IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 342 OF 2021

Dated: 27.09.2022

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

In the matter of:

M/s. CLEAN WIND POWER (MANVI) PRIVATE LTD.
(Through Its Authorised Representative)
202, Third Floor,
Okhla Industrial Area,
New Delhi – 110020

Appellant(s)

Versus

1. **KARNATAKA ELECTRICITY REGULATORY COMMISSION**
(Through Its Secretary)
No. 16, C-1, Millers Tank Bed Area,
Vasanth Nagar,
Bengaluru– 560052, Karnataka.

2. **CHAMUNDESHWARI ELECTRICITY SUPPLY CORPORATION LIMITED**,
(Through Its Managing Director)
Commercial Section No. 29,
Vijayanagara 2nd Stage, Hinkal.
Mysore-570017, Karnataka.

3. **BANGALORE ELECTRICITY SUPPLY COMPANY**
(Through Its Managing Director)
BESCOM, K.R. Circle
Bangalore-560001, Karnataka.

4. **MANGALORE ELECTRICITY SUPPLY COMPANY**
(Through Its Managing Director)
MESCOM Bhavan,
Kavoor Cross Road, Bejai,
Mangaluru-575004, Karnataka.

5. **M/S. RANE (MADRAS) LIMITED**
(Through Its Director)
Maithri, 132, Cathedral Road,
Chennai-600086, Tamil Nadu.

6. **M/S DM SOUTH HOSPITALITY LIMITED**
(Through Its Director)
Indiranagar Extension,
Nazarabad Mohalla, M.G Road,
Mysore-570010, Karnataka

7. **M/S. KLENE PAKS LIMITED**
(Through Its Director)
PB No.7611, 7th Mile,
Arekere Gate, Bannerghata Road,
Bangalore-560076, Karnataka.

Counsel for the Appellant(s)	:	Mr. Amit Kapur Mr. Avijeet Lala Ms. Nameeta Singh Mr. Akshat Jain Ms. Shefali Tripathi
Counsel for the Respondent(s)	:	Mr. Shahbaz Husain Mr. Fahad Khan Mr. Yashwanth Comar Ms. Ilma Subhan for R-2 to R-4

J U D G E M E N T *(Oral)*

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

1. The appellant is a company incorporated under the Companies Act, 2013, established as a Special Purpose Vehicle (SPV) of *Hero Future Energy Private Limited* owning, operating and managing 50 MW wind power plant located in Raichur District of Karnataka, the Memorandum of Association (MoA), by Clause 2, specifically providing for captive generation and sharing of electricity generated by the said power plant with its owners (equity shareholders). It had approached the respondent Karnataka Electricity Regulatory Commission (KERC) by an original petition (no. 120 of 2018), *inter alia*, seeking a declaration that it qualified as a captive

generating plant for Financial Year (FY) 2017-18. The Commission decided the said petition by Order dated 11.10.2021 declining the relief of such declaration. The appeal at hand challenges the view adopted by the Commission.

2. The key observations on which the impugned decision turns are set out in Para 7(xiii) which reads as under**:**

> *"7…*
>
> *xiii. On perusal of the statement of objections submitted on 10.12.2019 by Respondent No.1 at Annexure R-2 wherein the shareholding pattern existing as on 31.07.2017 has been exhibited, and the shareholding pattern as per CA certificate dated 31.03.2018 as submitted by the Petitioner, the Commission notes that there is change in the number of shares held by the consumers as on July, 2017 and that on March, 2018 but the total no. of 42,32,800 Equity shares remains the same. Thus, there has been a change in the share-holding pattern in FY2017-18 as compared to equity share-holding pattern during incorporation of the company in July, 2014. It is to be noted that a generating plant should be established as a 'captive generating plant' under Section 2 (8) read with Section 9 of the Electricity Act, 2003. In this case the Commission notes that no material evidence has been submitted by the Petitioner illustrating the equity shareholding pattern of the captive users at the time of setting up of the generating unit for ascertaining that the generating unit was set up as a captive generating unit under Section 2(8) of the Electricity Act, 2003. Thus, due to lack of material evidence, the Commission is unable to ascertain the shareholding pattern of the captive users at the time of establishment of the generating unit. Hence, the Petitioner should have produced material evidence with respect to the proprietorship of the captive users not less than 26% of the ownership in the CGP at the time of establishment of the captive unit. Until and unless the Petitioner places the required evidence to prove the captive status of the generating plant at the time of establishment, the Commission is unable to declare the generating plant as a captive generating unit for FY2017-18. Thus, in view of the above discussions, we are unable to come to a conclusion as to whether the generating plant was established as a captive generating plant under Section 2(8) read with Section 9 of the Electricity Act, 2003. In the absence of establishing the above facts properly, the prayer of the Petitioner for declaration of the captive status of its generating plant is to be dismissed by the Commission."*

3. The appellant relies upon three decisions of this tribunal to argue that the view taken cannot be upheld, they being *Kadodara Power Private Limited and Others versus Gujarat Electricity Regulatory Commission and Ors*., 2009 ELR (APTEL) 1037; *Prism Cement Limited versus Madhya Pradesh Electricity Regulatory Commission* (decision dated 17.05.2019, passed in Appeal No. 2 of 2018); *and Tamil Nadu Power Producers Association vs. Tamil Nadu Electricity Regulatory Commission & Ors.* in Appeal No. 131 of 2020 (judgement dated 07.06.2021 passed in Appeal No. 131 of 2020).

4. We agree with the learned counsel for the appellant and would rest content by extracting the principles already decided upon by this tribunal in two of the said previous judgements herein after.

5. In *Kadodara Power Private Limited* (supra), the relevant observations read as under:

> *"20. It is contended on behalf of the distribution licensees that the appellants in other appeals namely the CGP owners are not entitled to the benefit of the provisions of the Rules and the Act facilitating captive generation as they were not the persons who "set up" the generating plants. Reference can be made to section 2(8) of the Electricity which defines "captive generating plant" as a power plant "set up by any person to generate electricity primarily for his own use".*
>
> *21. It is submitted that the words "set up" here are important and that the person who has set up the plant alone can own captive generating plant and not the person (s) who is transferee from the original owner(s). This proposition has not been accepted by the Commission in the impugned order. Nor does this proposition appeal to us. The Act nowhere prescribes that once set up by a person(s) a captive generating plant cannot be*

transferred to another owner. Nor does the Act say that on transfer of ownership the captive generating plant will lose its character of being captive despite fulfillment of all other conditions requiring it to be so. Section 9 of the Act which permits captive generation begins with the following words: notwithstanding anything contained in this Act, the person may construct, maintain or operate a captive generating plant and dedicated transmission lines". Obviously, the owner of a captive generating plant need not be one who constructs. Set up defined in section 2(8) has been made equal to "construct, maintain or operate" by the use of these words in section 9. As we view it a captive generating plant does not lose its character by transfer of the ownership or any part of the ownership provided the generating plant produces power primarily for the use of its owner(s). The Regulation quoted above lays down further restrictions on the user of the power generated by a CGP. If all the provisions of the Act and Regulations governing captive generation and consumption from the CGP are specified a plant will be a CGP notwithstanding the fact that the plant at present is not owned by the person who originally set up the plant."

6. In *Prism Cement Limited* (supra), the issue raised was almost identical to the one on which the Commission has taken an erroneous view. The relevant part of the decision reads thus:

"9.23 We are unable to accept the view of the State Commission that since M/s. BLA's Unit-1 was initially an "IPP", and has a long term PPA, it is not possible for Unit-1 to subsequently qualify as a CGP. Such contentions is against the explicit wording of the Act. As mentioned above, "IPP" is a colloquial term which generally refers to a private sector generating station. There is nothing in the Act or Rules which prohibits a power plant (whether government owned or private owned) from acquiring the status of a CGP so long as it meets the conditions laid down in Rule 3 of the 2005 Rules. This is clear as Rule 3 itself recognizes that the captive status of a power plant is dynamic i.e. a power plant can be CGP in a particular year but can lose such status in the subsequent year and thereafter again qualify as a CGP in the 2nd year if the twin-criteria under Rule 3 are satisfied in that particular year. It is immaterial whether the power plant has a long term PPA for part capacity which is entered into, either prior to, or subsequent to, acquiring captive status by meeting the twin-conditions imposed by Rule 3."

7. The principles were reiterated, with reference to earlier ruling of this tribunal in the decision rendered in the case of *Tamil Nadu Power Producers Association* (supra).

8. In the above facts and circumstances, the view taken by KERC that a generating plant "*should be established as a captive generating plant*" so as to be entitled to relief in terms of section 2(8) and section 9 of Electricity Act, 2003 as indeed Rule 3 of the Electricity Rules 2005, is incorrect.

9. In the above view, there is no requirement for ascertaining the shareholding pattern of the entity claiming to be captive user at the time of establishment of the generating unit. The requisite material for purposes of FY 2017-18, in which respect the declaration was sought, has already been submitted by the appellant before the Commission. It is bounden duty of the Commission to consider the same and apply the law as declared by this tribunal in the aforementioned decisions. We order accordingly.

10. We, thus, set aside the impugned order to the above extent and remit the matter with regard to the relief of declaration claimed by the Appellant for FY 2017-18 to the Commission for afresh decision. Needless to add the Commission shall take a fresh call in terms of this remit at an early date, preferably within three months from today and, in the meanwhile, not allow any coercive action to be taken against the claim of the appellant.

11. It was pointed out at the conclusion of the hearing by the learned counsel for the appellant that by directions in para (c) of the operative part of the impugned order, the second to fourth respondents herein (distribution licensees) had been directed to refund the amount received towards cross subsidy surcharge, additional surcharge and differential electricity tax from the appellant within a time bound manner (two months from the date of order) but the same has not yet been complied with. It is pointed out that the impugned order was not challenged by the distribution licensees and thus it is a clear case of default in compliance on their part. We do not have the least doubt that if these facts were brought to the notice of the KERC, it would be inclined to take recourse of all powers available with it under the law to enforce the decision to above effect expeditiously.

12. The appeal is disposed of in above terms.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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