

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

APPEAL NO. 198 OF 2021

APPEAL NO. 202 OF 2021

APPEAL NO. 204 OF 2021

APPEAL NO. 337 OF 2021

AND

APPEAL NO. 295 OF 2021

Dated: 29.11.2022

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

APPEAL NO. 198 OF 2021

In the matter of:

ULTRATECH CEMENT LIMITED

(Unit: Vikram Cement Works)

Through its Authorized Representative,

having its registered office at

B Wing, Ahura Centre,

2nd Floor, Mahakali Caves Road,

Andheri (E), Mumbai – 400 093

Email id: raj.khetan@adityabirla.com

... Appellant(s)

VERSUS

**1. MADHYA PRADESH ELECTRICITY REGULATORY
COMMISSION**

Through its Secretary,

5th Floor, Metro Plaza,

Area Colony, Bittan Market,

Bhopal - 462 016,

Madhya Pradesh

Email id: secretary@mperc.nic.in

**2. MADHYA PRADESH PASHCHIM KSHETRA VIDYUT VITRAN
COMPANY LTD.**

Through its Managing Director,

G.P.H. Compound, Polo Ground,

Indore – 452 003

Email id: mkjmpeb@gmail.com

..... Respondent(s)

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Amit Kapur
Mr. Abhishek Munot
Mr. Malcolm Desai
Mr. Tushar Nagar
Mr. Samikrith Rao
Ms. Ruth Elwin

Counsel for the Respondent (s): Mr. Shlok Chandra
Mr. Ashutosh Mohan
Ms. Mansie Jain
Ms. Nimit Saigal for R-1

Mr. G. Umaphy, Sr. Adv.
Ms. Pavitra Balakrishnan for R-2

APPEAL NO. 202 OF 2021

In the matter of:

ULTRATECH CEMENT LIMITED (Unit : Dhar Cement Works)

Through its Authorized Representative,
having its registered office at
B Wing, Ahura Centre ,
2nd Floor, Mahakali Caves Road,
Andheri (E),
Mumbai – 400 093

Email id: mukesh.birla@star.adityabirla.com ... Appellant(s)

VERSUS

1. **MADHYA PRADESH ELECTRICITY REGULATORY
COMMISSION**

Through its Secretary,
5th Floor, Metro Plaza,
Area Colony, Bittan Market,
Bhopal - 462 016,
Madhya Pradesh
Email id: secretary@mperc.nic.in

2. **MADHYA PRADESH PASHCHIM KSHETRA VIDYUT VITRAN
COMPANY LTD.**

Through its Managing Director,
G.P.H. Compound, Polo Ground,
Indore – 452 003 (MP)
Email id: aotariff@gmail.com Respondents

Counsel for the Appellant (s) : Mr. Amit Kapur
Mr. Abhishek Munot

Mr. Malcolm Desai
Mr. Tushar Nagar
Mr. Samikrith Rao

Counsel for the Respondent (s): Mr. Shlok Chandra
Mr. Ashutosh Mohan
Ms. Mansie Jain for R-1

Mr. G. Umapathy, Sr. Adv.
Ms. Pavitra Balakrishnan for R-2

APPEAL NO. 204 OF 2021

In the matter of:

1. **ULTRATECH CEMENT LIMITED**
(Unit : Dhar Cement Works)
Through its Authorized Representative,
having its registered office at
B Wing, Ahura Centre,
2nd Floor, Mahakali Caves Road,
Andheri (E),
Mumbai – 400 093
Email id: mukesh.birla@star.adityabirla.com

2. **AMPLUS SUNSHINE PRIVATE LIMITED**
Through its Authorised Representative
having its registered office at:
A-57, DDA Sheds,
Okhla Industrial Area, Phase-II,
New Delhi – 110 020
Email id: sharad.pungalia@amplussolar.com ...Appellants

VERSUS

1. **MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION**
Through its Secretary,
5th Floor, Metro Plaza,
Area Colony, Bittan Market,
Bhopal - 462 016,
Madhya Pradesh
Email id: secretary@mperc.nic.in

2. **MADHYA PRADESH PASHCHIM KSHETRA VIDYUT VITRAN COMPANY LTD.**
Through its Managing Director,
G.P.H. Compound, Polo Ground,
Indore – 452 003

Email id: aotariff@gmail.com

..... Respondents

Counsel for the Appellant (s) : Mr. Amit Kapur
Mr. Abhishek Munot
Mr. Malcolm Desai
Mr. Tushar Nagar
Mr. Samikrith Rao

Counsel for the Respondent (s): Mr. Shlok Chandra
Mr. Ashutosh Mohan
Ms. Mansie Jain
Ms. Nimit Saigal for R-1

Mr. G. Umapathy, Sr. Adv.
Ms. Pavitra Balakrishnan for R-2

APPEAL NO. 337 OF 2021

In the matter of:

ULTRATECH CEMENT LIMITED

Through its Authorized Representative,
B Wing, Ahura Centre ,
2nd Floor, Mahakali Caves Road,
Andheri (E), Mumbai – 400 093
Email id: pankaj.agarwal@adityabirla.com

... Appellant(s)

VERSUS

1. **MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION**

Through its Secretary,
5th Floor, Metro Plaza,
Area Colony, Bittan Market,
Bhopal - 462 016,
Madhya Pradesh
Email id: secretary@mperc.nic.in

2. **MADHYA PRADESH POORVA KSHETRA VIDYUT VITRAN COMPANY LTD.**

Through its Managing Director,
Corporate Office at Block No.7
Shakti Bhawan, Rampur, Jabalpur-482008
Email id: secommlez@gmail.com

3. **STATE LOAD DISPATCH CENTRE
M.P. Power Transmission Company Limited**

Through its Managing Director,
Block No.2, Shakti Bhawan, Rampur,
Jabalpur-482008

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Amit Kapur
Mr. Abhishek Munot
Mr. Malcolm Desai
Mr. Tushar Nagar
Mr. Samikrith Rao
Ms. Ruth Elwin

Counsel for the Respondent (s): Mr. Shlok Chandra
Mr. Ashutosh Mohan
Ms. Mansie Jain
Ms. Nimit Saigal for R-1

Mr. Vikas Upadhyay
Mr. Deepak Chandela (OIC) for R-2

Mr. Ravin Dubey for R-3/SLDC

APPEAL NO. 295 OF 2021

In the matter of:

M/s PRISM JOHNSON LIMITED

Through Authorised Representative,
305, Laxmi Niwas Apartment,
Ameerpet, Hyderabad – 500 016

Email: delhi.office@skvlawoffices.com

... Appellant(s)

VERSUS

1. **MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION**

Through its Secretary

5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal, 462 016
Email: secretary@mperc.nic.in

2. **MADHYA PRADESH POORVA KSHETRA VIDHYUT VITRAN COMPANY LTD.**

Through its Managing Director,

Block -7, Shakti Bhavan, Rampur,
Jabalpur, Madhya Pradesh – 470 226
Email: cmdeast@hotmail.com

3. **M.P. POWER MANAGEMENT COMPANY LTD.**

Through its Managing Director,

Block No. 15, Shakti Bhawan, Rampur,
Jabalpur – 482 008
Email: rajeev.keskar@mppmcl.com

4. **M/S. BLA POWER PVT. LTD.**
Through its Managing Director
P.O Khursipar, Village Niwari,
Tehsil Gardarwara,
Dist. Narsinghpur (M.P)-487 661
Email: anup@bla.co.in

Counsel for the Appellant(s) : Mr. Buddy A. Ranganadhan
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Counsel for the Respondent(s) : Mr. Shlok Chandra
Mr. Ashutosh Mohan
Ms. Mansie Jain
Ms. Nimit Saigal for R-1

Mr. Vikas Upadhyay
Mr. Deepak Chandela(OC) for R-2&3

Ms. Shikha Ohri
Mr. Ayush Aggarwal for R-4

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. These appeals raise a common question of law as to whether *additional surcharge* on the charges of wheeling can be levied by a distribution licensee on a captive user receiving supply of electricity from its own *Captive Generating Plant* (“CGP”) in terms of section 42(4) of the Electricity Act, 2003. The first respondent *Madhya Pradesh Electricity Regulatory Commission* (hereinafter referred to as “the State Commission”), by its orders vis-à-vis the CGPs of the appellants has answered in the negative, which view is challenged by the appeals, reliance being placed on decision of the Supreme Court dated

10.12.2021 reported as *Maharashtra State Electricity Distribution Company Limited v. JSW Steel Limited and Others* (2022) 2 SCC 742.

2. Four of the above captioned appeals have been preferred by *Ultratech Cement Limited* (“Ultratech”), the fifth appeal (no.295/2021) having been brought by another similarly placed entity viz. *Prism Cement Generation Limited* (“Prism”). The first, Ultratech, is engaged in manufacturing business having units located at three places they being known as *Vikram Cement Works* (“Vikram unit”), *Dhar Cement Works* (“Dhar unit”), and *Maihar Cement Works* (“Maihar Unit”). It maintains CGP with capacity of 2X23MW at its Vikram unit co-located with manufacturing facility, it statedly being owned (100%) by Ultratech, entire capacity being consumed by the said Vikram unit. There are two CGPs connected to the Dhar unit, one being 15MW and the other 1X13MW, both co-located and behind the meter Solar CGP and Captive Co-gen Waste Heat Recovery System (WHRS). The ownership of the first is statedly held by Ultratech to the extent of 34.95 per cent, the remaining 65.05 per cent being with co-appellant (in corresponding appeal no.204/2021) *Amplus Sunshine Private Limited*. The second unit is owned in entirety by Ultratech. The entire electricity generated by both the said CGPs is consumed by Dhar unit of Ultratech. There is a CGP with capacity of 1X60MW located at *Sidhi Cement Works* plant of Ultratech which feeds the entire capacity for consumption by Maihar unit, the ownership vesting in Ultratech, the consumption being primarily by

Sidhi unit of Ultratech, the surplus intended to be consumed by Maihar unit.

3. The fifth captioned appeal is by Prism, primarily a producer of cement, operating a plant in Satna, Madhya Pradesh, it being a captive user under the provisions of Electricity Act drawing electricity from unit-1 of generating station set-up by an entity called *BLA Power* having acquired stake therein in June 2016 to the extent of 30.46 per cent and procuring more than 51 per cent of the power thereby generated.

4. Section 9 of the Electricity Act, 2003, to the extent relevant, may be quoted as under:

“Section 9. (Captive generation):

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under subsection (2) of section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.”

[Emphasis supplied]

5. The provisions relating to distribution licensees are set out in Part-VI of the Electricity Act, 2003. We are concerned here with section 42 which, to the extent relevant, is as under:

“Section 42. (Duties of distribution licensee and open access): - (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling

such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access .

4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.
...”

[Emphasis supplied]

6. It is clear from the bare reading of sub-section (2) of section 42 that a surcharge, commonly known as *cross subsidy surcharge*, may be levied and made payable on charges for wheeling as determined by the State Commission in the context of permission for open access. But, the fourth proviso to sub-section (2) of section 42 makes it clear that the *cross subsidy surcharge* cannot be imposed on a captive user availing of open access for carrying the electricity from its own CGP to a destination of “*his own use*”.

7. Sub-section (4) of section 42, however, also authorizes the Commission to levy an additional surcharge on the charges of wheeling against such consumers as seek to avail supply of electricity from sources other than the distribution licensee of the area, the justification being that such additional surcharge is necessary to enable the distribution licensee “*to meet*” its “*fixed cost*”, arising out of its “*obligation to supply*”.

8. The respondent distribution licensees had demanded payment of additional surcharge against captive consumption from the appellants. Its demands of such nature for various periods were challenged by the petitions brought before the State Commission, the same having been rejected, the orders passed thereon now under challenge before this tribunal by these appeals.

9. The orders impugned by the first three appeals of Ultratech were passed on 14.05.2021, the background facts noted and the reasons set out being similar. The order under challenge in the fourth appeal of Ultratech (no.337/2021) was rendered on 02.11.2021, the view taken and the reasons articulated being identical. The case of Prism was decided by the same Commission by order dated 16.09.2021.

10. The facts found in the orders under challenge in first three captioned appeals (nos.198/2021, 202/2021 and 204/2021), are set out in para nos.20/21/25 respectively by the State Commission in identical language (quoted from order impugned in appeal no.198/2021) as under:

“20. In the present case, the petitioner without availing open access is receiving supply of electricity from a person (captive power plant) other than the distribution licensee of his area of supply. The petitioner is receiving supply of electricity from its captive power plant to its manufacturing unit through dedicated line. As provided in Section 42(4) of the Electricity Act 2003, the petitioner who was having Contract Demand of 24,000 KVA to 5,000 KVA is permitted by the Commission to avail open access as per provisions under MPERC (Terms and Conditions for intra-state Open Access in Madhya Pradesh) Regulations, 2005. Further, as provided in Section 42(4), such a consumer or class of consumers who is/are permitted to avail open access by the State Commission to receive supply of electricity from a person other than the distribution licensee of his area of supply, shall be liable to pay an additional surcharge on the

charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.”

[Emphasis supplied]

11. The conclusions reached, on facts, by the order assailed in the last two captioned appeals (nos.337/2021 and 295/2021) are also identically worded in para nos.17/21 respectively (quoted from order impugned in appeal no.337/2021) as under:

“17. In the present case, the petitioner is a HT consumer of Respondent No.1 and it is connected to transmission line (EHT network) of Transmission licensee for availing supply from the Respondent No.1 (East Discom). The petitioner No.1 while availing open access is receiving supply of electricity from a person (captive power plant) other than the distribution licensee of his area of supply. The petitioner is receiving supply of electricity from captive power plant to its manufacturing unit through transmission lines/ system of Licensee. As provided in Section 42(4) of the Electricity Act 2003, the petitioner is permitted by the Commission to avail open access as per provisions under MPERC (Terms and Conditions for intra-state Open Access in Madhya Pradesh) Regulations, 2005. Further, as provided in Section 42(4), such a consumer or class of consumers who is/ are permitted to avail open access by the State Commission to receive supply of electricity from a person other than the distribution licensee of his area of supply, shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.”

[Emphasis supplied]

12. The captive generation and use is statutorily permitted. The State Commission is not right in proceeding on the premise that this requires permission to be taken from the regulatory authority, right to open access for carrying electricity by the captive user to the destination of own use having been granted by the law. It is not correct to treat a captive user as a *consumer* availing supply from another person. The captive user owns the captive power plant and, therefore, is carrying his

own electricity elsewhere and, thus, cannot be treated, to that extent, as a procurer of electricity from another person within the mischief of sub-section (4) of section 42. A captive user thus forms a class distinct from a “consumer”, as defined by section 2(15) which reads as under:

“ "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;”

13. A captive user does not seek or receive supply of electricity for his use from a licensee or the government or by any other person engaged in such business of supply of electricity to the public. The expression “*captive user*” is defined by the explanation appended to Rule 3 of the Electricity Rules, 2005, simply as “*the end user of electricity generated in a captive generating plant (CGP).*”

14. This tribunal, by its judgment dated 27.03.2019, in the matter of *JSW Steel Ltd. v. Maharashtra Electricity Regulatory Commission* (appeal no.311/2018) and *Sai Wardha Power Generation Limited v. Maharashtra Electricity Regulatory Commission* (appeal no.315/2018), reported as 2019 SCC OnLine APTEL 57, had held that captive consumers are not liable to pay additional surcharge to the distribution licensee. The appellants had pressed for relief on similar lines before the State Commission placing reliance on the said decision of this tribunal. By the time the matters came up for consideration before the

State Commission, the judgment dated 27.03.2019 had come up for challenge before Hon'ble Supreme Court by civil appeal nos. 5074-5075/2019. The Supreme Court, by an interim order passed on 01.07.2019 in the said civil appeals, had been pleased to stay the operation and implementation of the judgment dated 27.03.2019 of this tribunal. Referring to the said stay, the State Commission declined to follow the view taken by this Tribunal in the judgment dated 27.03.2019.

15. The above said appeals have since been decided by Hon'ble Supreme Court by its judgment dated 10.12.2021 which has been reported as *Maharashtra State Electricity Distribution Company Limited v. JSW Steel Limited and Others* (2022) 2 SCC 742.

16. We may quote the following part of the decision of Hon'ble Supreme Court in the matter of *MSEDCL v. JSW Steel* (supra):

“12. Sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply and only such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that as per the Scheme of the Act, there can be two classes of consumers, (i) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee / licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act 2003.

...

14. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of additional surcharge on the

charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee arising out of his obligation to supply. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature.

15. However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person – distribution licensee of his area of supply. So far as captive consumers/captive users are concerned, no such permission of the State Commission is required and by operation of law, namely, Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the 2003 Act. In the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the 2003 Act shall not be leviable.

16. Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 42(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the 2003 Act, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the 2003 Act.

... ”

17. It is pointed out that the State Commission has been following the dictum in *MSEDCL v. JSW Steel* (supra), one illustration being the order dated 20.04.2022 in the matter of *M/s. Grasim Industries Ltd. v. The Managing Director, M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.* (petition no.49 of 2021 & IA No. 08 of 2021), on facts identical to those found in the three above-captioned appeals, the decision being as under:

“22. In view of foregoing observations and in light of the above-mentioned judgment of Hon’ble Supreme Court, it is held the Additional Surcharge is not applicable on captive use by Petitioner under Section 42(4) of the Electricity Act 2003 on the quantum of power consumed for manufacturing unit from its 52 MW onsite Captive Power Plant. With the aforesaid observations and findings, the subject petition along with IA No.08 of 2021 stands disposed of.”

18. As noted above, the State Commission, upon factual enquiry, has concluded that the appellant Ultratech is receiving supply of electricity from its captive power plants to its manufacturing units named Vikram, Dhar and Maihar, which are subject matter of the first three above-captioned appeals, *“through dedicated line”*. There being no evidence noticed of any use of the transmission system of the distribution licensee or, for that matter, of transmission licensee, in such respect, the ruling of Supreme Court in *MSEDCL v. JSW Steel* (supra) squarely applies and the levy and demand by the distribution licensee of additional surcharge on charges of wheeling under section 42(4) of Electricity Act, 2003, can not be justified or upheld. We hold accordingly. In these circumstances,

the first three captioned appeals must succeed, the orders of the State Commission to the contrary being consequentially set aside.

19. The case of the appellants in the last two captioned appeals i.e. appeal no.337/2021 of Ultratech, and appeal no.295/2021 of Prism, however, may stand on a different footing. The findings on facts concerning them have been quoted earlier (see Para 11). Per the view taken by the State Commission, the concerned appellants are receiving supply of electricity from their respective captive power plants to their manufacturing units, but “*through transmission lines/system of Licensee*”. The appeals before us seek to refute these findings on fact as incorrect. We find some merit in the argument of the respondent that if the dedicated lines connecting the generating stations to the point of own use of the CGPs avail of the transmission/distribution line network or associated facilities, the claim of total exemption from levy of additional surcharge under section 42(4) may have to be examined afresh in light of the relevant law on the subject which, of course, would include the *ratio* of decision of Supreme Court in *MSEDCL v. JSW Steel* (supra). We find need for some further inquiry into the facts.

20. In above facts and circumstances, it would be appropriate that we set aside the orders challenged in appeal nos. 337 and 295 of 2021 and remit the petitions on which the same were rendered for fresh consideration by the State Commission in light of above observations.

21. We order accordingly.

22. Needless to add, the issues having persisted for long would require to be addressed expeditiously. We would expect the State Commission to rehear the parties and pass fresh orders in accordance with law at an early date, preferably within two months of this judgment.

23. The appeals are disposed of in above terms.

PRONOUNCED IN OPEN COURT ON THIS 29TH DAY OF NOVEMBER, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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