

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APL No. 78 OF 2019, APL No. 81 OF 2019,  
APL No. 82 OF 2019, APL No. 111 OF 2019,  
APL No. 112 OF 2019,  
APL No. 147 OF 2019 & IA No. 614 OF 2019  
APL No. 117 OF 2019 & IA No. 1507 OF 2019  
**and**  
**DFR No. 146 OF 2020 & IA No. 443 OF 2020 &  
IA No. 442 OF 2020 & IA No. 444 OF 2020****

**Dated: 2<sup>nd</sup> September, 2021**

**Present: Mr. Ravindra Kumar Verma, Technical Member  
Mr. Justice R.K. Gauba, Judicial Member**

**APL No. 78 OF 2019**

**In the matter of:**

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

**.... Appellant(s)**

**Versus**

**1. Maharashtra Electricity Regulatory  
Commission,  
World Trade Centre,  
Centre No.1,13<sup>th</sup> Floor, Cuffe Parade,  
Colaba, Mumbai-400005**

**.... Respondent No.1**

**2. Maharashtra State Electricity Distribution  
Company Limited  
5<sup>th</sup> Floor, Prakashgad  
Bandra (East)  
Mumbai – 400 051**

**.... Respondent No.2**

**Counsel on record for the Appellant(s):** Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Mr. Ashwin Ramanathan

**Counsel on record for the Respondent(s):** Mr. S.K. Rungta, Sr. Adv.  
Ms. Pratiti Rungta for R-1

Mr. G. Saikumar  
Ms. Anup Jain  
Ms. S. Rama for R-2

**APL No. 81 OF 2019**

**In the matter of:**

**Mahindra CIE Automotive Limited  
Mahindra Towers, 1<sup>st</sup> Floor  
Dr. G.M. Bhosale Marg  
Worli, Mumbai – 400 018** .... **Appellant(s)**

**Versus**

- 1. Maharashtra Electricity Regulatory  
Commission,  
Through its Secretary  
World Trade Centre,  
Centre No.1,13<sup>th</sup> Floor, Cuffe Parade,  
Colaba, Mumbai-400005** .... **Respondent No.1**
- 2. Maharashtra State Electricity Distribution  
Company Limited  
Through its Managing Director  
5<sup>th</sup> Floor, Prakashgad  
Bandra (East)  
Mumbai – 400 051** .... **Respondent No.2**
- 3. Sai Wardha Power Generation Limited  
Through its Director,  
8-2-293/82/A/431/A  
Road No.22, Jubilee Hills**

Hyderabad – 500 033

.... Respondent No.3

Counsel on record for the Appellant(s): Mr. Anirban Bhattacharya  
Mr. Dhruv Sachdeva

Counsel on record for the Respondent(s): Mr. S.K. Rungta, Sr. Adv.  
Ms. Pratiti Rungta for R-1

Mr. Ashish Singh  
Mr. Udit Gupta  
Mr. Anup Jain or R-2

Mr. Anand K. Ganesan for R-3

**APL No. 82 OF 2019**

**In the matter of:**

**INOX Air Products Private Limited  
7th Floor, Ceejay House,  
Dr. Annie Besant Road,  
Worli, Mumbai - 400 018**

.... Appellant(s)

**Versus**

**1. Maharashtra Electricity Regulatory  
Commission,  
Through its Secretary  
World Trade Centre,  
Centre No.1, 13<sup>th</sup> Floor, Cuffe Parade,  
Colaba, Mumbai-400005**

.... Respondent No.1

**2. Maharashtra State Electricity Distribution  
Company Limited  
Through its Managing Director  
5<sup>th</sup> Floor, Prakashgad  
Bandra (East)  
Mumbai – 400 051**

.... Respondent No.2

**3. Sai Wardha Power Generation Limited**

Through its Director  
8-2-293/82/A/431/A  
Road No.22, Jubilee Hills  
Hyderabad – 500 033

.... Respondent No.3

Counsel on record for the Appellant(s): Mr. Sanjay Sen, Sr. Adv.  
Ms. Dipali Sheth  
Ms. Keyur Talsania

Counsel on record for the Respondent(s): Mr. S.K. Rungta, Sr. Adv.  
Ms. Pratiti Rungta for R-1

Mr. G. Saikumar  
Mr. Ravi Prakash  
Mr. Samir Malik  
Mr. Rahul Sinha  
Ms. Prerna Gandhi  
Mr. Ashish Singh  
Mr. Udit Gupta  
Mr. Anup Jain or R-2

Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Mr. Ashwin Ramanathan for R-3

**APL No. 111 OF 2019**

**In the matter of:**

Lupin Limited  
2/A, Laxmi Towers  
Bandra Kurla Complex  
Bandra (E), Mumbai  
Maharashtra – 400 051

.... Appellant(s)

**Versus**

1. Maharashtra Electricity Regulatory  
Commission,  
Through its Secretary  
World Trade Centre,

.... Respondent No.1

Centre No.1,13<sup>th</sup> Floor, Cuffe Parade,  
Colaba, Mumbai-400005

2. Maharashtra State Electricity Distribution  
Company Limited ..... Respondent No.2  
Through its Managing Director  
5<sup>th</sup> Floor, Prakashgad  
Bandra (East)  
Mumbai – 400 051
3. Sai Wardha Power Generation Limited  
Through its Director  
8-2-293/82/A/431/A  
Road No.22, Jubilee Hills ..... Respondent No.3  
Hyderabad – 500 033

Counsel on record for the Appellant(s): Mr. Sanjay Sen, Sr. Adv.  
Ms. Divya Chaturvedi  
Mr. Saransh Shaw  
Mr. Anshuman Sharma  
Mr. Vishesh Dhundia

Counsel on record for the Respondent(s): Mr. S.K. Rungta, Sr. Adv.  
Ms. PratitiRungta for R-1

Mr. Ashish Singh  
Mr. Udit Gupta  
Mr. Anup Jain or R-2

Mr. Anand K. Ganesan  
Ms.Swapna Seshadri  
Mr. Ashwin Ramanathan for R-3

**APL No. 112 OF 2019**

**In the matter of:**

Mahindra Sanyo Special Steel Private  
Limited,  
74,Ganesh Apartment, 7th floor, ..... Appellant(s)  
Opposite Sitladevi Temple,

**Lady Jamshedji Road,  
Mahim (West),  
Mumbai- 400016**

**Versus**

- 1. Maharashtra Electricity Regulatory  
Commission,  
Through its Secretary  
World Trade Centre,  
Centre No.1,13<sup>th</sup> Floor, Cuffe Parade, .... Respondent No.1  
Colaba, Mumbai-400005**
  
- 2. Maharashtra State Electricity Distribution  
Company Limited  
Through its Managing Director .... Respondent No.2  
5<sup>th</sup> Floor, Prakashgad  
Bandra (East)  
Mumbai – 400 051**
  
- 3. Sai Wardha Power Generation Limited  
Through its Director  
8-2-293/82/A/431/A  
Road No.22, Jubilee Hills  
Hyderabad – 500 033 .... Respondent No.3**

**Counsel on record for the Appellant(s): Mr. Sajan Poovayya, Sr. Adv.  
Ms.Dipali Sheth  
Mr. Keyur Talsania**

**Counsel on record for the Respondent(s): Mr. S.K. Rungta, Sr. Adv.  
Ms. PratitiRungta for R-1**

**Mr. G. Saikumar  
Mr. Ravi Prakash  
Mr. Samir Malik  
Mr. Rahul Sinha  
Ms. Perna Gandhi  
Mr. Ashish Singh  
Mr. Udit Gupta**

**Mr. Anup Jain or R-2**

**Mr. Anand K. Ganesan  
Ms.Swapna Seshadri  
Mr. Ashwin Ramanathan for R-3**

**APL No. 147 OF 2019 & IA No. 614 of 2019**

**In the matter of:**

- 1. Mahindra & Mahindra Limited  
Gateway Building  
Apollo Bunder  
Mumbai – 400 001** .... **Appellant No.1**
  
- 2. Mahindra Vehicle Manufacturers Limited  
Mahindra Towers,  
P.K. Kurne Chowk  
Worli, Mumbai – 400 018** .... **Appellant No.2**

**Versus**

- 1. Maharashtra Electricity Regulatory  
Commission,  
Through its Secretary  
World Trade Centre,  
Centre No.1,13<sup>th</sup> Floor, Cuffe Parade,  
Colaba, Mumbai-400005** .... **Respondent No.1**
  
- 2. Maharashtra State Electricity Distribution  
Company Limited  
Through its Managing Director  
5<sup>th</sup> Floor, Prakashgad  
Bandra (East)  
Mumbai – 400 051** .... **Respondent No.2**
  
- 3. Sai Wardha Power Generation Limited  
Through its Director  
8-2-293/82/A/431/A  
Road No.22, Jubilee Hills  
Hyderabad – 500 033** .... **Respondent No.3**

**Counsel on record for the Appellant(s):** Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Mr. Ashwin Ramanathan

**Counsel on record for the Respondent(s):** Mr. S.K. Rungta, Sr. Adv.  
Ms. Pratiti Rungta for R-1

Ms. Udit Gupta  
Ms. Anup Jain for R-2

**APL No. 117 OF 2019 & IA No. 1507 OF 2019**

**In the matter of:**

**Pudumjee Paper Products Ltd.  
Thergaon, Chinchwad  
Pune – 411 033**

**.... Appellant No.1**

**Versus**

- 1. Maharashtra Electricity Regulatory  
Commission,  
Through its Secretary  
World Trade Centre,  
Centre No.1,13<sup>th</sup> Floor, Cuffe Parade,  
Colaba, Mumbai-400005** .... **Respondent No.1**
  
- 2. Maharashtra State Electricity Distribution  
Company Limited  
Through its Managing Director  
5<sup>th</sup> Floor, Prakashgad  
Bandra (East)  
Mumbai – 400 051** .... **Respondent No.2**
  
- 3. Sai Wardha Power Generation Limited  
Through its Director  
8-2-293/82/A/431/A  
Road No.22, Jubilee Hills  
Hyderabad – 500 033** .... **Respondent No.3**



**Counsel on record for the Appellant(s):** Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Ritu Apurva

**Counsel on record for the Respondent(s):** Mr. S.K. Rungta, Sr. Adv.  
Ms. Pratiti Rungta for R-1

Ms. Udit Gupta  
Ms. Anup Jain  
Ms. S. Rama for R-2

**DFR No. 146 OF 2020 & IA No. 443 OF 2020 &  
IA No. 442 OF 2020 & IA No. 444 OF 2020**

**In the matter of:**

**Bekaert Industries Private Limited  
B 1, MIDC Ranjangaon  
Taluka Shirur, District - Pune  
Pincode – 412 209** .... **Appellant No.1**

**Versus**

- 1. Maharashtra Electricity Regulatory  
Commission,  
Through its Secretary  
World Trade Centre,  
Centre No.1,13<sup>th</sup> Floor, Cuffe Parade,  
Colaba, Mumbai-400005** .... **Respondent No.1**
- 2. Maharashtra State Electricity Distribution  
Company Limited  
Through its Managing Director  
5<sup>th</sup> Floor, Prakashgad  
Bandra (East)  
Mumbai – 400 051** .... **Respondent No.2**
- 3. Sai Wardha Power Generation Limited  
Through Resolution Professional/ Director  
8-2-293/82/A/431/A  
Road No.22, Jubilee Hills**

**Counsel on record for the Appellant(s):** Ms. Dipali Sheth  
Ms. Vinita Melvin  
Mr. Keyur Talsania

**Counsel on record for the Respondent(s):** Mr. S.K. Rungta, Sr. Adv.  
Ms. Pratiti Rungta for R-1

Mr. Udit Gupta  
Mr. Anup Jain  
Ms. S. Rama  
Mr. Samir Malik  
Mr. Rahul Sinha  
Ms. Rimali Batra  
Ms. Nikita Choukse for  
R-2

### **JUDGMENT (ORAL)**

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

1. These matters have been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.
2. Consistency in approach on the part of adjudicatory forum is one of the core attributes of fair justice. A deviation from this general norm is acceptable if special reasons are set out for a view contrary to the view held earlier to be taken. Inconsistency without expression of reasons renders the decision open to be questioned as arbitrary or capricious. This is precisely the criticism directed against the Maharashtra Electricity Regulatory Commission (for short, "*the State Commission*") qua the order impugned in these appeals and having

heard all sides perceived by us to be well-founded. We must observe at the outset that such indulgence by statutory regulatory bodies erodes the confidence of the people at large.

3. The first six captioned appeals have come up before us for final hearing and disposal today, each of them being directed against order dated 15.02.2019 passed by the Maharashtra Electricity Regulatory Commission (for short, "*the State Commission*") in Case no. 116 of 2018. During the hearing, the seventh and eighth above captioned appeals were mentioned, the submissions of the learned counsel appearing for the parties being that though appeals are not listed today, they are also directed against the very same order, they being also on behalf of the captive consumers similarly placed as those in second to sixth above captioned appeals, the questions of law raised by them being identical. Hence, we have taken up the said two other appeals as well for final hearing and disposal with the consent of the learned counsel of all sides.
4. It can be said in the preface that the Electricity Act, the rules and regulations framed thereunder give certain benefits to captive generators and captive consumers mainly in nature of exemption from levy of cross-subsidy surcharge. The Electricity Rules 2005 framed in exercise of powers conferred by Section 176 of the Electricity Act, 2003 provide primarily for the essential qualifications for "Captive Generating Plant". Rule 3 which is of interest here, to the extent relevant, may be quoted as under:

*"3. Requirements of Captive Generating Plant.-*

(1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless-

(a) in case of a power plant –

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

and

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

*Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the cooperative society:*

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

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

*Explanation :-*

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

(2) the equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to

the generating unit or units identified as the captive generating plant.

*Illustration: In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.*

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

*Explanation.- (1) For the purpose of this rule.-*

*a. “Annual Basis” shall be determined based on a financial year;*

*....”*

(Emphasis supplied)

5. The Appellant Sai Wardha Power Generation Limited (Appeal No. 78 of 2019) had approached the State Commission by case no. 116 of 2018 invoking its jurisdiction under Section 42 of the Electricity Act, 2003 seeking directions to the Respondent Maharashtra State Electricity Distribution Company Limited (“MSEDCL”) regarding the terms of open access for the period beginning 01.04.2018, the prayers made reading as under:

*“(a) Hold and declare that the mention of ‘Section 10’ or ‘IPP’ in the open access permissions dated 27/03/2018 issued by MSEDCL are incorrect and the said open access permissions*

*shall be operational by treating the said terms of 'Section 10' and 'IPP' as deleted*

*(b) Direct MSEDCL to grant open access against the MTOA applications made by SWPGL on 26/12/2017 immediately;*

*(c) Declare and reiterate the MSEDCL shall be entitled to levy the CSS and any other charges exempt for captive consumption, only on an annual basis after the year is over, if and when the Hon'ble Commission determines that the captive status has not been fulfilled for the year;*

*(d) Pass an ex-parte ad-interim order restraining MSEDCL from levy of CSS, Additional Surcharge and any other charges not leviable on captive consumption, in the monthly invoice of April, 2017 and subsequent invoices to be raised after the end of each month;"*

6. It appears that MSEDCL resisted the said prayer on various grounds, the State Commission accepting the objections and denying the claims, for reasons having been set out in para 18 to 22 of the impugned order which read thus:

*"Commission's Analysis and Rulings:*

*...  
18. SWPGL also contended that whether 26% shareholders/captive users have consumed the 51% electricity on proportionate basis has to be considered only at the end of the year and the same principles were followed by the Commission in its previous years for CGP status declaration. However, the Commission observes that the discrepancies mentioned by the MSEDCL in CA certificates for April, 2018 and MTOA applications have never come before the Commission in previous years that only Unit 3 will supply the power to users and that the application for MTOA provides the CA certificate for Unit 3 and 4. It is a mere conjecture by the Petitioner that if 26% of equity holding is true for unit 3 and 4 together then it must be so for Unit 3. Electricity rules governing captive generating plants*

*categorically mention unit wise status of CGP. Therefore, it was incumbent upon Petitioner to comply with the unit wise equity status of the intended captive users. It has clearly failed to do so while making the application for STOA for unit 3 while maintaining captive status for both the units 3 and 4 for MTOA. Commission therefore rules that Petitioner has not complied with the mandatory requirement of providing the needed details as to the equity of the intended captive users while making application for open access. Defence of the Petitioner that the determination of captive status is to be done on annual basis is misconceived. Petitioner can not be given an open ended mandate that it should canvass enrolment of the requisite number of captive users on the go basis. Whether the application is genuine or an exercise of avoiding payment of CSS is the basis verification which is intended at the beginning of the year. Petitioner has not discharged its duty in this regard and therefore its captive status is not established as regards stipulated equity contribution for unit 3.*

*19. The Commission further observes that SWPGL mentioned that it will supply power to its captive users from Unit 3 only. However, the injection entity mentioned as Unit 3 and 4. This discrepancy would also arise while fulfilling the criteria of CGP status.*

*20. Further, the Commission notes that MSEDCL has contended that SWPGL has to comply with the CGP requirements laid out by the Commission in its Order dated 17 January, 2018 in Case No. 23 of 2017. SWPGL on the other hand has contended that the meters are in place / installed unit wise in the generating station and since August, 2017 the unit wise data has also been available with the licensees including the SLDC and therefore there is no issue for the year 2018-19. The Commission in its Order dated 17 January 2018 in Case No. 23 of 2017 has ruled regarding the metering and accounting arrangement for CGP to be in place. The relevant ruling is stated as under:*

*“ 19.....*

*b) Each CPP Generating Unit shall have a separate Special Energy Meter (SEM) as per the specifications in the Central Electricity Authority (CEA) (Installation and Operation of Meters)*

*Regulations, 2006 as amended from time to time. The monthly reading data at the Generation Transformer EHV level, outgoing feeder level and that of auxiliary consumption should be submitted to the Distribution Licensee(s) and to MSLDC in hard and soft versions. Downloading of monthly data of all these meters shall be jointly undertaken by the Generator and Distribution Licensee(s), and the State Transmission Utility (STU) (if relevant). Similarly, the sealing of the respective meters, their testing, etc. should also be jointly undertaken by the Generator, Distribution Licensee(s) and the STU (if relevant), and appropriately certified. The general practice adopted for any HT consumer monthly meter reading should be followed.*

*In order to ascertain the above arrangement for establishing SWPGL's CGP status, SWPGL was duty bound to obtain its certification/validation from STU/SLDC that such arrangement of its CGP Unit-3 is in place which would facilitate ascertaining of CGP status at the end of financial year. It has chosen not to comply with this mandatory requirement and instead is putting the blame across SLDC and MSEDCL that the unit wise data was not taken despite its availability. As mentioned earlier, the data was to be taken jointly with the Generator. There is nothing brought on record by Petitioner that it had asked for joint meter reading which was not responded by the respondent.*

*21. In view of the foregoing regarding fulfillment of criteria of CGP qualification when CGP Open Access is sought, the Commission holds that the Petitioner is not CGP for the FY 2018. The action of MSEDCL in allowing open access as a IPP under Section 10 of EA is justified. MSEDCL is directed to levy CSS and other applicable charges on the alleged captive users of SWPGL from April, 2018 onwards.*

*22. In view of the above, the Commission does not find any merits in the contentions of SWPGL and hence the following Order:*

### ORDER

*Case No. 116 of 2018 is dismissed.”*



7. Sai Wardha Power Generation Limited (the first above-mentioned appellant) and captive consumers (the other appellants) in this batch have come up feeling aggrieved because of the consequences of the dismissal of the petition for open access as captive generator wherein the burden of Cross Subsidy Surcharge coming their way.
8. It is pointed out during the course of hearing that in another matter – Case No. 117 of 2012 titled *M/s. Wardha Power Company Limited Vs. MSEDCL & Anr.* - decided by order dated 28.08.2013, the State Commission had, *inter alia*, observed thus: -

*“50. Now the question arises that when can it be ascertained whether obligations of the Captive Power Plant have been met or not. It can be inferred that the requirements of the Electricity Rules, 2005 can only be ascertained on annual basis at the end of the financial year based on the information available on the actual generation from the Power Plant during the year and actual consumption made by the Captive User(s).*

*51. In view of the above ruling, the prayer of the Petitioner in (b) that Cross Subsidy shall not be levied during the financial year without verification of power generation and consumption on annual basis in the Petition in Case No. 117 of 2012 gets answered that Cross Subsidy Surcharge shall not be levied on month to month basis and can only be levied after verifying the generation and consumption data on annual basis at the end of the financial year. Accordingly, the bills raised by MSEDCL on Cross Subsidy Surcharge should be revised by MSEDCL and a single bill shall be raised based on the determination of captive status. In light of this and in the circumstances of the case, the Commission directs MSEDCL to ensure compliance of the Orders of the Commission.”*

(Emphasis supplied)

9. During the course of hearing the learned senior counsel appearing for the State Commission fairly agreed that the scrutiny as to whether the requirements of the Electricity Rules 2005 *vis-a-vis* captive power plant have been fulfilled or not can be ascertained on annual basis only “*at the end of the financial year*”. The impugned order is clearly not in *sync* with the view taken by same Commission in above-quoted earlier order. In this context, it is also essential to take note of the findings returned by this tribunal in Appeal No. 131 of 2020 titled *Tamil Nadu Power Producers Association Vs. Tamil Nadu Electricity Regulatory Commission & Ors.* decided on 07.06.2021. It is pertinent to quote the observations in para 11.19 to 11.21 of the said decision which read as under:

*“11.19 The short question which arises next is, when verification under Rule 3(1)(a)(ii) has to be done along with the verification mandated under Rule 3(1)(a)(i), then whether this process has to be undertaken annually i.e. at the end of Financial Year or not?”*

*11.20 To answer this question, we see the decision in Appeal No. 02 and 179 of 2018 titled as “Prism Cement Limited v. MPERC & Ors.,” wherein this Tribunal had the occasion of considering the said issue, as to whether the twin requirements under Rule 3 have to be determined at the end of the financial year together or only the requirement under Rule 3(1)(a)(ii) can be so determined with the exception of Rule 3(1)(a)(i) which can be verified at any given point of time. At para 9.6 of the said judgment, the following has been held by us:*

*“9.6 It is clear from the Act, and Rules as also from the above cited Judgment of Hon’ble Supreme Court that to qualify as ‘captive generating plant’ under Section 2(8) read with Section 9 of the Act and Rule 3 of the Rules, a power plant has to fulfil two conditions;*

a) firstly, 26% of the ownership of the plant must be held by the captive user(s); and  
b) secondly, 51% of the electricity generated in such plant, determined on annual basis, is to be consumed for captive use by the captive user.

Upon fulfilment of the aforesaid conditions determined on an annual basis, the power plant qualifies as a captive generating plant. It is also clear that the Rules provide for determination of the status of the CGP on an annual basis at the end of the financial year. Rule 3 itself recognizes that the status of a power plant is dynamic i.e. a power plant can be a CGP in a particular year but can lose such status in any subsequent year if the twin conditions are not satisfied and thereafter again qualify as a CGP if the twin-conditions under Rule 3 are satisfied in any particular year.”

[Bold & underline supplied]

11.21 This Tribunal has taken a decision in the aforesaid case of Prism Cement Limited (Supra). In terms of this decision, we see that the verification of the tests contemplated under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) can only be done annually, i.e. with respect to the shareholding existing at the end of the financial year. We have to give mandate to the legislative intent as well as the law settled by us on the said issue.”

(Emphasis supplied)

10. We note that it is not in dispute that each of the four units of the power plant of the appellant Sai Wardha Power Generation Limited has a separate meter installed. Though there are certain doubts raised with reference to the fact of common injection point, the fact remains that the compliance with the second requirement of consumption up to the specified extent by the captive consumers can be determined only at the end of the financial year and not at the beginning of the period for which such relief is sought. From this perspective, the approach of the State Commission in the impugned order is found to be wholly

incorrect and inappropriate. The conclusions contrary to the interest of the party which had approached for relief could not have been drawn on the basis of facts which pertains to the previous financial year. It is not in dispute, we may repeat, that metering system has been in position concededly since August, 2017 and, therefore, it can be safely assumed that there would have been continuity. Of course, the actual injection, drawl and consumption is a matter which would require scrutiny, *albeit* at the end of the period and not at the beginning.

11. We do find some merit in the submissions of the learned senior counsel for the State Commission that the existence of facts concerning extent of shareholding must also be examined at the threshold, though it would also require scrutiny at the end of the financial year when the rights and obligations are to be finally determined. When asked, the learned counsel for the appellants, Sai Wardha Power Generation Limited, fairly submitted and agreed that a better proof and certification from the concerned quarters (including the Chartered Accountant) would be placed before the State Commission so that there are no doubts left in its mind while considering grant of the necessary relief.
12. The impugned order, for the above reasons, will have to be set aside. At the same time, it cannot be ignored that the FY 2018-19 to which this dispute relates has already come to an end. In terms of the interlocutory orders passed in these appeals some of the captive consumers who are appellants before us had made certain deposits towards their liability on account of cross subsidy surcharge, without

prejudice to their contentions awaiting consideration herein. Since we are inclined and intend to set aside and vacate the impugned order, the learned Counsel of all parties agree that it would be just, proper and more convenient that the State Commission now instead of considering the matter for grant of permission at the beginning of the FY 2018-19 considers it as a matter requiring scrutiny at the end of the financial year. The permission for open access for captive generating plant would be granted, subject to all requirements being fulfilled in the further scrutiny as indicated above, as a *post facto* approval. Needless to add that in case the generator viz. Sai Wardha Power Generation Limited succeeds in establishing its claim, the deposits made by the captive consumers on account of cross-subsidy surcharge will have to be directed to be refunded forthwith in accordance with law. Conversely, if the said generator fails in establishing its case, the amounts deposited as above will be appropriated properly and the appellants will be duty bound to account for the remainder of the liability on that score.

13. For the forgoing reasons and considerations, the impugned order is set aside. The matter is remitted to the State Commission for further proceedings and fresh decision in light of above discussion and observations. The State Commission shall take up the matter on 13.09.2021. Given the time which has elapsed, and having regard to need for expedition, we request the State Commission to decide the matter at the earliest preferably within three months of the date above fixed for first appearance of the parties.

14. The appeals stand disposed of in above terms. Interim applications, if any pending, are rendered infructuous and will be treated as disposed of accordingly. No order as to costs.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO  
CONFERENCING ON THIS 2<sup>nd</sup> DAY OF SEPTEMBER, 2021.**

**(Justice R.K. Gauba)**  
Judicial Member

**(Ravindra Kumar Verma)**  
Technical Member

√  
**REPORTABLE/NON-REPORTABLE**  
mk/tp