appeal No.57 of 2009 of being generic in nature, would apply to all the co-generation based captive consumers

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

Therefore, in view of the aforesaid judgment, this Tribunal consistently followed and position reiterated by this Tribunal in the above judgments. Inspite of consistent view taken by this Tribunal, the Respondent/State Regulatory Commission has failed to take judicial note and appreciate the matter and on contrary, proceeded to pass the impugned Order without evaluation of the material available on records and the case made out by the Appellant. We are of the considered view that the Respondent/State Regulatory Commission has failed to consider

the same and on contrary has passed the impugned order. Therefore, the impugned order passed by the Respondent/State Regulatory Commission is liable to be set aside on this ground.
Hence, we answered these issues in favour of the Appellants.

OUR CONCLUSION ON ISSUE NO. (III)

43. It is pertinent to note that the order of reference to the Full Bench dated 23.09.2013 in the case of Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission & Ors. order dated 23.09.2013 makes it clear that the limited question for reference to the Full Bench is as follows:

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

Registry is directed to get the Administrative Order from the Chairperson to post it before the Full Bench for re-examination of the interpretation given in the Century Rayon Case on this question." *The Full Bench of this Tribunal vide its order dated 02.12.2013 in the case of Lloyds Metal & Energy Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors., after thoughtful consideration of all the relevant material available on records, answered the question as referred for consideration which read thus: "This important aspect has not been considered in the Century Rayon judgment, where in this Tribunal had held that the Sate commission has to promote both co-generation as well as generation of electricity from renewable sources of energy. Accordingly, we feel that the State Commission*

could promote the fossil fuel based co-generation by any other measures such as facilitate sale of electricity from such sources, grid connectivity, etc. by the State Commission could not compel the Distribution Licensee to procure electricity from fossil fuel based co-generation against the purchase obligation to be specified under Section 86(1)(e) of the Electricity Act, 2003." [Emphasis supplied]

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

51. …It is also rightly pointed out by the learned counsel for the Appellants that, this Tribunal has consistently held that co-generation plants are exempted from these regulations by virtue of the special status granted to them in the light of Section 86(1)(e) of the Electricity Act, 2003. It is not in dispute that this Tribunal has proceeded to hold that even where the Regulations provide for the imposition of the Renewable Purchase Obligation on co-generation, the Regulations need to be read down in view of the interpretation of Section 86(1)(e) of the Electricity Act, 2003.

53. It is rightly pointed out by the counsel for the Appellant that, the judgment of the Hon'ble Apex Court actually covered co-generators as well has got some substance and it is highly unlikely

that the Rajasthan Electricity Regulatory Commission, whose Regulations were under challenge before the Hon'ble Apex Court, would itself grant relief to the co-generators before it relying on the judgment of this Tribunal in Century Rayon case. Therefore, we hold that a co-generation facility irrespective of fuel is to be promoted in terms of section 86(1)(e) of the Electricity Act, 2003; an entity which is to be promoted in terms of section 86(1)(e) of the Electricity Act, 2003 cannot be fastened with renewable purchase obligation under the same provision; and as long as the co-generation is in excess of the renewable purchase obligation, there can be no additional purchase obligation placed on such entities.

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

Hence, the issue Nos. (I) to (IV) raised for our consideration in the instant appeals, as stated supra, are answered in favour of the Appellants.

(iii) JSW Steel Limited vs. Karnataka Electricity Regulatory Commission [Appeal No. 333 of 2016]

"25. They heavily rely upon decision of the co-ordinate Bench of this Tribunal in ***JSW Energy Steel Limited vs. Tamil Nadu Electricity Regulatory Commission*** *(in Appeal No. 278 of 2015 and batch dated 2.1.2019). On perusal of this decision, we note that the controversy which arose for consideration of the Bench in those batch of Appeals is exactly the same in these Appeals. It would be just and proper to quote the issues raised in those Appeals and how they were considered by the co-ordinate Bench.*

The judgment in Century Rayon, the full Bench judgment in Lloyd Metals by this Tribunal as well as the Judgment of the Hon'ble Supreme Court in Hindustan Zinc Limited, are discussed at length and have answered ultimately that co-generation facilities irrespective of fuel are to be promoted in terms of Section 86(1)(e) of the Electricity Act. Therefore, they cannot be fastened with the obligation of Renewable Purchase Obligation under the same provisions of the Act. The relevant paragraphs are as under:

> *"…*
>
> *52. …In view of the settled legal position, Commission is of the considered view that no RPO liability shall be fastened on such generators who generate electricity through Waste Heat Recovery for their own purpose and consume it, subject to the condition that generation from Waste Heat Recovery generation plant is in excess of the total RPO required to be complied by the CPP. If generation is lesser than the requirement to the extent of shortfall general rule applies. So far as distinction tried to be made by RREC between solar and non-solar for the purpose of compliance, in the Commission's view does not merit acceptance. Once Captive Power Plant generating electricity through Waste Heat Recovery, cannot be fastened with RPO liability under Section 86 (1) (e), there is no question of imposition of solar RPO also as the same falls in the category of Renewable Energy."*
>
> *53. It is rightly pointed out by the counsel for the Appellant that, the judgment of the Hon'ble Apex Court actually covered co-generators as well has got some substance and it is highly unlikely that the Rajasthan Electricity Regulatory Commission, whose Regulations were under challenge before the Hon'ble Apex Court, would itself grant relief to the*

co-generators before it relying on the judgment of this Tribunal in Century Rayon case. Therefore, we hold that a co-generation facility irrespective of fuel is to be promoted in terms of section 86(1)(e) of the Electricity Act, 2003; an entity which is to be promoted in terms of section 86(1)(e) of the Electricity Act, 2003 cannot be fastened with renewable purchase obligation under the same provision; and as long as the co-generation is in excess of the renewable purchase obligation, there can be no additional purchase obligation placed on such entities.

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

26. After going through the above judgment of the co-ordinate Bench, we are of the opinion that we totally concur with the opinion of the co-ordinate Bench. There is no reason to differ from the view expressed by the co-ordinate Bench with regard to co-generation plant vis-a-vis RPO. Accordingly, the Appeal Nos. 322 of 2016 and 333 of 2016 are allowed and the impugned order dated 25.08.2016 passed by Karnataka Electricity Regulatory Commission is hereby set aside. All the pending IAs shall stand disposed of. No order as to costs."

(iv) *M/s. National Aluminum Company Limited v. OERC & Ors.* [Appeal No. 260 & 261 of 2015]

"*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.*

…

*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."

51. What emerges from the above said four judgments of this Tribunal need to be looked into to analyse whether the above opinion of the Commission in the impugned order is in the right perspective.

52. The meaning of the term ‘cogeneration’ has to be considered as defined under Section 2(12) of the Act, which reads as under:

> *“’Cogeneration’ means a process which simultaneously produces two or more forms of useful energy (including electricity).*”

53. Section 86(1)(e) of the Act does not indicate that the word ‘cogeneration’ means cogeneration from renewable energy source alone. Section 86(1)(e) of the Act reads as under:

> *“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;”*

Section 86(1)(e) of the Act contemplates two categories of generators; one is cogeneration and the other is ‘generation of power from renewable sources’. The above section uses the phrases ‘cogeneration’ and ‘renewable energy sources’. Therefore, the section mandates that both categories of generators must be promoted by the Appropriate Commission concerned issuing directions to distribution licensees to purchase electricity from both the categories. From reading of the above Section i.e., 86(1)(e) what emerges is, the cogenerating plants are

required to be treated at par with renewable energy generating plants. Irrespective of the nature of fuel used in the cogeneration of power in the cogenerating plant to generate power, cogeneration has to be encouraged and promoted in terms of Section 86(1)(e) of the Act. Therefore, cogeneration plant cannot be fastened with the liability of purchasing power from renewable sources to meet its RPO obligation irrespective of the fuel used for cogeneration. From this it is seen that the nature of promotion ascribed to cogeneration plants, it is a sort of protection or special status is attached to cogeneration under statute i.e., section 86(1)(e) of the Act. There is distinction and difference attached to both categories of generation of power under Section 86(1)(e), which would lead to a conclusion that both are required to be promoted. In other words, one cannot be given preference to the other. If such preference is given, it would amount to defeating the purpose and intention of the Section itself. Therefore, one category of generation of power cannot be allowed to affect the other category of generation of power.

54. The Respondent Commission, according to the Appellant, seems to have not considered the above judgments of this Tribunal in the right manner and perspective. To substantiate the said contention of the Appellant, they bring to our notice the relevant paragraphs of the impugned order, which are:

"*10. Issue No. A: Can the applicable Regulations in force be ignored?*

…

10.3. Thus, after making observations that removal of exemption of RPO to fossil fuel-based cogeneration plants is inconsistent with its earlier judgments in Century Rayon matter, Hon'ble APTEL has also observed that said withdrawal of exemption in 2016 Regulations was based on Tariff Policy 2016 notified by the Central Government. The APTEL has held that such policy framed under the provisions of the Electricity Act or Regulations framed by the appropriate Commission, if it is inconsistent with the statutory provisions, can be challenged before appropriate court of competence. Provisions of Regulations which are in force, need to be complied with. Said Judgment of APTEL has apparently been challenged before the Hon'ble Supreme Court in Civil Appeal No. 2714 of 2020, which is pending and no stay has been granted in the matter.

10.4. In view of the above quoted findings of the APTEL, the Commission cannot accede to the request of JSWSL to ignore any provision of RPO Regulations which are in force.

…

11. Issue No. B: Can the electricity produced and consumed from the fossil fuel based cogeneration plant meet /offset the corresponding RPO targets for OA category under RPO Regulations 2010?

…

11.5. As stated earlier, in terms of Regulations only RE sources approved by MNRE are eligible for meeting RPO. Admittedly, JSWSL's co-generation is not a RE Source. Further, as stated in paras 10.2 and 10.3 above, the Regulations which are in force need to be implemented in true letter and spirit. Hence, the Commission

cannot allow JSWSL to use its fossil fuel-based co-generation for meeting RPO on OA energy consumed by its group companies.

11.6. Only relief which JSWSL can seek and which has already been granted by this Commission vide Order dated 12 April 2018 is to get exemption from RPO on energy consumed from cogeneration plant during the applicability period of MERC RPO Regulations, 2010.

…

Order

1. The Case No. 335 of 2019 is rejected.

2. As already allowed in Order dated 12 April 2018, power consumed by JSW Steel Limited from its fossil fuel-based Co-Generation Captive Power Plant is exempted from Renewable Purchase Obligation for the period applicable under MERC (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificates Framework) Regulations, 2010.

3. JSW Steel Limited shall comply with the Renewable Purchase Obligation targets as notified by the Commission under MERC (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificates Framework) Regulations, 2016 and MERC (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificates Framework) Regulations, 2019 for their respective periods. In the alternative, JSW Steel Limited can avail Option as per para 12.3 and 12.4 above."

55. What we notice is that after the first round of litigation in Petition No. 134 of 2013, the Respondent Commission opined that it would deal with the verification of RPO compliance by obligated entities in Case No. 101 of 2017 for FY 2010-11 to FY 2013-14. However, the Appellant was under the impression that the said verification would be taken up in Case No. 101 of 2017. Hoping that such exercise will be done by giving opportunity to all the parties concerned, the Appellant did not challenge MERC Order dated 12.04.2018. Without issuing any show cause notice to the Appellant to explain its RPO compliance data, the Commission seems to have passed orders in Case NO. 101 of 2017 on 04.05.2018 opining that:

> *"… Based on the data submitted by MEDA, the Commission finds a shortfall against the cumulative RPO target to the extent of OA consumption. The Commission directs the OA Consumer to fulfil its target cumulatively for the period from FY 2010-11 to FY 2013-14 by the end of FY 2018-19."*

56. Respondent No.2-MEDA when failed to respond to the representations/demand/request of the Appellant to certify that Dolvi unit has met RPO compliance, since the generation and consumption from its cogeneration plant was in excess of presumptive RPO obligation corresponding to the open access consumption, the Appellant was compelled to file the Petition. By that time, two judgments of this Tribunal JSW Steel Ltd. Vs. TNERC and JSW Steel Ltd. vs. KERC were

pronounced, wherein it was specifically opined that cogeneration plant cannot be saddled with the liability of any RPO as long as the cogeneration was in excess of its presumptive RPO obligations irrespective of source used for generation of power. The following chart filed by the Appellant demonstrate how the Appellant has consumed power from its cogeneration plant in excess of its RPO obligation.

JSW Steel Ltd. Dolvi

Year	Total Energy Consumption (MU)		Total calculated RE power to be procured as per % obligation an OA source (MU)	Total energy consumed from Captive Cogeneration Facility (MU)	Excess Co-Generation energy available after offsetting OA Obligation (MU)
	OA Power (MU)	Energy consumed from Captive Cogeneration			
	(A)		(B)	(C)	(C-B)
FY 10-11	0.00	0.00	0.00	0.00	0.00
FY 11-12	255.34	29.18	17.87	29.18	11.31
FY 12-13	1531.53	39.52	122.46	39.52	82.94
FY 13-14	1454.33	435.94	130.89	435.94	305.05
FY 14-15	1643.54	387.79	147.92	387.79	239.87
FY 15-16	1429.87	160.89	128.69	160.89	32.20
FY 16-17	1898.10	417.00	208.79	417.00	208.21
FY 17-18	2006.99	450.11	250.87	450.11	199.23
FY 18-19	2236.96	407.52	307.58	407.52	99.94
FY 1920	1766.33	498.11	264.95	498.11	233.16

57. During the proceedings before the Respondent Commission, it is seen there was no issue of maintainability of the petition. Series of orders were placed before MERC, which were passed by this Tribunal. However,

MERC placing reliance on Century Rayon Case 2, has rejected the claim of the Appellant.

58. From the impugned order, what we could ascertain is that the Respondent Commission did not make any distinction between energy generated by cogeneration plant and energy generated by renewable energy source. In fact, the Commission brought cogeneration of energy also under renewable energy source. The definition of 'obligated entity' needs to be analysed. In terms of MERC RPO Regulations of 2010 an 'obligated entity' is defined as under:

> "*Obligated Entity" means the distribution licensees, users owning captive power plants, and open access consumers in the State of Maharashtra, who have to mandatorily comply with renewable purchase obligation under these Regulations subject to fulfilment of conditions outlined under Regulation 5."*

59. This Tribunal while disposing of Vedanta Aluminium Ltd. Vs OERC case had an occasion to analyse the definition of 'obligated entity' as held in Century Rayon Case 1. In Vedanta Aluminium case, this Tribunal was dealing with Orissa RPO Regulations of 2010, which defined obligated entity as follows:

> *"2.*
>
> *…*

> *h) 'Obligated entity' means the entity mandated under clause (e) of sub-section (1) of Section 86 of the Act to fulfill the renewable purchase obligation and identified under clause 3 of these Regulations;*
> *This shall be applicable to:*
> *(1) Distribution licensee (or any entity procuring power on their behalf).*
> *(2) Any other person consuming electricity (i) generated 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.*"

60. Respondent No.1 in its impugned order has totally misplaced the definition of 'obligated entity'. As per impugned order, the State Commission has mixed up the concept of captive plants with cogeneration plants. According to Respondents, since the definition of 'obligated entity' takes into its fold captive generation plants; captive cogeneration plant also comes within the captive generation plants, hence, it also becomes an obligated entity. What we note is that the Appellant did not pursue/place its case on the definition of 'obligated entity'. Even if we presume, for a moment, that the Appellant is an obligated entity, ***whether the provisions of RPO Regulations of MERC over rule the statute, which mandates promotion of cogeneration as a separate entity/category.*** As already stated above, the subordinate legislation

cannot read down the purpose and intention of the main statute. Subordinate legislation must go in line with the main Act. It cannot give a meaning, which is contrary to the meaning assigned under the Act. Therefore, according to us, fastening of the obligation on the co-generator to procure energy from renewable energy source would defeat the object of Section 86 (1)(e) of the Act. The Regulation, being a subordinate legislation, must yield to the Act. As already stated above, at any stretch of imagination, the RPO Regulations of MERC cannot be interpreted in a manner to defeat the objectives to be achieved in terms of provisions of statue qua cogeneration plants. We place reliance on the following judgments:

a. *Bhartidasan University and Another v. All India Council for Technical Education* [2001 (8) SCC 676]

> *"**14. The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned do not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make Regulations are confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the Courts are bound to ignore them when the question of their enforcement arise and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party in sufferance is a Respondent to the lis or proceedings cannot confer any further sanctity or***

authority and validity which it is shown and found to obviously and patently lack. *It would, therefore, be a myth to state that Regulations made under Section 23 of the Act have "Constitutional" and legal status, even unmindful of the fact that anyone or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question, which the AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforced against or bind a University in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions."*

b. *State of Tamil Nadu vs. P. Krishnamurthy* [AIR 2006 SC 1622]

"21. ***If a rule is partly valid and partly invalid, the part that is valid and severable is saved. Even the part which is found to be invalid, can be read down to avoid being declared as invalid.*** *We have already held that premature termination of existing leases, in law, can be only after granting a hearing as required under Sub-section (3) of Section 4A for any of the reasons mentioned in Section 4A(1) or (2). Therefore, let us examine whether we can save the offending part of Rule 38A (which terminates quarrying leases/permissions forthwith) by reading it down. Apart from the statutory provision for termination in Section 4A(3), there is a contractual provision for termination in the mining leases granted by the State Government. This provision enables either party to terminate the lease by six months notice. No cause need be shown for such termination nor such termination entails payment of compensation or other penal consequences. In this case, after considering the High Level Committee Report, the State has taken a decision that all quarrying by private agencies in pursuance of the*

quarrying leases granted in regard government lands or permissions granted in respect of ryotwari land should be terminated in public interest. If Rule 38A is read down as terminating all mining leases granted by the government by six months notice (in terms of Clause 11 in the lease deeds based on the model form at Appendix 1 to the Rules) or for the remainder period of the lease whichever is less, it can be saved, as it will then terminate the leases after notice, in terms of the lease.."

c. *Global Energy Ltd. vs. Central Electricity Regulatory Commission* [AIR 2009 SC 3194]

"17. Regulation 6A has been inserted. The said provision is imperative in character. It is couched in negative language. It provides for disqualifications. ***Indisputably, a subordinate legislation should be read in the context of the Act.*** *Thus read, Regulation 6A should be construed in terms of the requirements contained in Section 52 of the Act, namely, technical requirement, capital adequacy, requirement and creditworthiness for being an electricity trader.*

…

43…

*The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the context of rule making, delegated legislation should establish the structural conditions within which those processes can function effectively****. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation.*** *[…] However, when the provision inherently perpetuates injustice in the award of licenses*

> *and brings uncertainty and arbitrariness it would be best to stop the government in the tracks. Since the vires of the regulation is under challenge, we took the opportunity to consider the propriety and constitutionality of generic decision-making process encapsulated under the impugned legislation. Amongst others, in this context, we strike down the impugned clause."*

61. It is well settled preposition of law that all words used in a statute have to be given effect to. To ignore such express words used in a statute would be to act in a manner contrary to express legislative intent. Reference can be made to the decision of the Hon'ble Supreme Court in ***Union of India vs. Brigadier P.S. Gill*** (2012 (4) SCC 463).

62. It is also noticed that this Tribunal right from Century Rayon's case followed the said principle in various appeals namely: i. *Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission* [Appeal No. 54 of 2012]; ii. *Vedanta Aluminium Ltd. Vs. Orissa Electricity Regulatory Commission* [Appeal No. 59 of 2012]; iii. *Hindalco Industries Limited vs. Uttar Pradesh Electricity Regulatory Commission* [Appeal No. 125 of 2012]; iv. *India Glycols Limited vs. Uttarakhand Electricity Regulatory Commission* [Appeal No. 112 of 2014]; v. *M/S. JSW Steel Limited v. Karnataka Electricity Regulatory Commission* [Appeal No. 333 of 2016]; vi. *JSW Steel Limited v. Tamil Nadu Electricity Regulatory Commission* [Appeal No. 278 and 293 of 2015].

63. In more than one occasion, this Tribunal has held that irrespective of the fuel used in a cogeneration plant, the cogeneration plant has to be treated as a separate category of generation of power from that of renewable energy source category. The cogeneration plant cannot be fastened with the RPO obligation to purchase energy from renewable sources, irrespective of the fuel used by the cogeneration plant. A special status, rather protection, is granted to cogeneration plants under the statute. One cannot ignore the fact that investment made in a cogeneration plant is akin to investment made in renewable energy projects. Therefore, both being independent from each other in terms of Section 86 (1)(e), there is an obligation to promote both renewable energy source and also cogeneration.

64. Then coming to placing reliance on Century Rayon Case 2 of this Tribunal by the Respondent Commission in the impugned order, one has to see the difference between the law laid down in Century Rayon Case 1 and other judgments referred to above, and the issue in controversy, which came up for consideration of this Tribunal in Century Rayon case 2. Century Rayon case 2 also based on MERC Regulations. This judgment of the Tribunal is dated 28.01.2020. No doubt, the judgment of this Tribunal, in this case, was upheld before the Hon'ble Supreme Court.

But the fact remains that the relief sought in Century Rayon Case 2 is entirely different from the relief sought by the Appellant in the present appeal. It would be useful to reproduce the relevant paragraphs of the judgment of this tribunal in Century Rayon Case 2 to understand what exactly was the issue, which came up for consideration. The relief sought before the Respondent No.1 in Century Rayon Case 2 is as under:

> *"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..."*

The relevant paragraphs are as under:

> "***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.

…

"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."

65. A reading of the above paragraphs of judgment of this Tribunal in Century Rayon case 2, we note that no issue was neither raised nor deliberated upon by this Tribunal so far as MERC RPO Regulations of 2010 *vis-a-vis* Captive Cogeneration plants. The main relief sought by the Appellant was amendment or modification to the MERC Regulations of 2016, which was rejected by this Tribunal opining that in the said case, the issue, which arose for consideration was whether the Appellant is an 'obligated entity' under MERC RPO Regulations of 2010 or MERC RPO

Regulations of 2016. We have already opined that the Appellant's case do not fall within the definition of 'obligated entities'. The Appellant's case is based on 86(1)(e) of the Act where the intension of the legislation was to provide special status to cogeneration as well. The Appellant, certainly is not asking for modification or amendment of MERC RPO Regulations in any manner.

66. The Appellant's claim is that the Appellant cannot be fastened with the RPO obligation based on the MERC Regulations, but it has to be considered independently in accordance with Section 86(1)(e) of the Act, where it enjoys special status and protection as cogeneration category.

67. In the light of the above discussion and reasoning, we totally agree with the contentions advanced by the Appellant that the impugned order over looked well settled position of law by this Tribunal and placed reliance on Century Rayon Case 2, where the issues adjudicated upon are entirely different from the controversy raised in the present appeal. Therefore, we are of the opinion that the Appellant is entitled for the relief sought in the appeal. Therefore, we pass the following order:

i) Appeal is allowed setting aside the impugned order dated 29.08.2020 in Case No.335 of 2019 passed by MERC

ii) We hold and declare that the Appellant is exempted from the RPO obligation/targets in relation to its Dolvi unit for the period between FY 2010-11 to FY 2015-16 (period during which MERC RPO Regulations of 2010 were applicable) as long as the power from cogeneration is in excess of presumptive RPO targets, *de hors* the provisions of the relevant regulations.

iii) We also hold that Appellant is exempted from the RPO obligation for the subsequent years (period covered by the MERC RPO Regulations, 2016) as long as power from cogeneration is in excess of presumptive RPO targets.

iv) We also hold that irrespective of the type of fuel utilized in the cogeneration of CPPs of the Appellant (Dolvi Unit), the Appellant is entitled to set-off its presumptive RPO obligation vis-à-vis the open access consumption against the electricity generated and consumed from its cogeneration plants.

68. The pending IAs, if any, shall stand disposed of. There shall be no order as to costs.

69. Pronounced in the virtual court on this the 2nd day of August 2021.

Ravindra Kumar Verma
[Technical Member]

Justice Manjula Chellur
[Chairperson]

Dated: 2nd August, 2021

REPORTABLE/~~NON-REPORTABALE~~

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