IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
APPELLATE JURISDICTION

APL No. 89 OF 2019 & IA No. 424 OF 2019
APL No. 103 OF 2019 & IA No. 1691 OF 2019 & IA No. 1740 OF 2019 & IA No. 2032 OF 2019 & IA No. 442 OF 2019
APL No. 90 OF 2019 & IA No. 426 OF 2019

Dated: 31st May, 2024

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

APL No. 89 OF 2019 & IA No. 424 OF 2019

M/s Bhadreshwar Vidyut Private Limited
(Formerly known as OPGS Power
Gujarat Private Limited)
Village Bhadreshwar, Taluka – Mundra
District Kutch, Gujarat – 370 411
(Through Authorized Representative) .... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Mumbai, Maharashtra 400005
(Through Secretary) .... Respondent No.1

2. Maharashtra State Electricity Distribution Company Limited
Hongkong Bank Building
M.G. Road, Fort
Mumbai – 400 001
(Through Chairman and Managing Director) .... Respondent No.2

Counsel on record for the Appellant(s)	:	Hemant Singh Mridul Chakravarty Biju Mattam Lakshyajit Singh Bagdwal Chetan Kumar Garg Ankita Bafna Nehul Sharma Supriya Rastogi Agarwal Robin Kumar Harshit Singh Lavanya Panwar Alchi Thapliyal Ayush Raj Shaurya kuma for App. 1
Counsel on record for the Respondent(s)	:	for Res. 1 Samir Malik Rahul Sinha Nikita Choukse for Res. 2

APL No. 103 OF 2019 & IA No. 1691 OF 2019 & IA No. 1740 OF 2019 & IA No. 2032 OF 2019 & IA No. 442 OF 2019

M/s Bhadreshwar Vidyut Private Limited
(Formerly known as OPGS Power
Gujarat Private Limited)
Village Bhadreshwar, Taluka – Mundra
District Kutch, Gujarat – 370 411
(Through Authorized Representative) .... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Mumbai, Maharashtra 400005
(Through Secretary) .... Respondent No.1

2. Maharashtra State Electricity Distribution Company Limited
Hongkong Bank Building

M.G. Road, Fort
Mumbai – 400 001 ....
(Through Chairman and Managing Director) Respondent No.2

Counsel on record for the Appellant(s) : Hemant Singh
Mridul Chakravarty
Biju Mattam
Lakshyajit Singh Bagdwal
Chetan Kumar Garg
Ankita Bafna
Nehul Sharma
Supriya Rastogi Agarwal
Robin Kumar
Harshit Singh
Lavanya Panwar
Alchi Thapliyal
Ayush Raj for App. 1

Counsel on record for the Respondent(s) : for Res. 1

Samir Malik
Rahul Sinha
Nikita Choukse for Res. 2

APL No. 90 OF 2019 & IA No. 426 OF 2019

M/s Bhadreshwar Vidyut Private Limited
(Formerly known as OPGS Power Gujarat Private Limited)
Village Bhadreshwar, Taluka – Mundra
District Kutch, Gujarat – 370 411
(Through Authorized Representative) .... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Mumbai, Maharashtra 400005
(Through Secretary) .... Respondent No.1

2. Maharashtra State Electricity Distribution Company Limited
Hongkong Bank Building
M.G. Road, Fort
Mumbai – 400 001
(Through Chairman and Managing Director) .... Respondent No.2

Counsel on record for the Appellant(s)	:	Hemant Singh Lakshyajit Singh Bagdwal Chetan Kumar Garg Mridul Chakravarty Biju Mattam Ankita Bafna Nehul Sharma Supriya Rastogi Agarwal Robin Kumar Harshit Singh Lavanya Panwar Alchi Thapliyal Ayush Raj Shaurya kuma for App. 1
Counsel on record for the Respondent(s)	:	for Res. 1 Samir Malik Rahul Sinha Nikita Choukse for Res. 2

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I.INTRODUCTION:

The Appellant, M/s Bhadreshwar Vidyut Private Limited (BVPL) is a special purpose vehicle (**SPV**) which owns, operates and maintains a Captive Generating Plant (**CGP**) with an installed capacity of 300 MW consisting of 2 units of 150 MW each, located in the State of Gujarat, near Village Bhadreshwar, District Kutch. The Appellant sources power to

various captive users located in multiple states. The issue, in the present appeals, relates to Financial Years 2015-16, 2016-17 and 2017-18 with respect to sourcing of captive power by the Appellant to its captive users located in the States of Maharashtra, Gujarat and Madhya Pradesh. Respondent No. 2-MSEDCL levied Cross Subsidy Surcharge ("**CSS**") and Additional Surcharge, vide letters/ invoices dated 28.11.2017, 05.12.2017 and 15.10.2018 for the power supplied by the Appellant to its captive users in Maharashtra in Financial Years 2015-16, 2016-17 and 2017-18, alleging that the Appellant had lost its captive status, which was required to be maintained annually in terms of Rule 3 of the Electricity Rules, 2005 (the "2005 Rules" for short). The Appellant, as a (*captive*) generating company, filed Petitions before the Maharashtra Electricity Regulatory Commission ("MERC" for short) invoking its adjudicatory jurisdiction under Section 86(1)(f) of the Electricity Act, 2003. In the said petitions, numbered as Case No. 323 of 2018 (*for FY 2015-16*), Case No. 324 of 2018 (*for FY 2016-17*) and Case No. 372 of 2018 (*for FY 2017-18*), MERC passed a common order dated 22.02.2019 holding that the Appellant ought to agitate the matter, of determination of its captive status for inter-state open access supply, before the Central Commission.

II.CONTENTS OF THE IMPUGNED ORDER PASSED BY THE MERC:

Case Nos. 323, 324 and 372 of 2018 were filed before the MERC by the appellant herein under Sections 9(2), 42, 57, 60, 86(1)(c), 86(1)(f) and 86(1)(k) of the Electricity Act, 2003 ("**EA2003**") regarding wrongful imposition of cross subsidy surcharge (CSS) by MSEDCL on the captive users of the Appellant, who had availed open access for Financial Years 2015-16, 2016-17 and 2017-18 respectively. In Case No. 323 of 2018, the reliefs sought by the appellant were: (a) declare that the

Petitioner (ie the appellant herein) is a captive generating plant for Financial Year 2015-16; (b) Quash the letter dated 28.11.2017 issued by MSEDCL to the Petitioner wherein Cross Subsidy Surcharge for FY 2015-16 was imposed on the captive users of BVPL; (c) Quash the letter dated 15.10.2018 issued by MSEDCL to the Petitioner wherein Cross Subsidy Surcharge for FY 2015-16 has been imposed on the captive users of BVPL; (d) Quash the invoices raised by MSEDCL for the month of March, 2016, to the extent Cross Subsidy Surcharge was levied upon the captive users of the Petitioner ; (e) Quash the invoices raised by MSEDCL dated 05.12.2017 upon the captive users of the Petitioner, qua imposition of Cross Subsidy Surcharge, for FY 2015-16; (f) Direct MSEDCL to refund the amount in terms of prayers (d) herein above, along with applicable interest; (g) declare that MSEDCL has abused its dominant position, in terms stated in the present petition; and (h) direct MSEDCL to pay compensation to the Petitioner as computed in accordance with Section 57(2) read with Section 60 of the Electricity Act, 2003 on account of abuse of dominant position. Similar reliefs were sought by the appellant in Case Nos. 324 and 372 of 2018 also.

By its notice dated 28.11.2017, (which the appellant had requested MERC to quash), MSEDCL informed the Appellant that, as per the Electricity Rules, 2005, captive users are required to hold not less than 26% of ownership of the plant and such captive users are required to consume not less than 51% of the electricity generated, as determined on an annual basis in proportion to their share of ownership of the power plant within a variation not exceeding (+/-) 10%; the criteria, regarding the consumption by captive users, is (1) aggregate consumption by captive users not less than that of 51% of the annual electricity generated; (2) consumption by the captive users in proportion to their shares in

ownership within a variation not exceeding (+/-) 10%; both these consumption criteria are required to be fulfilled independently so as to be eligible as a captive user; the generator is located in Gujarat and consumers were located in Maharashtra & other States; to ascertain captive status of F.Y. 2015-16, they had, vide letter dated 29.01.2016, informed the Appellant to submit various necessary documents such as month-wise details of gross generation, auxiliary consumption and net generation duly certified by WRLDC/GSLDC along with the month-wise consumption of each consumer with the copy of electricity bills issued; a similar information/ data was required to ascertain the captive status for F.Y. 2016-17; however the required data was yet not received at their office; the data/ documents were submitted by the Appellant vide letter dated 13.07.2017 for verification of CPP status for FY 2016-17; from the documents submitted by the Appellant, the captive status could not be verified/ ascertained for FY 2016-17; hence open access consumers, sourcing power from the Appellant under group captive status, were liable to pay the cross subsidy surcharge to MSEDCL for FY 2016-17; and, in view of the above, the bill for applicable CSS and additional surcharge should be levied on all their open access consumers under the licensee area of MSEDCL. Similar letter was issued for the subsequent FY 2017-18 also.

In the impugned Order dated 22-02- 2019**,** the MERC observed that the generator of the appellant- BVPL was situated in Gujarat, and its proposed captive users were in Gujarat, MP and Maharashtra; BVPL required short term Inter-State open access as provided under the CERC Inter-State Transmission Regulations, 2008 ("CERC OA Regulations") since the power generated in Gujarat has to be wheeled/ transmitted to proposed captive users of Maharashtra; under Regulation 8 of the CERC

OA Regulations, BVPL required the consent of the Maharashtra State Load Despatch Centre (MSLDC) since the proposed captive users are situated in Maharashtra; in the instant cases, since the proposed captive users were connected to the distribution network of MSEDCL, the MSLDC, as per the proviso to Regulation 8.3 of the DOA Regulations, 2016 for the open access term of FY 2016-17 and FY 2017-18, and Regulation 9 of the DOA Regulations 2014 for open access term of FY 2015-16, was required to seek consent/ concurrence of MSEDCL before giving its consent to the Western Region Load Despatch Centre (WRLDC) as per Regulation 8 of the CERC OA Regulations; the DOA Regulations, 2014 and 2016 recognized the consent/ concurrence required for entities who wished to avail Inter-State OA as per CERC OA Regulations; whenever the injection point was other than Maharashtra, and the drawal point was in Maharashtra, then such transactions were governed by the CERC Regulations; the DOA Regulations were applicable for the transactions that happened within the State of Maharashtra, and any disputes that arose due to such transactions would be only adjudicated by the Commission (MERC) ; in the instant cases, the dispute was whether concurrence/NOC given by MSEDCL for inter-state open access under Captive or IPP was governed under CERC (Open Access in inter-State Transmission) Regulations, 2008 when the generator was located in Gujarat and its proposed captive users were in Maharashtra; this determination of captive or non-captive status of the Generator decided the levy of CSS and AS on the consumers availing Inter-State OA transactions; and. thus, it was clear that the MERC had no jurisdiction to adjudicate the dispute of inter-state open access in the instant cases with regard to the captive status of the generating plant of the appellant- BVPL.

The MERC then observed that, in the instant cases, the open

access transaction was under the inter-state mode and was governed by CERC (Open Access in inter-State Transmission) Regulations, 2008; the dispute pertained to the generator located in Gujarat and its proposed captive users located in Maharashtra; and there was no jurisdiction of the MERC to adjudicate the disputes in the instant cases of inter-state open access with regard to the captive status of the appellant-BVPL's generating plant located in Gujarat, the jurisdiction lay with the CERC in view of the provision regarding Redressal Mechanism under CERC (Open Access in inter-State Transmission) Regulations, 2008. After referring to the definition of "open access" under Section 2(47) of EA 2003, the MERC observed that in the instant cases, as it was an inter-state open access transaction, the dispute had to be adjudicated as per the Regulations framed by the Appropriate Commission which, in the instant case, was the CERC.

After taking note of the submission of MSEDCL that, in case the Generator was in the State of Gujarat and its proposed captive users were in Gujarat, Madhya Pradesh and Maharashtra, then a situation may arise wherein consumers in one State may comply with Rule 3 of the Electricity Rules, 2005 but consumers in another state do not comply with the same or vice-versa; in that event, MERC would not have jurisdiction over consumers in other States; this may lead to a complex situation wherein determination of CPP status would become very difficult; moreover, a State Commission cannot travel beyond its jurisdiction if the injection point and drawal point is not within the periphery of the State; admittedly, in the present case, the injection point was in Gujarat and drawal point was in Maharashtra, and hence MERC cannot have jurisdiction; it found merit in the submissions of MSEDCL that MERC was limited by its territorial jurisdiction, and could not look into

transactions which were inter-state in nature or related to other States.

After referring to to the definition of “Supply” in Section 2(70) of EA, 2003, to the definition of “Consumer” in Section 2(15) of EA, 2003, and to the definition of “person” in Section 2(49) of EA, 2003, the MERC observed that, in view of the above provisions, the proposed captive users of BVPL, who were supplied electricity under inter-state open access transactions from BVPL, were covered under the definition of “consumer” whereas BVPL was covered under the definition of “person”; and from a conjoint reading of the above provisions, the transaction between BVPL and its proposed captive users was a transaction that squarely fell under the definition of “supply” wherein a composite scheme was involved.

After referring to the observations of the Supreme Court in the **Energy Watchdog** Judgment regarding a composite scheme, MERC observed that whenever there was a dispute that involved a composite scheme, then it was the CERC that had jurisdiction to adjudicate the same. After noting that there was disagreement on the methodology aspect with regard to the criteria as specified in Rule 3 of the Electricity Rules, 2005, MERC observed that it had not delved into any merits of the submissions tendered by either Parties in the instant cases and was ruling exclusively with regard to the jurisdiction aspect only.

A common order was passed by MERC, disposing of Case Nos. 323, 324 and 372 of 2018, directing the appellant-BVPL to agitate the matter of determination of captive status for inter-state open access supply before the CERC and seek appropriate relief, if deem fit, within one month. MERC also directed MSEDCL not to take any coercive action during this period.

III.RIVAL SUBMISSIONS:

The question, which arises for consideration, in the present batch of appeals, is whether it is the CERC or the State Commission (in the present case, the MERC) which has jurisdiction to adjudicate the aforesaid dispute. At our request, Sri M.G. Ramachandran and Sri Sanjay Sen, Learned Senior Counsel and Sri Buddy Ranganadhan, Learned Counsel, graciously agreed to assist us in resolving this question, and their sagacious counsel was of immense help in adjudicating this dispute. The rival submissions, put forth by Sri Hemant Singh, Learned Counsel for the appellant, and Sri B. Sai Kumar, Learned Senior Counsel appearing on behalf of MSDCL, and the views expressed by the Learned Amicus Curaie are detailed, for convenience sake, under different heads.

IV.DOES CERC LACK JURISDICTION TO ADJUDICATE THE DISPUTE RAISED BY THE APPELLANT BEFORE MERC?

In support of his submission that the CERC has no jurisdiction, under Section 79 of EA 2003, to adjudicate the present dispute, and the State Commission is the only authority under Section 86 of EA 2003 to adjudicate the present dispute, Sri Hemant Singh, Learned Counsel for the appellant, would submit that Section 79(1)(f), which confers dispute adjudication powers on the Central Commission, is restrictive and is confined only to disputes connected with clauses (a) to (d) of Sections 79(1) of the EA 2003; and from a plain reading of the said clauses (a) to (d), it is evident that the same is not attracted.

Sri M.G. Ramachandran, Learned Senior Counsel and Amicus curaie, would submit that, in case a generating company claims that it is

supplying to a captive user, the Central Commission will have to go into the aspect of whether the captive user qualifies in terms of Section 2(8) and Section 9 of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005; this will be an exercise of power under Section 79(1)(a) or (b); and it is then a case of exercise of jurisdiction of the CERC and not a case of existence or lack of jurisdiction.

Sri Sanjay Sen, Learned Senior Counsel and Amicus Curiae, would submit that a statutory body can exercise jurisdiction only in accordance with the provisions of the statute; upon existence of the jurisdictional fact, the court or tribunal has the power to proceed and decide on the adjudicatory facts; this legal principle of conferment of jurisdiction has been reiterated by the Supreme Court in (i) **Chiranjilal Shrilal Goenka v. Jasjit Singh, (1993) 2 SCC 507,** *(ii)* **Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307,** and *(iii)* **Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136;** the jurisdictional law and fact necessary for exercise of jurisdiction has to be clearly discernible from a reading of the statute; jurisdiction of courts and tribunals cannot be enlarged or supplied by a process of expansive statutory interpretation; and inconvenience or hardship of parties or expediency/ efficiency in the adjudicatory process also cannot be a ground for conferring jurisdiction.

Sri Buddy Ranganadhan, Learned Amicus Curiae, would submit that a disconnect appears to arise only if the “existence of jurisdiction” in the Commission is inter-spaced with “exercise of jurisdiction” by such Commission; there is no disconnect if the two are kept distinct and not juxtaposed; for example, under Section 79(1)(b), the CERC has jurisdiction to “regulate the tariff” of a Generating Company which falls within its ambit; the mere fact that the CERC has not actually exercised its jurisdiction to regulate the tariff of such a Generating Company does not mean that such

Generating Company is outside the ambit of the said Section; and merely because its tariff has not been regulated does not mean that it is not within the jurisdiction of the CERC.

A. ANALYSIS:

Section 79 of the Electricity Act, 2003 relates to the functions of the Central Commission and, under sub-section (1) thereof, the Central Commission shall discharge the following functions, namely:-- (a) to regulate the tariff of generating companies owned or controlled by the Central Government; (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause *(a)*, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State; (c) to regulate the inter-State transmission of electricity; (d) to determine tariff for inter-State transmission of electricity; (e) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations; (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses *(a)* to *(d)* above and to refer any dispute for arbitration; (g) to levy fees for the purposes of this Act; (h) to specify Grid Code having regard to Grid Standards; (i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees; (j) to fix the trading margin in the inter-State trading of electricity, if considered necessary; and (k) to discharge such other functions as may be assigned under this the Electricity Act ,2003 .

Section 86 of the Electricity Act, 2003 relates to the functions of the-State Commission and, under sub-section (1) thereof, the State Commission shall discharge the following functions, namely:- (a)

determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State. Under the proviso thereto, where open access has been permitted to a category of consumers under Section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers; (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State; (c) facilitate intra-State transmission and wheeling of electricity; (d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State; (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; (f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration; (g) levy fee for the purposes of this Act; (h) specify State Grid Code consistent with the Grid Code specified under clause *(h)* of sub-section *(1)* of section 79; (i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees; (j) fix the trading margin in the intra-State trading of electricity, if considered necessary; and (k) discharge such other functions as may be assigned to it under this Act.

As the Appellant is not a generating company owned or controlled by the Central Government, clause (a) of Section 79(1) has no application.

The jurisdiction conferred on the CERC by Section 79(1)(b), to regulate tariff of generating companies other than those owned or controlled by the Central Government as specified in clause (a), is restricted only to such of those generating companies which have entered into or otherwise have a composite scheme for generation and sale of electricity in more than one State. It is only with respect to those generating companies, which have entered into or otherwise have a composite scheme, for generation and sale of electricity in more than one State, can the CERC exercise jurisdiction to regulate their tariff under Section 79(1)(b).

As the CERC is a tribunal of limited jurisdiction, it must exercise its jurisdiction strictly within the limits of what the Electricity Act, 2003 expressly stipulates, and not beyond. Jurisdiction is the authority or power of the court to deal with a matter and make an order carrying binding force in the facts. ***(Chiranjilal Shrilal Goenka v. Jasjit Singh*, (1993) 2 SCC 507; and A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602).** The power to create or enlarge jurisdiction is legislative in character. Parliament alone can do it by law and no court, whether superior or inferior or both combined, can enlarge the jurisdiction of a court (or statutory tribunal). Jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the legislature. The Court or Tribunal cannot confer a jurisdiction on itself which is not provided in the law. Thus, jurisdiction can be conferred by statute, and Courts cannot confer jurisdiction or an authority on a tribunal. ***(Chiranjilal Shrilal Goenka v. Jasjit Singh*, (1993) 2 SCC 507; and A.R. Antulay v. R.S. Nayak: (1988) 2 SCC 602).**

Conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a Superior Court, and if the court passes an order/decree having no jurisdiction over the matter,

it would amount to a nullity as the matter would go to the roots of the cause. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Equally, acquiescence of a party should not be permitted to defeat the legislative animation. (**United Commercial Bank Ltd. v. Workmen: AIR 1951 SC 230; Nai Bahu v. Lala Ramnarayan [(1978) 1 SCC 58; Natraj Studios (P) Ltd. v. Navrang Studios: (1981) 1 SCC 523; Sardar Hasan A.R. Antulay v. R.S. Nayak: (1988) 2 SCC 602; Union of India v. Deoki Nandan Aggarwal:1992 Supp (1) SCC 323; Karnal Improvement Trust v. Parkash Wanti: (1995) 5 SCC 159; U.P. Rajkiya Nirman Nigam Ltd. v. Indure (P) Ltd: (1996) 2 SCC 667; State of Gujarat v. Rajesh Kumar Chimanlal Barot: (1996) 5 SCC 477; Kesar Singh v. Sadhu: (1996) 7 SCC 711; Kondiba Dagadu Kadam v. Savitribai Sopan Gujar: (1999) 3 SCC 722; CCE v. Flock (India) (P) Ltd: (2000) 6 SCC 650; and Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307).**

The court cannot derive jurisdiction apart from the statute. In such eventuality, the doctrine of waiver also does not apply. (**United Commercial Bank Ltd. v. Workmen: AIR 1951 SC 230; Nai Bahu v. Lala Ramnarayan: (1978) 1 SCC 58; Natraj Studios (P) Ltd. v. Navrang Studios: (1981) 1 SCC 523; Kondiba Dagadu Kadam v. Savitribai Sopan Gujar: (1999) 3 SCC 722; and Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136**). For the purpose of interpretation and/or application of a statute, the Court cannot base its decision on any hypothesis. Construction of a statute, save and except some exceptional cases, cannot be premised on the hardship which may be suffered by the licensee. **(Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659).** The possibility of hardship being

caused, if the dispute in the present case is held to be amenable to adjudication only the State Commissions under Section 86(1)(f), and not by the CERC under Section 79(1)(b) read with Section 79(1)(f), would not justify conferring jurisdiction on the CERC to adjudicate the present dispute, if it is held to lack jurisdiction to do so.

It is only if the Appellant falls within the ambit of Section 79(1)(b), in that it has, as a generating company, entered into or otherwise has a composite scheme for generation and sale of electricity in more than one State, can the CERC exercise jurisdiction to regulate its tariff. We shall examine, a little later in this order, whether or not the Appellant satisfies the composite scheme test.

V.IS RULE 3 A PRECURSOR TO DETERMINATION OF JURISDICTION OF THE APPROPRIATE COMMISSION?

Sri Hemant Singh, Learned Counsel for the appellant, would submit that the present case covers a situation where the Appellant, as a CGP, is sourcing power to a special category of consumers (*called as captive users*); there is no supply/ sale of electricity in the event a CGP sources power to captive users, since the same is for self-consumption as per Section 2(8) of the Electricity Act, 2003 ; this also stands settled by the following judgments: (a) **A.P. Gas Power Corporation Limited v. A.P. State Regulatory Commission & Anr: (2004) 10 SCC 511**; and (b) **M/s. J.S.W Steel Limited v. MERC & Anr: 2019 SCC OnLine APTEL 57,** which has been upheld by the Supreme Court in **Maharashtra State Electricity Distribution Co. Ltd. v. JSW Steel Ltd: (2022) 2 SCC 742**.

Sri Sanjay Sen, Learned Senior Counsel and amicus curiae, would submit that the jurisdictional law and fact required for the Central

Commission to decide the adjudicatory facts (in terms of Section 79 (1) (f)) are as follows: (a) the dispute has to *involve generating companies or transmission licensees* (i.e, the party- requirement test / who can be parties) and then (b) such dispute must be with *regard to matters connected* with clauses (a) to (d) of Section 79(1) (i.e, the subject matter test); and it is only if the aforesaid two jurisdictional facts are established, the Central Commission can adjudicate upon the dispute or refer any dispute for arbitration.

Sri Buddy Ranganadhan, Learned Amicus Curaie, would submit that the question as to whether there is a “sale” by a Captive Generating Plant to its consumers also depends on whether its consumers fulfill the requirements of Rule 3; if the CGP and/or its consumers satisfy Rule 3, there is no sale; if, however, the CGP and/or its consumers do not so fulfil Rule 3, there would be a sale; in such eventuality, such sale, being in more than one state, the CGP would have a “Composite Scheme”; therefore, adjudication on the question as to whether the CGP and/or its consumers qualifies Rule 3 is itself a pre-cursor to a determination of jurisdiction itself; it has also been held by this Tribunal in **BSES Rajdhani Power Limited -v- Delhi Electricity Regulatory Commission and NTPC Limited (**Judgement of APTEL in Appeal No. 94 and 95 of 2012 dated 04.09.2012) that, once the matter is covered by Section 79, it goes completely out of the ambit of Section 86.

A. ANALYSIS:

Section 2(8) of the Electricity Act, 2003 defines "Captive generating plant" to mean a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity

primarily for use of members of such co-operative society or association. Section 9 of the Electricity Act, 2003 relates to Captive generation. Section 9(1) provides that, notwithstanding anything contained in the Electricity Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines. Under the first proviso thereto, 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. The second proviso stipulates that no licence shall be required under the Electricity 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 sub- section (*2*) of Section 42.

Section 9(2) provides that 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. Under the first proviso, 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. The second proviso stipulates that any dispute, regarding the availability of transmission facility, shall be adjudicated upon by the Appropriate Commission.

In exercise of the powers conferred by Section 176 of the Electricity Act,2003, the Central Government made the Electricity Rules, 2005. Rule 3 thereof relates to the requirements of Captive Generating Plant. Rule 3(1) provides that no power plant shall qualify as a 'captive generating plant', under Section 9 read with clause (8) of Section 2 of the Electricity

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. Under the first proviso thereto, in case of a power plant set up by a registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society. Under the second proviso, 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.

Rule 3(1)(b) provides that, 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. Under Explanation (I) 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 (II) 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.

The Illustration, thereunder, states that, 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.

Rule 3(3) provides that 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) thereto stipulates that, for the purpose of this rule, (a) “Annual Basis” shall be determined based on a financial year; (b) “Captive User” shall mean the end user of the electricity generated in a Captive Generating Plant and the term “Captive Use” shall be construed accordingly; (c) “Ownership” in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant; and (d) “Special Purpose Vehicle” shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity.

In **BSES Rajdhani Power Limited -v- Delhi Electricity Regulatory Commission and NTPC Limited (Appeal No. 94 and 95 of 2012 dated 04.09.2012),** this Tribunal held that Sections 61 and 79 of the Electricity Act not only deal with the tariff but also deal with the terms and conditions of tariff; the terms and conditions necessarily include all terms related to tariff; determination of tariff and its method of recovery will also

depend on the terms and conditions of tariff; Section 79(1)(f) of the Electricity Act, 2003 provides for the adjudication of disputes involving a generating company or a transmission licensee in matters connected with clauses (a) to (d) of Section 79; thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79 (1) (f) of the Electricity Act.

It is no doubt true that existence of jurisdiction is distinct from its exercise. In case the Electricity Act has conferred jurisdiction on the CERC, failure of the CERC to exercise the jurisdiction conferred on it by the Electricity Act would not denude it of its jurisdiction to do so later. We shall also proceed on the premise that, in case the CERC is held to have jurisdiction to adjudicate the present dispute under Section 79(1)(f), the jurisdiction of the State Commission under Section 86(1)(f) is ousted.

For the CERC to be held to have jurisdiction to adjudicate the present dispute, under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003, the jurisdictional fact, of the Appellant having entered into or otherwise having a composite scheme for generation and sale of electricity in more than one state, must exist.

A 'jurisdictional fact' is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends the jurisdiction of a court, a tribunal or an authority. **(Arun Kumar vs. Union of India:(2007) 1 SCC 732; *Ramesh Chandra Sankla v. Vikram Cement*, (2008) 14 SCC 58).** The fact or facts upon which the jurisdiction of a court, a Tribunal or an authority, depends can be said to be a "jurisdictional fact". If the "jurisdictional fact" exists, a court, Tribunal or authority has jurisdiction to decide other issues. If such fact does not

exist, a court, Tribunal or authority cannot act. A court or a Tribunal cannot wrongly assume the existence of a jurisdictional fact, and proceed to decide a matter. The underlying principle is that, by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior Tribunal cannot confer upon itself jurisdiction which it otherwise does not possess. The existence of a jurisdictional fact is thus the sine qua non or the condition precedent for the assumption of jurisdiction by a court or Tribunal of limited jurisdiction. Once such a jurisdictional fact is found to exist, the court or Tribunal has the power to decide adjudicatory facts or facts in issue. (**Carona Ltd. v. Parvathy Swaminathan & Sons (2007) 8 SCC 559; *Ramesh Chandra Sankla v. Vikram Cement*, (2008) 14 SCC 58; Halsbury's Laws of England (Fourth Edition), Volume 1, para 55, page 61 ; Reissue, Volume 1(1), para 68, pages 114-15, Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi AIR 1959 SC 492; Arun Kumar v. Union of India [2006] 286 ITR 89 (SC) ; (2007) 1 SCC 732; BGR Energy Systems Ltd. v. ACCT, 2009 SCC OnLine AP 238; Bharat Electronics Ltd. v. Deputy Commr., (CT), 2011 SCC OnLine AP 1080; K. G. F. Cottons (P) Ltd. v. Asst. Commr. (CT): 2015 SCC OnLine Hyd 46; and Ad Age Outdoor Advertising P. Ltd. v. Govt., A. P., 2011 SCC OnLine AP 1077).** No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. **(Raza Textiles Ltd. v. ITO, (1973) 1 SCC 633).**

The jurisdictional fact, necessary for the CERC to exercise its powers under Section 79(1)(b), would be for the Appellant to have entered into or otherwise have a composite scheme, and for the composite scheme to provide for the generation and sale of electricity in more than one State. It is only if the aforesaid jurisdictional fact is satisfied, can the

CERC then exercise jurisdiction to adjudicate the dispute considering the adjudicatory facts involved in such a lis.

As existence of a 'jurisdictional fact' is the *sine qua non* for the exercise of power, the authority can proceed with the case and take an appropriate decision in accordance with law if the jurisdictional fact exists. Once the authority has jurisdiction in the matter, on existence of 'jurisdictional facts', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to the existence of jurisdiction is present. **(Arun Kumar v. Union of India:(2007) 1 SCC 732; *Ramesh Chandra Sankla v. Vikram Cement*, (2008) 14 SCC 58; Carona Ltd. v. Parvathy Swaminathan & Sons, (2007) 8 SCC 559)**

The law does not permit any court/tribunal/authority/forum to usurp jurisdiction on any ground whatsoever, in case such an authority does not have jurisdiction on the subject-matter, for the reason that it is not an objection as to the place of suing; "it is an objection going to the nullity of the order on the ground of want of jurisdiction". Thus, for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional facts is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide on the adjudicatory facts or facts in issue. (**Setrucherla Ramabhadraraju v. Maharaja of Jeypore: AIR 1919 PC 150; State of Gujarat v. Rajesh Kumar Chimanlal Barot: (1996) 5 SCC 477; Harshad Chiman Lal Modi v. D.L.F. Universal Ltd: (2005) 7 SCC 791; Carona Ltd. v. Parvathy Swaminathan & Sons: (2007) 8 SCC 559; and *Jagmittar Sain Bhagat v. Health Services, Haryana*, (2013) 10 SCC 136).**

In terms of Rule 3(1) of the Electricity Rules 2005, a power plant would qualify as a captive generation plant under Section 2(8) and 9 of the Electricity Act only if (i) not less than 26% of the ownership of the said plant is held by the captive users, and (ii) not less than 51% of the annual aggregate electricity generated in such plant is consumed for captive use. Under the first and second provisos to Rule 3 (1), registered cooperative societies and association of persons, who fulfil the aforesaid criteria, would also to be eligible to be treated as a captive generation plant. Fulfilment of the afore-said criteria would bring a generating plant within the ambit of a "captive generation plant". As shall be detailed later in this order, in case a generating company fails to fulfil the aforesaid criteria, it would then not be entitled to claim the benefits available to a captive generation plant and may, consequently, fall within the ambit of Section 79(1)(b).

The jurisdictional fact, of the Appellant having entered into or to otherwise to have a composite scheme for generation and sale of electricity in more than one State, can be said to exist only if they are held not to be a captive generation plant. Enquiry into this jurisdictional fact, and a finding that the Appellant does not satisfy the test of being a captive generation plant, are pre-requisites for the Central Commission to exercise jurisdiction under Section 79(1)(b).

In ***A.P. Gas Power Corpn. Ltd. v. A.P. State Regulatory Commission*****, (2004) 10 SCC 511,** the Supreme Court held that consumption of electricity by the participating industries in their units, to the extent of their shareholding, amounts to captive consumption for which no licence would be required as it would neither be a supply nor distribution of the electricity produced; it is utilisation of the product by the manufacturer itself; there is no sale, supply or distribution to one self so

long as the power produced is utilised by those who are participating in the activity of generating electricity; in a case where it is not a single owner but a joint or collective venture for generation of electricity for their own captive consumption, obviously the self-consumption of the power generated would be amongst those who are participating in the activity of generation and it shall not be confined to any one industry; a participating industry, subject to certain conditions as agreed upon, is entitled to transfer its shares to any other company; any existing participating industry may decide to transfer all of its shares or part thereof; after transfer of shares, the transferee company or industry would not remain an outsider but a shareholding company, and it is entitled to utilize the power generated by the CGP, and would be confined to the extent of the value of the shares transferred to it; holding of share capital in the CGP is the basis of participating in their generating activity; utilization of the power produced, to the extent of the shareholding, would only amount to captive consumption and self-supply or distribution of power; as soon as the electricity generated by CGP goes to anyone who has no shareholding in the company, or beyond the extent of the shareholding, it would certainly amount to supply or distribution to the public.

In **JSW Steel Ltd. v. Secretary, Maharashtra Electricity Regulatory Commission, 2019 SCC OnLine APTEL 57,** this Tribunal held that it is only if the two conditions envisaged under Rule 3 of the 2005 Rules are fulfilled by captive users i.e, minimum of 26% shareholding and consume 51% of aggregate electricity on annual basis generated in the captive plant, the association of persons or members of special purpose vehicle can be treated as members of captive generating plant; on the question whether this consumption of required minimum percentage can be equated with the ‘supply’ of power by a generating company in terms

of Section 2(70), the judgement in **A.P. Gas Power Corporation Limited**, is relevant; it is clear that the word 'supply' has to be understood in the context it is used with reference to Section 42 (4) of the Electricity Act, 2003; it does not include utilization of power by a captive user from a generating plant in which he or it has ownership i.e, equity interest; therefore, the words 'consume' and 'receive supply' used in Section 42(4) have to be carefully understood and interpreted; the words 'consume' and 'receive supply' used in the context of captive user, which is recognized in Section 9(2) and the fourth proviso to Section 42(2), would clearly mean a captive generator carrying electricity to the destination of his own use; therefore, if the transaction is between the captive generating plant and its shareholders/users, it cannot be equated with the case of supply of power (in the context of definition of Section 2(70) of the Electricity Act, 2003); in other words, the relevance is with regard to carrying power to the destination of use rather than supply to a consumer; sub-section (2) of Section 42 does not deal with supply; it only refers to open access and sub-section (4) of Section 42 is conditional on there being supply of electricity as defined in the Electricity Act, 2003, which does not occur in the case of captive consumption; in other words, if the captive consumers, who get 51% of the aggregate power generated, use the electricity generated from a captive generating plant, it is not supply of electricity as defined in the Act; from the very same generating plant, if the surplus power, i.e, beyond 51% of self-consumption by the members, is supplied to a consumer there is supply of electricity as defined; in that situation, payment of surcharge, additional surcharge arises; therefore, no separate exemption is provided under Section 42(4) of the Electricity Act 2003 exempting captive users to pay additional surcharge on wheeling charges which is payable by consumers in general if he were to change his supply

from a third party i.e, other than the licensee of that area; if cross subsidy surcharge is exempted for captive generation and use, there is no reason why additional surcharge should be imposed on captive users; the National Electricity Policy of 2005 aims at creation of employment opportunities through speedy and efficient growth of industries; captive power plants, by group of consumers, were promoted with the objective of enabling small and medium industries being set up which may not be possible and easy individually to set up a plant of optimal size in cost effective manner; therefore, with certain riders like 26% share-holding and minimum 51% of annual consumption of electricity generated in the captive plants, setting up of captive or group captive plants were encouraged; if these members or captive users contribute some money towards consumption of electricity, it cannot be equated with 'supply' of electricity in normal parlance; therefore, captive consumers are not liable to pay additional surcharge; it is clear that, once the captive user or members of special purpose vehicle or members of association, satisfy the conditions at (a) and (b) of sub-rule (1) of Rule 3 of the 2005 Rules, they cannot be treated as consumer or class of consumers who receive supply of electricity in normal course of business; a separate class is carved by fiction of law i.e, captive user/users or consumers by complying with certain conditions; as long as the conditions to become captive consumer exists and all requirements are complied with, they are captive consumers consuming electricity generated by the captive generating plant; it is, therefore, self-consumption; if the consumer is not a captive consumer, he has to pay additional surcharge; once he is a captive consumer (including shareholders of special purpose vehicle or the company) it is not supply of power as meant or understood when consumer in general gets supply of power; it is self-consumption of power

produced by captive generating plant in which the captive consumer or shareholder has rights of ownership; and captive consumers do not have to pay additional surcharge on wheeling charges when they switch over from distribution licensee.

The judgement of this Tribunal, in **JSW Steel Ltd. v. Secretary, Maharashtra Electricity Regulatory Commission, 2019 SCC OnLine APTEL 57**, was approved in **Maharashtra State Electricity Distribution Co. Ltd. v. JSW Steel Ltd., (2022) 2 SCC 742,** wherein the Supreme Court held that 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 a statutory right; as per the scheme of the Electricity 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 Electricity Act, 2003; 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; additional surcharge on the charges of wheeling is levied 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 licence is issued; therefore, if a consumer or class of consumers want to receive 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; and, therefore, the levy of additional surcharge under sub-section (4) of Section 42 of the Electricity Act, 2003 can be said to be justified and can be imposed and also can be said to be compensatory in nature.

The Supreme Court further held that 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 captive consumers/captive users are concerned, they are not liable to pay additional surcharge under Section 42(4) of the Electricity Act, 2003; in the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines; so far as captive consumers/captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Electricity Act, 2003 shall not be leviable; 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 are not to incur any expenditure and/or invest any amount at all; if captive consumers, who are a separate class by themselves, are subjected to levy of additional surcharge under Section 42(4), it will be discriminatory; and such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Electricity Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Electricity Act ,2003 .

Since electricity generated by a captive generation plant, for consumption by its captive users, is consumption for one's own use, and does not amount to supply or sale of electricity, the power to adjudicate whether or not the Appellant is a captive generation plant does not fall within the ambit of Section 79(1)(b), and it is only after this jurisdictional fact, of the Appellant not being a CGP, is established can any consequential dispute be adjudicated, under Section 79(1)(b), by the CERC.

Unlike Section 79(1)(b) read with Section 79(1)(f), Section 86(1)(f) confers power on the State Commission to adjudicate all disputes between a distribution licensee and a generator (which would include a captive generation plant). It goes without saying that, consequent on the Appellant's CGP status being adjudicated by the State Commission, and in case the said Commission were to hold that they do not fulfil the requirements of Rule 3(1) of the Electricity Rules, the Appellant may then fall within the ambit of Section 79(1)(b), and any other dispute, consequent

on their being held not to be a CGP, can be adjudicated by the CERC under Section 79(1)(f), provided such a dispute falls within the ambit of clauses (a) to (d) of Section 79(1).

VI. "COMPOSITE SCHEME" TEST:

Sri Hemant Singh, Learned Counsel for the appellant, would submit that Section 79(1)(b) provides (a) power to the Central Commission to 'regulate' 'tariff' of generating companies other than those owned or controlled by the Central Government; and (b) the said power is subject to the condition that such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State; thus, for the Central Commission to exercise jurisdiction, there must be 'regulation of tariff' of a generating company having a 'composite scheme'; the words 'composite scheme' are not defined under EA 2003; the Tariff Policy, issued under Section 3 of EA 2003, contains an explanation to Clause 5.11, from which it becomes clear that a 'composite scheme' of a generating company has to involve sale of electricity to a distribution licensee outside the State in which the generation project is located; thus, without a sale agreement with the distribution licensee, there cannot be a composite scheme; the Supreme Court, in **Energy Watchdog v. CERC: (2017) 14 SCC 80**, held that the tariff policy is an important aid to the construction of Section 79(1)(b) of Electricity Act 2003; and, from the said judgment, it is clear that, for construing the term 'composite scheme', there has to be sale of electricity by a generating company to a distribution licensee.

Sri Hemant Singh, Learned Counsel for the appellant, would submit that, in order to invoke Section 79(1)(b), it is necessary that there should

be generation and 'sale' of electricity in more than one State; in this context, the following is to be considered: (a) Section 2(70) of EA 2003 defines the term 'supply' by specifying that the said term in relation to electricity, means the 'sale' of electricity to a licensee or a consumer; (b) thus, 'sale' means 'supply' of electricity; in the present case, there is no sale/ supply of electricity by the Appellant to any of the licensees (distribution); as per Rule 3(2) of ER 2005, in the event a CGP fails to fulfil the test of qualifying as a captive generating plant as per Rule 3(1), the transaction becomes 'supply' of electricity by a generating company to the consumers (*not to any licensee*); hence, under both the above scenarios, i.e, where a CGP passes the captive tests under Rule 3(1) or it fails such tests and becomes a generating company, by virtue of Section 49 of EA 2003, the role of Regulatory Commissions, in determining price or tariff, is not attracted (*as no sale is there to a distribution licensee*); consequently, in both the above scenarios, Section 79(1)(b) is not attracted when the Commissions have no role to determine tariff; and, if tariff cannot be determined, then there cannot be any regulation of tariff of a generating company so as to attract the above provision. Learned Counsel would rely on **Tata Power Company Limited v. Reliance Energy Limited & Ors: (2009) 16 SCC 659** to submit that the words '*regulate the tariff of generating companies*', used in Section 79(1)(b), cannot mean regulating any aspect of tariff in a transaction entered into by a CGP with its captive users, where power is sourced through open access; or a transaction is entered into by a generating company with consumers directly, again under open access.

Sri M.G. Ramachandran, Learned Senior Counsel and Amicus curaie, would submit that Section 79, being a special provision vesting the function in the Central Commission, would exclude the jurisdiction of the

State Commission; in terms of Section 79 (1) (a) and (b), the Central Commission has jurisdiction to regulate determination of Tariff; the term 'regulate' is wider than the determination of Tariff, and would include any aspect of the transaction of supply of electricity by a Generating Company including whether such a Generating Company qualifies as a captive power plant, and to what extent the person to whom electricity is supplied can be considered as a captive user; Section 79 (1) (a) or (b) does not depend on whom the electricity has been supplied to; and, in terms of Section 79 (1) (f), adjudication of any issue relating to such generation and supply will be by the Central Commission.

Sri M.G. Ramachandran, Learned Senior Counsel, would submit that a Captive Generating Plant, as defined in Section 2(8) read with Section 9 of the Electricity Act, 2003 and described as a power plant in Rule 3 of the Electricity Rules, 2005, is also a specie of a Generating Station, as defined in Section 2(30) and a Generating Company as defined in Section 2(28) of the Act; if a Generating Station fulfils the requirement of a Captive Generating Plant, as per the provisions of the Act and Rule 3 of 2005 Rules, it will be a Captive Power Plant, and such of the persons who fulfil the conditions of ownership/shareholding (26%) and consumption (51%) will be a captive user; even if it is a Captive Power Plant, supply of electricity to other than the captive users will be considered as supply as a Generating Company in its status as non-captive; this is also provided in Section 9(1) - proviso of the Act as well as Rule 3 (2) of the Electricity Rules, 2005; further, captive user status is also to be determined on an annual basis for each Financial Year; and the power plant may be a Captive Generating Station in one Financial Year with one or more users of the generated electricity satisfying the conditions/qualifications provided in the Electricity Act and the Rules, and in another Financial Year it may not be so.

Sri Sanjay Sen, Learned Senior Counsel and amicus curiae, would submit that the Maharashtra Commission, in dealing with the issue of jurisdiction, relied upon Section 79(1)(f) read with Section 79(1)(b) and the principles laid down in *Energy Watchdog v Central Electricity Regulatory Commission*, (2017) 14 SCC 80, to returned its findings; keeping in view the aforesaid, it is necessary to appreciate that in Section 79(1) (b) the legislature, *firstly*, is seeking to align the powers of the Central Commission with the power earlier vested under Section 79(1)(a) although in a different factual situation; in Section 79(1)(b), the Central Commission is primarily vested with the jurisdiction to regulate tariff of generating companies (not owned or controlled by the Central Government), if such generating companies have a "composite scheme" for generating and sale in more than one State; the core purpose of both Section 79(1)(a) and (b) is to vest the Central Commission with the "power to regulate tariff of generating companies"; however, the nature/kind of generating companies contemplated in the said two sub-sections are separate and distinct; the CERC does not have jurisdiction to regulate the tariff of a captive generating plant or generating companies supplying electricity to captive users or to consumers (under open access); the "composite scheme" test as elaborated and explained in the *Energy Watchdog,* will be relevant and apply only if the first part of Section 79(1)(b) (i.e, the existence of the Central Commission's power to regulate tariff) is available and satisfied; and, hence, reliance on *Energy Watchdog* is wrong.

Sri Buddy Ranganadhan, Learned Amicus Curaie, would submit that the Generating Company, in order to fall within the ambit of Section 79(1)(b), must have a "composite scheme for generation and sale of electricity in more than one state"; only then could its tariff be regulated;

once the Generating Company is held to have a “composite scheme”, then all other consequences and/or incidents of Section 79 would follow, i.e to say, its tariff could potentially be regulated (if the transaction came within Section 61), and under Section 79(1)(f) all disputes “concerning” such Generating Company would be adjudicated by the CERC; therefore, the only question to be addressed is whether the Generating Company has a “composite scheme” or not?; and, if it does, the CERC would have jurisdiction and, if it did not, the CERC would not.

A. ANALYSIS:

Section 2(28) of the Electricity Act, 2003 defines "generating company" to mean any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station. Section 2(30) defines "generating station" or "station" to mean any station for generating electricity, including any building and plant with step-up transformer, switch-gear, switch yard, cables or other appurtenant equipment, if any, used for that purpose and the site thereof; a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station.

Section 2(70) of the Electricity Act defines "supply", in relation to electricity, to mean the sale of electricity to a licensee or consumer. Section 49 relates to Agreement with respect to supply or purchase of electricity and, thereunder, where the Appropriate Commission has allowed open access to certain consumers under Section 42, such

consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of Section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.

The Tariff Policy dated 6-6-2006 is a statutory policy enunciated under Section 3 of the Electricity Act. The amendment of 28-1-2016 throws considerable light on the expression "composite scheme", which has been defined as follows:

> "5.11 (*j*) *Composite Scheme*: Clause (*b*) of Section 79(1) of the Electricity Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State.
>
> *Explanation*.—The composite scheme as specified under Section 79(1) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such project is located."

This definition is an important aid to the construction of Section 79(1)(*b*), and correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. **(Energy Watchdog v. CERC, (2017) 14 SCC 80).**

In **Energy Watchdog v. CERC, (2017) 14 SCC 80,** the Supreme Court held that, whenever there is inter-State generation or supply of

electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved; this is the precise scheme of the entire Electricity Act, including Sections 79 and 86; Section 79(1) itself, in clauses (*c*), (*d*) and (*e*), speaks of inter-State transmission and inter-State operations; this is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in clauses (*a*), (*b*) and (*d*), and "intra-State" in clause (*c*); this being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission; the State Commission's jurisdiction is only where generation and supply takes place within the State; on the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Electricity Act; the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State; this also follows from the dictionary meaning [*McGraw-Hill Dictionary of Scientific and Technical Terms* (6th Edn.), and *P. Ramanatha Aiyar's Advanced Law Lexicon* (3rd Edn.)] of the expression "composite": (*a*) "*Composite*".—"A re-recording consisting of at least two elements. A material that results when two or more materials, each having its own, usually different characteristics, are combined, giving useful properties for specific applications. Also known as composite material."(*b*) "*Composite character*".—"A character that is produced by two or more characters one on top of the other."(*c*) "*Composite unit*".—"A unit made of diverse elements."; the aforesaid dictionary definitions lead to the conclusion that the expression "composite" only means "consisting of at least two elements"; in the

context of the present case, generation and sale being in more than one State, this could be referred to as “composite”; even otherwise, the expression used in Section 79(1)(*b*) is that generating companies must enter into or otherwise have a “composite scheme”; this makes it clear that the expression “composite scheme” does not have some special meaning — it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.

In **Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659,** the Supreme Court held that delicensing of generation as also grant of free permission for captive generation is one of the main features of the Electricity Act, 2003; it also, for the first time, provides for open access in transmission from the outset; the primary object, therefore, was to free the generating companies from the shackles of the licensing regime; the Electricity Act, 2003 encourages free generation and more and more competition amongst the generating companies and the other licensees so as to achieve customer satisfaction and equitable distribution of electricity; the generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit; choice of counter-party buyer; freedom from tariff regulation when the generating company supplies to a trader or directly to the consumer; if delicensing of generation is the prime object of the Electricity Act, the courts, while interpreting the provisions of the statute, must guard itself from doing so in such a manner which would defeat the purpose thereof; and it must bear in mind that licensing provisions are not brought back through the side-door of regulations.

The Supreme Court further held that the scheme of the Act, namely, generation of electricity is outside the licensing purview; subject to

fulfilment of the conditions laid down under Section 42 of the Act, a generating company may also supply directly to a consumer wherefor no license would be required; a generating company has to make a huge investment on the assurances given to it that subject to the provisions of the Act it would be free to generate electricity and supply the same to those who intend to enter into an agreement with it; only in terms of the said statutory policy, it makes huge investment; if all its activities are subject to regulatory regime, it may not be interested in making investment; that, however, would not mean that the generating company is absolutely free from all regulations; such regulations are permissible under the Electricity Act, 2003; one of them being fair dealing with the distributor; thus, other types of regulations should not be brought in which were not contemplated under the statutory scheme; if it is exercising its dominant position, Section 60 would come into play; it is only in a situation where a generator may abuse or misuse its position, the Commission would be entitled to issue a direction; and the regulatory regime of the Commission, thus, can be enforced against a generating company if the condition precedent therefore becomes applicable.

As held by the Supreme Court, in **Energy Watchdog vs. CERC (2017 14 SCC)**, a composite scheme is the one where the generation and sale of electricity is in more than one State. Though it is not tangible, “Electricity” is movable property, and a commodity like other goods, as it can be manufactured, transmitted and sold. It falls within the definition of “goods” under the provisions of the Sale of Goods Act. (***Kartar Singh* v. *Punjab State Electricity Board*, 2014 SCC OnLine P&H 5917; *Commissioner of Income Tax* v. *The Hutti Gold Mines Co. Ltd*: Judgment of the Karnataka High Court in ITA No. 08/2014 dated**

16.09.2014; *CIT* v. *NTPC SAIL POWER CO. (P) Ltd*, (2020) 428 ITR 535) as well as under the Electricity Act, 2003. (***State of A.P.* v. *National Thermal Power Corpn. Ltd.*, (2002) 5 SCC 203 : AIR 2002 SC 1895; *Commissioner of Sales Act, Madhya Pradesh, Indore* v. *Madhya Pradesh Electricity Board, Jabalpur*, (1969) 1 SCC 200, *Kartar Singh* v. *Punjab State Electricity Board*, 2014 SCC OnLine P&H 5917; *Sukhwinder Singh* v. *Raj Kaur*, 2014 SCC OnLine P&H 9003**).

Section 4(1) of the Sale of Goods Act, 1930 stipulates that a contract for sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Section 2(1) of the said Act defines "buyer" to mean a person who buys or agrees to buy goods. Section 2(10) defines "price" to mean the money consideration for sale of goods. Section 2(11) defines "property" to mean the general property in goods, and Section 2(13) defines "seller" to mean a person who sells or agrees to sell goods. It is only a contract, whereby property in goods is either transferred or agreed to be transferred for a price (i.e, money consideration for the sale of goods), which would constitute a "sale".

As Electricity is "goods" under the Sale of Goods Act and, under Section 4(1) of the Sale of Goods Act, a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price (i.e, money consideration for the sale of goods), it is only a scheme, which provides both for generation and for sale of electricity (for money consideration) in more than one State, which would constitute a composite scheme. While the Appellant is, no doubt, a generator, the electricity generated by it is claimed by them to be consumed entirely by its members. Such consumption, as has been held

in the judgements of the Supreme Court and this Tribunal referred to hereinabove, is consumption for one's own use, and not for sale. Consequently, while generation is no doubt in one State, and its consumption is in that State and in other States, the ingredients of "sale of electricity" is missing, and the Appellant cannot therefore be said to have a composite scheme for generation and sale of electricity in more than one State, justifying exercise of jurisdiction by the CERC under Section 79(1)(b) read with 79(1)(f) of the Electricity Act 2003.

Further, Para 5.11(j) of the 2006 Tariff Policy, as amended in 2016, and its explanation, defines a composite scheme to mean a scheme for generation and sale of electricity in more than one State with a generating company having signed long term or medium term PPA prior to the commercial operation of the project for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such project is located. In the present case there is, admittedly, no sale of electricity by the appellant to a distribution licensee.

Failure of the Appellant to comply with Rule 3(1) of the Electricity Rules, 2005 would result in Rule 3(3) being attracted, and the entire electricity generated by them being treated as if it is supply of electricity. It is only if it is established that the Appellant has failed to comply with Rule 3(1) would it then be held to be generating and supplying electricity in more than one State which, in turn, would result in the Appellant being presumed to have a composite scheme. It is only thereafter, and as a consequence, would the Appellant fall within the ambit of Section 79(1)(b) of the Electricity Act, 2003.

The jurisdictional fact, essential to confer jurisdiction on the CERC under Section 79(1)(b), of the generator having a composite scheme (i.e, to generate and supply (sell) electricity in more than one State), would

arise only after it is established that the Appellant has failed to comply with Rule 3(1) of the 2005 Electricity Rules. It is this question which must be firstly addressed, and it is only after adjudication and in case it is conclusively held that the Appellant does not fulfil the requirements of Rule 3(1), would the CERC then have jurisdiction to regulate the tariff of the Appellant under Section 79(1) (b), and not prior thereto. As the jurisdictional fact, necessary to confer jurisdiction on the CERC, would arise only after adjudication of whether or not the Appellant has complied with Rule 3(1), the said exercise of adjudication can only be undertaken by the State Commission under Section 86(1)(f) of the Electricity Act.

Unlike Section 79(1)(f), Section 86(1)(f) is not hedged by any limitations and the power available to the State Commission, thereunder, is to adjudicate disputes between licensees (i.e, transmission licensees, distribution licensees and trading licensees as referred to in Section 12 read with Section 14 of the Electricity Act, 2003) on the one hand and the generators on the other. Any dispute between a generating company and a distribution licensee can be adjudicated under Section 86(1)(f) of the Electricity Act, 2003.

The dispute raised by the Appellant, in the present case, relates mainly to the notice issued by the distribution licensee (MSEDCL) calling upon the Appellant to pay cross-subsidy surcharge and additional surcharge after holding that, since they do not fulfil the requirement of Rule 3(1) of the Electricity Rules, they are not entitled to avail the benefits, extended by the Electricity Act and the Rules, to a captive generation plant and its captive users. The dispute as to whether the appellant has fulfilled the requirements of Rule 3(1) of the Electricity Rules, a dispute between a generator and a distribution licensee, would undoubtedly fall within the

adjudicatory jurisdiction of the State Commission under Section 86(1)(f) of the Electricity Act.

VII. IS THE SCOPE OF SECTION 79(1)(f) SO WIDE AS TO ENABLE THE CERC TO ADJUDICATE THE APPELLANT'S STATUS AS A CGP?

Placing reliance on **Royal Talkies vs ESI Corporation:(1978) 4 SCC 204** and **Renusagar Power Co. Ltd vs General Electric Co: (1984) 4 SCC 679,**

Sri M.G. Ramachandran, Learned Senior Counsel and Amicus Curiae, would submit that the terms, "involving" "in regard to" etc, used in Section 79 (1) (f) should be given a wider meaning.

Sri Sanjay Sen, Learned Senior Counsel and Amicus Curiae, would submit that the regulatory powers of the Central Commission, inter alia, extend to subjects/entities covered under Section 79(1) (c) & (d) also; Section 79 (1)(c) and (d) grant express regulatory powers to the Central Commission on the parties/subjects therein covered; a reading of the scheme of Section 79(1)(f) will confirm that the power to regulate has to exist for exercising power to adjudicate; the said two powers, under the legislative scheme, must co-exist; and the legislature has provided that disputes, arising from the power to regulate, should also be adjudicated by the same statutory body i.e, the Central Commission.

Sri Buddy Ranganadhan, Learned Amicus Curaie, would submit that, use of the expressions 'involving' and 'in regard to', in Section 79(1)(f) of the Electricity Act, 2003, clearly imply that, if there is nexus of the dispute to the supply of electricity by the generating company in more than one state, with inter-state transmission of electricity and tariff of inter-state transmission of electricity, the same would fall under Section 79(1)(f),

notwithstanding that tariff for supply of electricity is not determined by the Central Commission because of Section 49 of the Act; the tariff of transmission is determined, and regulation of transmission is undertaken, by the Central Commission; accordingly, if any dispute having a nexus to the activities mentioned in sub-sections (a) to (d) of Section 79(1) of the Act exists, the regulatory power of the Central Commission would be applicable; in this regard, sub-clauses (a) or (b) or (c) or (d) of Section 79(1) and also sub-clause (f) refer to the generating company/transmission licensee and not to the corresponding counter-party with whom they are dealing; and, for example, it does not say that generating companies selling electricity only to a distribution licensee or as per Section 62(1)(a) of the Electricity Act 2003.

A. ANALYSIS:

In **Royal Talkies v. ESI Corpn., (1978) 4 SCC 204,** the Supreme Court held that the expression "*in connection with the work of an establishment"* only postulates some connection between what the employee does and the work of the establishment; it is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment; the question is whether such amenity or facility, even peripheral may be, has not a link with the establishment; it is not a legal ingredient that such adjunct should be *exclusively* for the establishment if it is mainly its ancillary.

In ***Renusagar Power Co. Ltd. v. General Electric Co.*, (1984) 4 SCC 679**, the Supreme Court held that the expressions, such as *"arising out of"* or *"in respect of"* or *"in connection with"* or *"in relation to"* or *"in consequence of"* or *"concerning"* or *"relating to"* the contract, are of the widest amplitude.

Section 79(1)(f), which confers on the CERC the power to adjudicate disputes *"involving"* generating companies, is *"in regard to"* matters *"connected with"* clauses (a) to (d) of Section 79(1) of Electricity Act 2003. The word *"involve",* according to the *Shorter Oxford Dictionary,* means "to enwrap in anything, to enfold or envelop; to contain or imply". **(CIT v. Surat Art Silk Cloth Manufacturers' Assn., (1980) 2 SCC 31).** It is stated, in the **Advanced Law Lexicon, P Ramanatha Aiyer 3rd Edition, 2005, Book 2, Pg 2455,** that the primary significance of the word *"involve"* is "to roll up or envelop; and it also means to comprise, to contain, to include by rational or logical construction.

The words *'in regard to',* occurring in a statute, must be given the interpretation justified by the context in which they occur. These words, ordinarily, mean 'for' or 'for the purpose of'. **(M.A. Jaleel v. State of Mysore, AIR 1961 Mys 210).** The word *"connected"* means intimately connected or connected in a manner so as to be unable to act independently. **(Kashi Nath Misra v. University of Allahabad, 1965 SCC OnLine All 416).** The connection, contemplated by the words *"connected with*", must be real and proximate, not far-fetched or problematical. **(Rex v. Basudev, 1949 SCC OnLine FC 26).**

In **STRONG & CO., OF ROMSEY, LIMITED APPELLANTS AND WOODIFIELD (SURVEYOR OF TAXES) RESPONDENT., [1906] A.C. 448,** it has been held that the words "connected with" are used in the sense that they are really incidental to the subject of the provision itself, and not if they are mainly incidental to some other subject other than what the provision relates to.

The power conferred by Section 79(1)(f) to adjudicate disputes, to which a generator is a party to, must be such as are inter-twined with clauses (a) to (d) of Section 79(1). In other words, the dispute, which can

be adjudicated by the CERC, must be an integral part of clauses (a) to (d) of Section 79(1). By use of the words *'in regard to',* in Section 79(1)(f), Parliament has made it clear that the disputes, to which a generator is a party to, can be adjudicated by the CERC only 'for the purposes of' clauses (a) to (d) of Section 79(1), and not otherwise. By use of the words "connected with", in Section 79(1)(f), Parliament has stipulated that the dispute should be really incidental or in close proximity to clauses (a) to (d) of Section 79(1).

The dispute, in the present case, relates to the imposition of cross-subsidy surcharge and additional surcharge on the Appellant by MSEDCL as, in their opinion, the appellant is no longer a CGP as it ceased to satisfy the requirements of Rule 3(1) of the Electricity Rules, 2005. Admittedly, clauses (a) and (d) of Section 79(1) are not attracted. The proximity of this dispute to clauses (b) and (c) of Section 79(1) is remote as it is only if, and after, it is adjudicated and held that the appellant is not a CGP can a subsequent dispute, on the basis that the Appellant is not a CGP, attract clauses (b) and (c) of Section 79(1). As the nexus, between the dispute and clauses (a) to (d) of Section 79(1), must be real and not remote, it cannot be held that the dispute, in the present case, has any nexus to the activities mentioned in sub-sections (a) to (d) of Section 79(1) of the Electricity Act. Consequently, the CERC must be held to lack jurisdiction to entertain and adjudicate such disputes.

VIII. WOULD DISTRIBUTION LICENSEES NOT BE PARTIES BEFORE THE CENTRAL COMMISSION?

Sri Sanjay Sen, Learned Senior Counsel and amicus curiae, would submit that a distribution licensee, whose presence may be necessary (in the present context), cannot be made a party-respondent before the Central Commission for any effective adjudicatory orders to be passed

against a distribution licensee by the Central Commission; neither can a distribution licensee invoke the jurisdiction of the Central Commission; a dispute before the Central Commission, necessarily, has to involve only generating companies or transmission licensees as provided in Section 79(1)(f); further, levy of cross subsidy surcharge and/or exemption thereto is in terms of the mandate under Section 42 of the Act (Distribution chapter of the Act); the ability to specify cross subsidy by the Central Commission, under the 1st to the 3rd proviso of Sections 38 and 39 of the Act, are different and distinct from that which is determined by the State Commissions under Section 42; the Central Commission and the State Commissions have concurrent powers and jurisdiction; and the State Commission can, within its jurisdiction (regulatory domain), exercise all powers that are available with the Central Commission.

A. ANALYSIS:

As noted hereinabove, Section 79(1)(f) confers on the CERC the power to adjudicate disputes involving generating companies or transmission licensees. The power to adjudicate disputes is in regard to matters connected with clauses (a) to (d) of Section 79(1). While clauses (a) and (b) confer on the CERC the power to regulate tariff of generating companies, Clauses (c) and (d) confer power on the CERC to regulate intra-state transmission of electricity and to determine its tariff. While the CERC has not been conferred jurisdiction to adjudicate disputes relating to distribution licensees, it is contended that the word “involving”, used in Section 79(1), can be construed as to suffice for the generating companies or the transmission licensees to be one of the parties, to the dispute with another entity, provided such a dispute falls under clauses (a) to (d) to Section 79(1). It is unnecessary for us to delve on this aspect any

further, as this aspect does not have a material bearing on the issue to be resolved in the present case.

IX.SECTION 49: ITS SCOPE:

Sri Hemant Singh, Learned Counsel for the appellant, would submit that Section 49 of Electricity Act 2003 excludes the power of the Commissions to determine retail tariff under Section 62(1)(d) for such a private transaction; this means that the Commissions have no role in determining the tariff at which a consumer receives electricity by way of open access in terms of Section 49; Section 49 would also include captive transactions, as sourcing of captive power by a CGP to its captive users is also by availing open access through the distribution or transmission network of the respective licensees; and, accordingly, Commissions have no role with respect to the terms and conditions of such sourcing of power by captive users from a CGP.

Sri M.G. Ramachandran, Learned Senior Counsel and Amicus curiae, would submit that the Generating Company, operating a power plant, does not require a license; however, it is regulated to the extent provided under the Act, and particularly when it supplies electricity to others for end use; such supply to a Distribution Licensee is governed by Section 62(1)(a); if it supplies electricity directly to an end-user it would amount to retail sale of electricity under Section 62 (1) (d); however, by virtue of Section 49 of the Act, the price of electricity for such direct supply by the Generating Company to an end user/consumer will be a bilateral mutual agreement and is not to be determined by the Regulatory Commission; in other words, there is a specific exemption provided under Section 49 which is restricted only to the price at which the Generating Company will supply electricity to the end user; it will not extend to other charges payable for the

transaction of supply of electricity by a generating company to an end user such as cross-subsidy Surcharge, Additional Surcharge etc; these will have to be paid to persons other than the Generating Company; and such charges are also Tariff covered under the Electricity Act, 2003, and to be regulated by the Appropriate Regulatory Commissions.

Sri Sanjay Sen, Learned Senior Counsel and amicus curiae, would submit that, for determination/regulation of tariff, the Act provides for the manner in which such jurisdiction is to be exercised; no reliance can be placed on Section 61, 62, 63 and 64, as Section 49 of the Act is a carve-out which excludes the tariff-determination jurisdiction of the Commissions generally.

Sri Buddy Ranganadhan, Learned Amicus Curaie, would submit that exclusion of determination of tariff, in the case of direct sale by a generating company to an end user, is by virtue of Section 49 of the Act; but for Section 49, the scope of Section 79(1)(a) and (b) would cover regulation of tariff of generating companies for supply to any and every person.

A.ANALYSIS:

Section 62(1)(a) confers power on the appropriate commission to determine the tariff for supply of electricity by a generating company to a distribution licensee. As the Appellant does not supply electricity to any distribution licensee, this provision is not attracted. Section 62(1)(d) of the Electricity Act 2003 stipulates that the Appropriate Commission shall determine the tariff in accordance with the provisions of the Electricity Act for retail sale of electricity. Because of Section 49, in cases where the Appropriate Commission has allowed open access to certain consumers under Section 42, such consumers may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions

(including tariff) as may be agreed upon by them, notwithstanding Section 62(1)(d). As Section 49 would apply to all consumers, including captive consumers, the question of tariff of the captive generating companies, from whom they procure power, being determined under Section 62 would not arise. In the case on hand, the appellant claims that the entire electricity generated by it is consumed by its captive consumers, and that no part of the electricity generated by it is supplied to a distribution licensee. If that be so, and as the electricity generated by the appellant is claimed to be for its own use, the question of determination of its tariff would, in any event, not arise.

Even if we were to proceed on the premise that the exemption under Section 49 is restricted only to the price at which the Generating Company supplies electricity to the end user, and does not extend to other charges such as cross-subsidy surcharge etc, and such charges are also “Tariff” to be regulated by the Appropriate Regulatory Commissions, the captive consumers of the appellant are not liable to pay cross subsidy surcharge, in view of the fourth proviso to Section 42(2) of the Electricity Act, as long as they continue to retain the CGP status under Rule 3(1) of the Electricity Rules.

X. IS THE EXEMPTION GRANTED TO CAPTIVE USERS, FROM PAYMENT OF CROSS-SUBSIDY SURCHARGE, DEPENDENT ON THE DETERMINATION THAT THEY QUALIFY AS CAPTIVE USER?

Sri M.G. Ramachandran, Learned Senior Counsel and Amicus curiae, would submit that there are a number of charges, including expenditure, which may not figure under Tariff determination as per Section 62, etc. of the Electricity Act 2003, but are leviable and payable; Sections 45 and 46 deal with such charges; in addition, even if it is assumed that

supply of electricity, by a Captive Generating plant to a captive user, will not constitute sale of electricity, (which proposition may not be settled law), still the issue whether the captive users are exempt from payment of cross-subsidy surcharge is dependent on the determination that they qualify as captive user; to the extent consumption by the end user does not satisfy the criteria of captive use, it would amount to a sale or supply of electricity by a generating company; the Generating Company/Generating Station may also be a Captive Power Plant with some of the users qualifying as captive users, but others not qualifying as captive users; a Generating Company may even supply up to 49% of the electricity generated to a Distribution Licensee, while 51% consumption is by a captive user; thus, the claim of a person to be a captive user, and therefore not subject to payment of Cross-subsidy Surcharge, would depend upon the determination whether the captive user satisfies the conditions specified in Rule 3 of the Electricity Rules, 2005; the above determination will have to be made by the Appropriate Commission constituted under the Electricity Act 2003; and the Appropriate Commission would be the Central Commission if Section 79 applies, otherwise it will be the concerned State Commission.

Sri Sanjay Sen, Learned Senior Counsel and amicus curiae, would submit that the question that now arises is whether the tariff of a generating company or a captive generating plant (not supplying power to a distribution company under Section 62 of the Act) is at all regulated?; it is necessary to appreciate that, under the scheme of the Electricity Act, 2003, neither the Central Commission nor the State Commissions exercise any *tariff-related* regulatory powers over a captive generating plant supplying power to its captive users; further, even when supply is made by a generating company to a consumer under open access or to a trader, tariff

is also not regulated (Section 49); the Electricity Act, 2003 has expressly de-licensed generation of electricity and has freely permitted captive generation; in this context, reference may be made to *Paragraph 4(i) of the Statement of Object and Reasons, Section 7, Section 9, Section 10, Section 49 & Section 62 of the Electricity Act, 2003;* it is clearly provided in Section 62 that the appropriate commission *shall determine tariff in accordance with the provisions of the Act when supply of electricity is made by a generating company to a distribution licensee*; in the present facts, the captive generating plant is not supplying to any distribution licensee, instead the power is utilised by captive users located in different states; and, in this context, reliance is placed on the judgment of the Apex Court in **Tata Power Co. Ltd. vs. Reliance Energy Ltd., (2009) 16 SCC 659.**

A. ANALYSIS:

Though it may not be strictly necessary to refer to the statutory provisions, referred to by Learned Senior Counsel, in order to consider the submissions urged under this head, we have nonetheless referred to them to avoid being faulted on this score.

Part-VII of the Electricity Act bears the heading "**TARIFF".** Section 61 thereunder relates to Tariff Regulations and provides that the Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by clauses (a) to (i) thereunder. Section 63 relates to determination of tariff by bidding process and stipulates that, notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government.

Section 45 of the Electricity Act relates to the power to recover charges. Section 45(1) provides that, subject to the provisions of this Section, the price to be charged by a distribution licensee, for the supply of electricity by him in pursuance of Section 43, shall be in accordance with such tariff fixed from time to time and the conditions of his license. Section 45(2) stipulates that the charges for electricity supplied by a distribution licensee shall be – (a) fixed in accordance with the methods and the principles as may be specified by the concerned State Commission; (b) published in such manner so as to give adequate publicity for such charges and prices. Section 45(3) provides that the charges for electricity supplied by a distribution licensee may include: (a) a fixed charge in addition to the charge for the actual electricity supplied; (b) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee. Section 45(4) stipulates that, subject to the provisions of Section 62, in fixing charges under this Section a distribution licensee shall not show undue preference to any person or class of persons or discrimination against any person or class of persons. Section 45(5) provides that the charges fixed by the distribution licensee shall be in accordance with the provisions of this Act and the regulations made in this behalf by the concerned State Commission.

Section 46 relates to the power to recover expenditure and, thereunder, the State Commission may, by regulations, authorize a distribution licensee to charge from a person requiring a supply of electricity in pursuance of Section 43 any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of giving that supply.

Para 4 of the Statement of Objects and Reasons, for introduction of the Electricity Bill, details the main features of the Bill. Clause 4.1 thereof states that generation is being delicensed and captive generation is being freely permitted. Hydro projects would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilization of water resources.

Part III of the Electricity Act relates to Generation of Electricity. Section 7 thereunder relates to Generating company and requirement for setting up of generating station. The said provision stipulates that any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of Section 73.

Section 10 relates to the duties of generating companies. Section 10(1) provides that, subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder. Section 10(2) enables a generating company to supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer. Section 10(3) provides that every generating company shall – (a) submit technical details regarding its generating stations to the Appropriate Commission and the Authority; (b) co-ordinate with the Central

Transmission Utility or the State Transmission Utility, as the case may be, for transmission of the electricity generated by it.

In **Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659,** the Supreme Court held that Section 86(1)(b) empowers the State Commission to regulate electricity purchase and procurement process of distribution licensees; inevitably it speaks of PPA; the PPA may provide for short-term plan, a mid-term plan or a long-term plan; depending upon the tenure of the plan, the requirement of the distribution licensee vis-à-vis its consumers, the nature of supply and all other relevant considerations, approval thereof can be granted or refused; while exercising the said power, the State Commission must be aware of the limitations thereto as also the purport and object of the 2003 Act; it has to take into consideration that the PPA will have to be dealt with only in the manner provided therefor; the scheme of the Act, namely, the generation of electricity is outside the licensing purview and subject to fulfilment of the conditions laid down under Section 42 of the Act; a generating company may also supply directly to the consumer wherefor no licence would be required; while exercising its power of "regulation", in relation to purchase of electricity and procurement process of distribution, it is not permissible for the Commission to direct allocation of electricity to different licensees keeping in view their own need; Section 86(1)(*b*) does not empower the Commission to issue direction to the generating company to supply electricity to a licensee who has not entered into any PPA with it; a generating company, if the liberalization and privatization policy is to be given effect to, must be held to be free to enter into an agreement, and in particular long-term agreement, with the distribution agency; terms and conditions of such an agreement, however, are not unregulated; such an agreement is subject to grant of approval by the Commission; the

Commission has a duty to check if the allocation of power is reasonable; and, if the terms and conditions relating to quantity, price, mode of supply, the need of the distributing agency vis-à-vis the consumer, keeping in view its long-term need are not found to be reasonable, approval may not be granted.

We are in complete agreement with the submissions that (i) the issue, whether the captive users are exempt from payment of cross-subsidy surcharge, is dependent on the determination that they qualify as captive user; (ii) if consumption by the end user does not satisfy the criteria of captive use, it may amount to a sale or supply of electricity by a generating company; (iii) the Generating Company/Generating Station may also be a Captive Power Plant with some of the users qualifying as captive users, but others not qualifying as captive users; (iv) a Generating Company may even supply up to 49% of the electricity generated to a Distribution Licensee, while 51% consumption is by a captive user; and (v) the claim of a person to be a captive user, and therefore not subject to payment of Cross-subsidy Surcharge, would depend upon the determination whether the captive user satisfies the conditions specified in Rule 3 of the Electricity Rules, 2005.

The only question being considered in the present appeals is which Commission (whether the CERC or the State Commission) can undertake the exercise of determination of the CGP status of the Appellant under Rule 3(1) of the Electricity Rules, 2005. As we are informed that the entire electricity generated by the appellant is consumed by its captive users, and they do not supply any part of the electricity generated by them to distribution licensees, it is wholly unnecessary for us to consider situations where the Generating Company/Generating Station is a Captive Power Plant with some of the users qualifying as captive users, but others not

qualifying as captive users; or to cases where the Generating Company is supplying up to 49% of the electricity generated to a Distribution Licensee, while 51% consumption is by a captive user.

Suffice it to hold that the tariff of a captive generating plant (not supplying power to a distribution licensee under Section 62 of the Act, and where the entire electricity generated by it is consumed by its' captive consumers) is not regulated under the scheme of the Electricity Act, 2003; and, in view of Section 49, even when a captive consumer is provided electricity by a CGP under open access, tariff is also not regulated.

XI.SECTION 79(1)(c) & (d) AND SECTION 38(2)(d) : ITS SCOPE:

Sri Hemant Singh, Learned Counsel for the appellant, would submit that Section 79(1)(c) and (d) deal with regulation of inter-state transmission of electricity and determination of tariff for such inter-state transmission; for the purpose of attracting Section 79(1)(c), MSEDCL has referred to the provisos of Section 38(2)(d) of EA 2003; the argument of MSEDCL is that, under the provisos, there is mention of surcharge (cross subsidy) qua inter-state transmission of electricity which has to be determined by the Central Commission; the said provisos also mandate that such surcharge is not leviable in the event a CGP carries electricity to its captive users; accordingly, MSEDCL is construing that the surcharge mentioned under the said provisions is the same as the surcharge levied by the distribution licensees under the provisos to Section 42(2) of EA 2003; and, in order to support the above argument, MSEDCL has relied upon Rule 6 of ER 2005.

Learned Counsel would further submit that the absurdity of the above argument is apparent from the fact that Rule 6 of ER 2005 does not contemplate that surcharge under Section 38 is the same as the

surcharge under Section 42(2) of EA 2003; the only thing which is provided under the said provision is that the surcharge to be specified by the Central Commission '*shall be in accordance with the surcharge on the charges of wheeling*' as specified by the State Commissions under Section 42(2) of the Act; the above circuitous argument of MSEDCL, to somehow invoke the jurisdiction of the Central Commission under Section 79 of EA 2003, ought not to be accepted by this Tribunal; further, till date, the Central Commission has not specified any surcharge (CSS) qua inter--state transmission of electricity; in the present case, there is no dispute between the Appellant and any of the transmission licensees or the utility qua either open access or levy of surcharge; and, hence, Sections 79(1)(c) and Section 79(1)(d) are also not attracted to the present case.

Sri B. Sai Kumar, Learned Senior Counsel appearing on behalf of the Respondent-MSEDCL, would submit that, in so far as the jurisdiction of the appropriate commission (in respect of determination of captive status of a generating plant which has captive users in different states, or for that matter within the same state) is concerned, the said issue has not been directly dealt with either in the Electricity Act, 2003 or in the Electricity Rules, 2005; it has, however, been held by this Tribunal, in **TNPPA v TNERC (Appeal No. 131/2020- Para 10.18),** that any action to be initiated against CGP/Captive User(s), regarding its captive status or recovery of CSS, as per law, needs to be done through appropriate proceedings before the Regulatory Commission, though the Distribution Licensee can undertake the exercise of collecting and verifying data for verification of CGP status; in **Dakshin Gujarat Vij Company Ltd. V Gayatri Shakti Paper And Board Ltd. And Anr.(Judgement in Civil Appeal 8257-8259 of 2009 and batch dated October 9, 2023, Para 14),** the Supreme Court held that, if a Power Plant invokes its right to open

access under Section 9(2) of the Act, no surcharge is leviable; and, therefore, the Distribution Licensee, after collection and verification of data at the end of the financial year, is required to submit the same before the appropriate commission for determination of Captive status and obtain an order for levy or non-levy / exemption of CSS /AS.

Learned Senior Counsel would further submit that Sections 38 to 40 of the Act deal with the functions of the Central Transmission Utility (CTU), State Transmission Utility (STU) as well as duties of Transmission Licensees (CTU as well; an STU also falls within the definition of "Transmission licensee" under Section 2(73) of the Act; under Section 38(2)(d)(ii), the CTU is mandated to provide non-discriminatory open access to its transmission system for use by any consumer who has been granted distribution open access on payment of transmission charges and a surcharge thereon (as may be specified by the CERC); the proviso to the said sub-section deals with such surcharge and requires it to be utilized for meeting the current level of cross subsidy and, amongst others, also provides that the manner of payment and utilization of the surcharge shall be specified by the CERC; it also provides that such surcharge, which is specified by the CERC, shall not be leviable in case the distribution/transmission open access is provided to a person who has established CGP for carrying electricity to the destination of its own use; from the above provision, it is clear that, in case of inter-state open access provided under Section 38(2)(d)(ii), it is only the CERC which has the jurisdiction to specify the surcharge which is to be levied to meet the current level of cross subsidy, which is mandated to progressively reduce the same; it is the CERC which is required to specify the manner of payment and utilization of such surcharge; and the question whether such

surcharge should be levied or not, would therefore automatically fall within the jurisdiction of only the CERC.

Learned Senior Counsel would also submit that, from a bare perusal of Section 38(2)(d)(ii), it is clear that the CERC has the jurisdiction to specify whether surcharge should be levied; it automatically has the jurisdiction, under Section 38 to determine whether exemption from payment of surcharge should be granted to any generating station, because of its qualification as a CGP; Section 79 of the Act deals with the functions of the CERC; sub-clause (k) of sub-section (1) confers power on the CERC "to discharge such other function as may be assigned under the Act"; the functions assigned to the CERC, under Section 38(2)(d)(ii), is to: (a) specify the transmission charges and a surcharge thereon; (b) to ensure that such surcharge is utilised for the purpose of meeting the requirement of current level of cross subsidy; (c) to reduce the surcharge so specified progressively; (d) to specify the manner of payment and utilisation of surcharge and to oversee whether the surcharge so specified is leviable or not; the last limb would definitely entail determination of captive status of a power plant to see if such surcharge is applicable or not; and, therefore, determination of captive status of a power plant,, having its captive users in more than one State, would fall under Section 79 (1) (k); and the jurisdiction is of the CERC alone.

Learned Senior Counsel would state that a similar provision, as in the case of CTU, has been provided for STU under Section 39 of the Electricity Act; the only difference in Section 39(2)(d)(ii) is that the transmission charges and a surcharge thereon would be specified by the State Commission and, amongst others, progressive reduction of such surcharge as well as its manner of payment and utilisation would also be specified by the State Commission; for such intra-state transmission by

STU, the question whether such surcharge is leviable or not is also within the jurisdiction of the state commission; determination of captive status of a power plant, to check whether such surcharge can be levied or not, is within the jurisdiction of the state commission, and falls under the functions of the state commission under Section 86 (1)(k) as the said function has been assigned to the state commission under the provisions of Section 39 of the EA 2003; and any dispute regarding the same can be adjudicated under Section 81(1)(f).

Learned Senior Counsel would further state that Section 40 of the Electricity Act deals with the duties of the Transmission Licensees; the definition of a 'transmission Licensee', under Section 2(73), includes CTU, STU and any other person having obtained the license under Section 14 of the Act; Section 40(c)(ii) of the Act is a similar provision, which would cover inter-state as well as intra-state transmission; sub-sections (a) and (b) of the said Section specifies that transmission charges and surcharge thereon for both inter-state as well as intra state transmission would be specified by the State Commission; however, in the proviso, amongst others, the duty for progressively reducing such surcharge and cross subsidies has been given to the appropriate commission; so also the manner of payment and utilization of such surcharge is with the appropriate commission; this means that, as far as inter-state open access is concerned, the manner of payment and utilisation of surcharge, as well as progressive reduction, would be within the jurisdiction of the CERC and, for intra state transmission, the said function would fall within the jurisdiction of the state commission; so also whether payment of such surcharge would be levied or not, would automatically go to the appropriate commission being the CERC for inter-state and SERC for intra-state, and a harmonious construction between Sections 38, 39 and

40 would lead to that conclusion; since, in terms of Section 40 of the Act in respect of duties of transmission licensees, imposition of transmission charges and a surcharge thereon is to be specified by the State Commission for both inter-state and intra-state transmission, which means both CTU as well as STU, for the purpose of re-aligning the discrepancy and to give a harmonious interpretation, without taking away the respective jurisdiction, the Central Government, in exercise of its powers under Section 176 of the Electricity Act 2003, more specifically under Rule 6 of the Electricity Rules, has specified that surcharge on transmission charges under Section 38(2)(d)(ii), which is to be specified by the CERC, shall be as may be specified by the appropriate commission of the state in which the consumer is located under Section 42(2) of the Act; therefore, the jurisdiction in all matters including determination of whether a power plant is a CGP or not, so as to check whether cross subsidy surcharge is leviable or not, is with the CERC in respect of consumers who are seeking inter-state open access; similarly, the jurisdiction under Section 39 for all matters, including whether to determine the payment of such surcharge would be levied or not and if a power plant is CGP or not, is with the state commission; and, in case of any other transmission licensee not being a CTU or STU, the jurisdiction for all matters, including determination of a captive status of a power plant for inter-state transmission, would be with the CERC and for intra-state transmission would be with the state commission.

Learned Senior Counsel would also state that, in the case of Appellants herein, it is the admitted position that the power plant is situated in Gujarat, and its shareholders/captive users are in the States of Maharashtra and Madhya Pradesh and therefore, for captive consumers of Maharashtra, seeking inter-state open access under Section 42(2) read

with Section 38(2)(d)(ii)/Section 40, the jurisdiction for determination of CGP status lies with the CERC; under the amended Electricity Rules 2005, specifically sub-rule 3 of Rule 3, CEA has been designated for collation and verification of data in respect of inter-state open access availed by captive user(s) of a CGP; the jurisdiction, for confirming the status as CGP at the end of the financial year, is with the CERC; the word *"tariff"* used in Sections 79(1)(b) and 79(1)(d) is wide enough to include all charges including surcharge as specified under Section 38(2)(d)(ii); as the CERC alone specifies the surcharge on transmission charges in case of users having secured distribution open access, Section 79(1)(f) would also be attracted in addition to Section 79(1)(k).

Sri M.G. Ramachandran, Learned Senior Counsel and Amicus curaie, would submit that Section 79 (1) (c) or (d) or Section 38 (2) (d) - proviso etc. may not have any implication on the above jurisdiction of the Central Commission as it relates to transmission; further, Section 40(c)(1) deals with both the Central Commission and the State Commission; the jurisdiction of the Central Commission should relate to generation of electricity for the purpose of considering charges payable by the end user; and determination of captive status would be required whether there is an open access or not.

Sri Sanjay Sen, Learned Senior Counsel and amicus curiae, would submit that an additional submission was made during the oral hearing; while the power to regulate tariff does not exist qua a captive generating plant supplying power to its user, the inter-state transmission of such power is indeed regulated by the Central Commission under Section 79(1)(c) of the Act; for the Central Commission to have adjudicatory jurisdiction, it may well be argued that, since the Central Commission has the power to regulate inter-state transmission of power, it indeed has the power to

adjudicate; it can additionally be argued that the power to levy cross-subsidy surcharge is also vested in the Central Commission under Sections 38 and 39 of the Act; though this line of argument is quite possible from a narrow technical perspective, it may not fit well with the overall architecture of Section 79(1)(f); and the present dispute has nothing to do with inter-state transmission or any levy or payment on account thereof.

Learned Senior Counsel and amicus curiae would further submit that, admittedly, the present dispute is not a dispute involving a generating company or transmission licensee *"in regard to matters connected with"* clauses (c) and (d) of Section 79 (1); unless the "dispute" is relatable to or connected with the subjects covered under clauses (c) and (d) of Section 79(1), the adjudicatory jurisdiction cannot be invoked; in the present facts, the status of captive generating plant depends on generation and actual consumption of power at a State/distribution licensee level; therefore, the question arises whether, on account of simply availing inter-state transmission, can a generating company be subjected to the adjudicatory jurisdiction of the Central Commission?; and only an expansive interpretation can drag a generating company whose dispute is not connected with inter-state transmission of electricity to an adjudication before the Central Commission, on the ground that such generator uses the inter-state transmission system.

A. ANALYSIS:

Section 2(73) of the Electricity Act defines "transmission licensee" to mean a licensee authorized to establish or operate transmission lines. Section 38 of the Electricity Act relates to the Central Transmission Utility and its functions. Section 38(2)(d) provides that the functions of the Central Transmission Utility shall be to provide non-discriminatory open

access to its transmission system for use by- (i) any licensee or generating company on payment of the transmission charges; or (ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the Central Commission. Under the first proviso thereto, such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy. The second proviso stipulates that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the Central Commission. The third proviso stipulates that the manner of payment and utilisation of the surcharge shall be specified by the Central Commission. Under the fourth proviso, 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.

Section 39 of the Electricity Act relates to the State Transmission Utility and its functions. Section 39(2)(d) stipulates that the functions of the State Transmission Utility shall be to provide non-discriminatory open access to its transmission system for use by (i) anylicensee or generating company on payment of the transmission charges; or (ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission. Under the first proviso thereto, such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy. The second proviso stipulates that such surcharge and cross subsidies shall be progressively reduced in the

manner as may be specified by the State Commission. Under the third proviso, the manner of payment and utilisation of the surcharge shall be specified by the State Commission. The fourth proviso stipulates 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 electricity to the destination of his own use.

Section 40 of the Electricity Act relates to the duties of transmission licensees, and thereunder it shall be the duty of a transmission licensee- (a) to build, maintain and operate an efficient, co-ordinated and economical inter-State transmission system or intra-State transmission system, as the case may be; (b) to comply with the directions of the Regional Load Despatch Centre and the State Load Despatch Centre as the case may be; (c) to provide non-discriminatory open access to its transmission system for use by- (i) any licensee or generating company on payment of the transmission charges; or (ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission. Under the first proviso thereto, such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy. The second proviso stipulates that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the Appropriate Commission. Under the third proviso, the manner of payment and utilisation of the surcharge shall be specified by the Appropriate Commission. The fourth proviso provides 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.

Part-VI of the Electricity Act bears the heading “Distribution of Electricity” and relates to provisions with respect to distribution licensee. Section 42 thereunder relates to duties of distribution licensee and open access**.** Section 42(1) provides that it shall be the duty of a distribution licensee to develop and maintain an efficient, coordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in the Electricity Act. Section 42(2) stipulates that 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. Under the first proviso, 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. The second proviso stipulates 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. Under the third proviso, such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission. The fourth proviso stipulates 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. Section 42(4) provides that, 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.

In **Tamil Nadu Power Producers Association vs. Tamil Nadu Electricity Regulatory Commission & Ors (Appeal No. 131 of 2020 dated 7th June, 2021),** this Tribunal observed that, while the distribution licensee can be appointed for undertaking an exercise of collecting and verifying data for the purpose of verification of captive generating plant status in the State of Tamil Nadu, without the powers to itself take any coercive action against any CGP/Captive User(s), any action to be initiated against the CGP/Captive User(s) regarding its captive status or for recovery of CSS, as per law, needs to be done through appropriate proceeding initiated before the State Commission.

In **M/s Dakshin Gujarat Vij Company Limited vs. M/s. Gayatri Shakti Paper and Board Limited and Another, etc (Judgement in Civil Appeal No. 8527-8529 of 2009 dated 09.10.2023),** the Supreme Court observed that the fourth proviso to Section 42(2) of the Electricity Act states that surcharge will not be leviable in case open access is provided to a person who has established a CGP for carrying electricity to the destination of his use; the fourth proviso deals with a situation when the person, who has established a CGP, invokes his right to open access for the purpose of carrying electricity from the CGP to the destination of his own use in terms of Section 9(2) of the Act; in such cases, no surcharge is leviable even if the right to open access is invoked; however, wheeling

charges have to be paid to the distribution licensee for the use of his distribution system to supply electricity to the destination of his own use.

It is no doubt true, as contended on behalf of MSEDCL, that, under Section 38(2)(d)(ii), the functions of the Central Transmission Utility shall be to provide non-discriminatory open access to its transmission system for use by any consumer, as and when such open access is provided by the State Commission under Section 42(2), on payment of transmission charges and a surcharge thereon, as may be specified by the Commission. Under the fourth proviso thereto, such surcharge shall not be levied in case open access is provided to a person who has established a captive generating plant for carrying electricity to the destination of his own use.

Section 38(2)(d)(ii) confers power on the CERC to specify a surcharge on payment of transmission charges. It is also true that the mere fact that the CERC has not, as yet, specified any such surcharge would not disable it from doing so later. Even if the CERC had specified any such surcharge, the fourth proviso to Section 38(2)(d)(ii) would have disabled it from imposing such surcharge for providing open access to a person who has established a captive generating plant for carrying electricity to the destination of his own use. It is only after it is established that the Appellant is not a captive generating plant carrying electricity to the destination of its own use (captive consumers), would the fourth proviso to Section 38(2)(d)(ii) cease to apply, and it is only thereafter that the surcharge, if and when specified by the CERC under Section 38(2)(d)(ii), can be levied on the Appellant. If, after adjudication by the State Commission, it is established that the Appellant no longer has the protection of the fourth proviso to Section 38(2)(d)(ii), the CERC can then

exercise jurisdiction to impose the surcharge, as and when specified under Section 38(2)(d)(ii), on the Appellant.

The jurisdictional fact necessary for the CERC to impose the surcharge, under Section 38(2)(d)(ii), is a conclusive determination that the Appellant is not a captive generating plant carrying electricity to the destination of his own use. The question as to whether or not the Appellant is a captive generation plant, fulfilling the requirements of Rule 3(1) of the Electricity Rules, should first be determined, and it is only after it is established that it is not a captive generating plant, can the CERC exercise jurisdiction under Section 38(2)(d)(ii) to impose surcharge, as and when specified, on the appellant.

Section 79(1)(k) of the Electricity Act requires CERC to discharge such other functions as may be assigned to it under the Electricity Act, 2003. One such function, which the Central Commission is required to discharge under Section 79(1)(k), is undoubtedly the function to specify the surcharge under Section 38(2)(d)(ii) of the said Act. That does not, by itself, confer jurisdiction on the CERC to determine the CGP status of the Appellant. Firstly because 79(1)(f) restricts the power of the CERC to adjudicate disputes involving generating companies only in regard to matters connected with clauses (a) to (d) of Section 79(1) and not to Section 79(1)(k). Secondly, even if the power of adjudication conferred on the CERC under Section 79(1)(f) is presumed to extend to Section 79(1)(k), and in turn to Section 38(2)(d)(ii), that would not confer on them the power to adjudicate on the CGP status of the Appellant. It is only after the State Commission adjudicates and holds that the Appellant is not a captive generation plant, can the CERC then adjudicate on the Appellant's liability to pay surcharge, if and when stipulated, under Section 38(2)(d)(ii) of the Electricity Act.

It is only if, and after, it is established that the Appellant is not a captive generating plant carrying electricity to the destination of its own use (captive consumers) would the fourth proviso to Section 38(2)(d)(ii) cease to apply, and it is only thereafter that the surcharge, if and when specified by the CERC under Section 38(2)(d)(ii), can be levied on the Appellant. The pre-requisite jurisdictional fact necessary for the CERC to impose the surcharge, as and when specified under Section 38(2)(d)(ii), is a conclusive determination by the State Commission, under Section 86(1)(f), that the Appellant is not a captive generating plant carrying electricity to the destination of his own use.

Like the 4th proviso to Section 38(2)(d)(ii), the 4th proviso to Section 39(2)(d)(ii) provides that a State Transmission Utility shall not levy surcharge under Section 39(2)(d)(ii) in case open access is provided to a person who has established a Captive Generation Plant for carrying electricity to the destination of its own use. Similarly, the 4th proviso to Section 40(c)(ii) disables a transmission licensee from levying surcharge, as specified by the State Commission, in case open access is provided to a person who has established a Captive Generation Plant for carrying electricity to the destination of his own use. The power to levy surcharge can be exercised by the Central Transmission Utility, State Transmission Utility and Transmission Licensee on generators, such as the Appellant or its captive consumers, only after they are held not to be a Captive Generation Plant/Captive Consumers.

In short, it is only after the State Commission adjudicates the dispute relating to the Appellant's CGP status under Section 86(1)(f), and in case it holds that the Appellant is no longer a CGP, would the Central and State Transmission Utilities, and Transmission Licensees, be then entitled to impose surcharge on the Appellant/its captive consumers. While the

Central Commission undoubtedly has the power to specify the surcharge to be imposed on any consumer (other than a CPG) as and when open access is provided, that does not bring within its ambit the power to adjudicate on the CGP status of the Appellant even if, as is contended on behalf of MSEDCL, the word 'tariff' is understood to be wide enough to include the surcharge specified in Section 38(2)(d)(ii).

As noted hereinabove, the tariff of a generating company, owned by the Central Government, is determined by the CERC under Section 79(1)(a) of the Electricity Act. In case such a generating company is supplying electricity to a distribution licensee, the tariff of the distribution licensee is determined by the State Commission taking the tariff determined by the CERC, for the Central Government generating company, into consideration. Likewise, after the State Commission adjudicates and if it holds the Appellant not to be a CGP, the CERC would then be entitled to adjudicate any dispute regarding the liability of the Appellant or its captive consumers to pay surcharge under Section 38(2)(d)(ii) of the Electricity Act.

The power conferred on the CERC under Section 38(2)(d)(ii) of the Electricity Act, 2003 is to specify the surcharge on payment of transmission charges. It is the function of the Central Transmission Utility, under Section 38(2)(d)(ii), to provide non-discriminatory open access to its transmission system for use by any consumer, as and when such open access is provided by the State Commission under Section 42(2), on payment of transmission charges and a surcharge thereon as is specified by the CERC. Once a consumer pays transmission charges plus surcharge thereon (if and when specified by the CERC), the CTU is obligated to provide them open access to its transmission system. The power conferred on the CERC to specify the surcharge is for its payment

by a consumer who seeks open access to the transmission system of the CTU, and does not extend to a person who has established a captive generation plant, for carrying electricity to the destination of its own use, in view of the bar under the 4th proviso to Section 38(2)(d)(ii).

The submission, that the CERC has the jurisdiction to specify whether surcharge should be levied and to determine whether exemption from payment of surcharge should be granted to a CGP, does not merit acceptance, since the CERC is prohibited by law, (ie the 4th proviso to Section 38(2)(d)(ii)), to specify/impose surcharge on a CGP.

As noted hereinabove, it is only after it is conclusively determined that the Appellant is not a CGP would the question of their being required to pay surcharge (if and when specified by the CERC), arise. That the CERC has been conferred the power to specify a surcharge does not, by itself, confer on them the jurisdiction to adjudicate the CGP status of the Appellant. The jurisdictional fact necessary for the CERC to specify a surcharge, and for the CTU to require its payment for providing open access to its transmission system, is only if and after the Appellant is held not to be a CGP, and not prior thereto.

Rule 6 of the Electricity Rules, 2005 relates to the surcharge under Section 38 and, thereunder, the surcharge on transmission charges under Section 38, the manner of progressive reduction of such surcharge and the manner of payment and utilization of such surcharge to be specified by the Central Commission under sub-clause (ii) of clause (d) of sub-section (2) of Section 38 shall be in accordance with surcharge on the charges for wheeling, the manner of progressive reduction of such surcharge and the manner of payment and utilization of such surcharge as may be specified by the Appropriate Commission of the State in which the consumer is located under sub-section (2) of Section 42 of the Act.

All that Rule 6 of the Electricity Rules provides is for the CERC to specify the surcharge on transmission charges under Section 38, the manner of progressive reduction of such surcharge, and the manner of payment and utilization of such surcharge. Rule 6 obligates the CERC, while specifying the surcharge, to ensure that the surcharge specified by it is in accordance with the surcharge and the charges on wheeling etc. as may be specified under Section 42(2) of the Electricity Act by the Appropriate State Commission. Rule 6 only deals with the power of the CERC to specify the surcharge, and stipulates the manner in which such surcharge should be specified. Neither does it relate to the issue of determination of the CGP status of the Appellant, nor can it be construed as having conferred on the CERC the power to adjudicate on this aspect. A CGP is entitled to seek open access without a corresponding obligation to pay surcharge in view of the 4th proviso to Section 38(2)(d)(ii) of the Electricity Act. The question whether it continues to be a CGP, and those to whom electricity is supplied by it continue to be captive consumers, are disputes which fall within the adjudicatory jurisdiction of the State Commission under Section 86(1)(f) of the Electricity Ac

XII.SECTION 86: ITS SCOPE:

In support of his submission that the State Commission is the only authority to adjudicate the present dispute under Section 86 of EA 2003, Sri Hemant Singh, Learned Counsel for the appellant, would submit that the only provision which gets attracted, for adjudication of the dispute in the present case, is Section 86(1)(f) of EA 2003; from a reading of the said Section, it becomes clear that there is no restriction under Section 86(1)(f) for adjudication of disputes between generating companies and licensees,

unlike Section 79(1)(f) which restricts the dispute adjudicatory powers of the Central Commission, as explained herein before.

Sri Sanjay Sen, Learned Senior Counsel and amicus curiae, would submit that, although the State Commission (like the Central Commission) does not have the power to regulate tariff of a captive generating plant supplying electricity to its users, the power to adjudicate disputes, in terms of Section 86 (1)(f), has been held to be wide and unqualified; the Supreme Court in ***Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*****, (2008) 4 SCC 755** has, inter alia, ruled on the issues of jurisdiction of the State Commission by holding that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies, can only be resolved by the Commission or an arbitrator appointed by it; and this is because there is no restriction in Section 86(1)(f) about the nature of the dispute.

A. ANALYSIS:

In **Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755,** the Supreme Court held that Section 86(1)(*f*) is a special provision for adjudication of disputes between the licensee and the generating companies; such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration; the word “and” in Section 86(1)(*f*), between the words “generating companies” and “to refer any dispute for arbitration”, means “or”; otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator; and, hence the word “and” in Section 86(1)(*f*) means “or”.

While the source of power, for the CERC to exercise its adjudicatory jurisdiction, is referrable to Section 79(1)(f) of the Electricity Act, the

source of power, for the State Commission to exercise its adjudicatory functions, is referrable to Section 86(1)(f) thereof. While Section 79(1)(f) confers on the CERC the power to adjudicate disputes involving generating companies or transmission licensees only in regard to matters connected with clauses (a) to (d) of Section 79(1), the power conferred on the State Commissions, under Section 86(1)(f), is to adjudicate disputes between licensees and generating companies. Unlike Section 79(1)(f) which confines the adjudicatory power of the CERC only to those disputes which fall within the ambit of clauses (a) to (d) thereof, no such limitation is placed on the State Commission by Section 86(1)(f), and any dispute between a distribution licensee (in the present case MSEDCL) and the generating companies (the Appellant herein) can be adjudicated by the State Commission (MERC) under Section 86(1)(f), including the present dispute relating to the CGP status of the appellant, as the said dispute does not fall within the ambit of clauses (a) to (d) of Section 79(1).

XIII.REGULATIONS FRAMED BY THE MERC: ITS SCOPE:

Sri Hemant Singh, Learned Counsel for the appellant, would submit that MERC enacted Regulations dealing with open access which also cover open access granted to CGPs, and further provide for imposition of CSS etc in the event the said CGP loses captive status; the said Regulations also stipulate that, for any dispute, it is the State Commission which will have jurisdiction; the said Regulations are: (i) MERC (Distribution Open Access) Regulations, 2014; and (ii) MERC (Distribution Open Access Regulation) 2016: in the present case, the captive users are situated in more than one State, being the States of Maharashtra, Gujarat and Madhya Pradesh in the concerned financial years, while the CGP is situated in the State of Gujarat; in the case at hand, MSEDCL, which is the

distribution licensee in the State of Maharashtra, disputed the captive status of the Appellant thereby holding it as non-captive, and consequently levying cross subsidy surcharge (CSS) and additional surcharge (ASC) upon the captive users (*in effect taking away the benefit of exemption of such charges provided under Sections 42(2) and 42(4) of the EA 2003*) by invoking Rule 3(2) of ER 2005; under Section 86(1)(f), the State Commission, which exercises jurisdiction over the distribution licensee, shall have jurisdiction to adjudicate the dispute between the CGP and the said licensee, in the event the licensee is questioning the captive status; in case the State Commission comes to the conclusion that the CGP has lost the captive status in terms of Rule 3 of ER 2005, and upholds the contention of the distribution licensee, then the said CGP will also be treated as non-captive in the other States as well, where it has been sourcing electricity to the captive users; this is because, for the purpose of ascertaining the captive status, the test contained under Rule 3(1) are required to be fulfilled, viz., *minimum shareholding (26%) and minimum consumption (51%)*; for this, metered data from State Energy Accounts (SEA) maintained by the respective State Load Despatch Centers (SLDCs) in public domain (websites) can be easily accessed and provided either by the distribution licensee, or the CGP or both, for consideration by the State Commission; for the above reason, even the contention of MSEDCL that a State Commission cannot exercise jurisdiction over either the distribution licensees located in other States or the entities such as State Load Despatch Centre of other States, to ascertain their data for the purpose of verification of captive power plant, falls flat, as the data is publicly available; Section 94 of EA 2003 provides that a State Commission has absolute powers to requisition any data or document from any entity, without any restriction; in the present case, the Appellant has culled out

the requisite data from various States, through the websites maintained by the respective authorities, and has handed it over to MSEDCL; it is this data which was analysed by MSEDCL for coming to the conclusion that the Appellant has lost its captive status; and, if MSEDCL can go through the data and give its observations, surely the State Commission could also consider the same data to adjudicate as to whether the observation of MSEDCL is correct or not.

Sri Sanjay Sen, Learned Senior Counsel and amicus curiae, would submit that Section 94 of the Electricity Act is available to both the Central Commission as well as the State Commissions; since in the electricity business, the data for generation and consumption are metered and certified at various stages, there should not be any difficulty in rendering a factual determination; and, even if the Central Commission were to exercise jurisdiction, the process for collating/verifying generation and consumption data would be the same.

A. ANALYSIS:

Regulation 1.2 of the MERC (Distribution Open Access) Regulations, 2014 provides that these Regulations shall apply for Open Access to and use of the distribution system of the Distribution Licensees in the State of Maharashtra, and will also include cases where the network of the Distribution Licensee is not being used but supply to Open Access Consumer is being provided within the distribution area of the Licensee. Regulation 15.2 stipulates that the bill, for use of the distribution system for wheeling of electricity, shall be raised by the Distribution Licensee on the Supplier/Open Access consumer whosoever is located in the Distribution Licensee's area of supply, and shall separately and clearly indicate the following: (i) wheeling charges, recovered or recoverable from consumers in accordance with Regulation 16.1; (ii) cross-subsidy

surcharge, recovered or recoverable from consumers in accordance with Regulation 17; (iii) additional surcharge on the charges of wheeling, recovered or recoverable from consumers in accordance with Regulation 18; (iv) if the Distribution Licensee schedules power for the Open Access Customer, the SLDC fees and charges payable by the Licensee shall be shared with the customer based on the ratio of scheduled demand of Open Access sought to the total demand of the Distribution Licensee on a pro-rata basis for Long-term and Medium-term Open Access customer. The scheduling and other operating charges shall be levied by Distribution Licensee for Short-term Open Access customer at the same rate as approved by the Commission for Short-Term Open Access customers in the Order of SLDC Fees and Charges from time to time. Under the Proviso thereto, in case of any specific methodology for charging SLDC fees and charges as approved by the Commission from time to time through separate Order or any other Regulations shall be followed. (v) in case of Partial Open Access consumer of a Distribution Licensee, Partial Open Access consumers should pay the Transmission charges to Distribution Licensee, instead of Transmission Utility, for using a transmission network (vi) Any other charges, surcharge or other sum recoverable from the consumer under the Act or any Regulation, Orders of the Commission within the Act or under any other law for the time being in force. Under the proviso thereto, where Open Access is sought through Power Exchange, billing shall be done on Consumer by the Distribution Licensee.

Regulation 17 of the 2014 Regulations relates to cross subsidy surcharge. The proviso to Regulation 17.1 stipulates that cross-subsidy surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant, in respect of his captive generation, for carrying electricity to a destination of his own use.

Regulation 18 relates to additional surcharge. Regulation 18.1 stipulates that an open access consumer, receiving supply of electricity from a person other than the Distribution Licensee of his area of supply, shall pay to the Distribution Licensee an additional surcharge on the charges of wheeling and cross-subsidy surcharge, to meet the fixed cost of such Distribution Licensee arising out of his obligation to supply as provided under sub-section (4) of section 42 of the Act. Regulation 39 relates to Disputes. Regulations 39.1 provides that any dispute under these Regulations shall be adjudicated upon by the Commission (MERC). Under the proviso thereto, the Commission shall take into account the report of the Committee for adjudication of the dispute.

Regulation 1.2 of the MERC (Distribution Open Access) Regulations, 2016 stipulates that these Regulations shall apply for Open Access to and use of the Distribution System of Distribution Licensees in the State of Maharashtra, and where the network of the Distribution Licensee is not being used but supply to an Open Access Consumer is being provided within the distribution area of the Distribution Licensee. Regulation 3 relates to the eligibility to seek Open Access. Regulation 3.2 stipulates that, subject to the provisions of these Regulations, a consumer having contract demand of 1 MW and above with a Distribution Licensee shall be eligible for Open Access for obtaining supply of electricity from one or more (a) Generating Plants or Stations, including Captive Generating Plants.

Regulation 14 of the 2016 Regulations relates to billing. The proviso to Regulation 14.1 stipulates that, if the Distribution Licensee schedules power for the Open Access Consumer, Generating Company or Licensee, as the case may be, the MSLDC fees and charges payable by the Licensee shall be shared by them in the ratio of scheduled demand of

Open Access sought to the total demand of the Distribution Licensee on a pro-rata basis for Long-term and Medium-term Open Access. Regulation 14.7 relates to Cross Subsidy Surcharge. Under the proviso thereto, such Surcharge shall not be levied in case Open Access is provided to a person who has established a captive generating plant, in respect of his own captive generation, for carrying the electricity to a destination of his own use. Regulation 14.8 relates to Additional Surcharge. Under the proviso to Regulation 14.8(ii), such Additional Surcharge shall be applicable to all Consumers who have availed Open Access to receive supply from a source. Regulation 32 relates to Disputes and stipulates that, save as otherwise provided, any dispute under these Regulations shall be adjudicated upon by the Commission.

Both the 2014 and 2016 Regulations apply with respect to open access to and use of the distribution system of the distribution licensee in the State of Maharashtra. The proviso to Regulation 17.1 of the 2014 Regulations prohibit cross subsidy surcharge being levied in case open access is provided to a person who has established a Captive Generation Plant, in respect of its captive generation, for carrying electricity to a destination of his own use. Likewise, the proviso to Regulation 14.7 of the 2016 Regulations contains a similar prohibition.

Regulation 39.1 of the 2014 Regulations, and Regulation 32 of the 2016 Regulations, require any dispute, under the said Regulations, to be adjudicated by the Maharashtra Electricity Regulatory Commission. The dispute, in the present case, relates to the notice issued /invoice raised by MSEDCL on the Appellant for payment of cross subsidy surcharge, which cannot be imposed in case the Appellant is justified in its claim to be a CGP. MSEDCL claims that the Appellant is not a CGP, and has therefore imposed cross subsidy surcharge on them. This claim of MSEDCL is

disputed by the Appellant. Both the 2014 and the 2016 Regulations obligate the Appellant to invoke the jurisdiction of the MERC for adjudication of this dispute. The MERC was, therefore, not justified in refusing to entertain and refraining from adjudicating this dispute, and instead relegating the Appellant to invoke the jurisdiction of the CERC under Section 79(1)(f) of the Electricity Act.

Section 94 of the Electricity Act relates to the powers of the Appropriate Commission and, under sub-section (1) thereof, the Appropriate Commission shall, for the purposes of any inquiry or proceedings under the Electricity Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: - (a) summoning and enforcing the attendance of any person and examining him on oath; (b) discovery and production of any document or other material object producible as evidence; (c) receiving evidence on affidavits; (d) requisitioning of any public record; (e) issuing commission for the examination of witnesses; (f) reviewing its decisions, directions and orders; and (g) any other matter which may be prescribed.

The difficulty, expressed by the Learned Senior Counsel appearing on behalf of the MSEDCL, in obtaining data from three different States i.e, the States of Maharashtra, Madhya Pradesh and Gujarat, in order to determine whether the consumers (of the electricity generated by the Appellant) fulfil the requirements of Rule 3(1) of the Electricity Rules 2005, is addressed by Section 94 of the Electricity Act in terms of which it is always open to the MERC (or for that matter any other State Commission) to summon and examine witnesses, to direct discovery and production of documents as evidence, receive evidence on affidavit, requisition public records etc. The mere fact that the information required is available with

entities in other States would not disable the MERC (or any other State Commission) from exercising the powers conferred on it, under Section 94 of the Electricity Act, to procure the required information.

Mr. Hemant Singh, Learned Counsel appearing on behalf of the Appellant, would submit that this information is readily available on the websites of the concerned statutory bodies, and it is from such sources that the Appellant had provided the necessary information to the MERC. If that be so, such information can also obtained by the MERC.

In any event, since it is the Appellant which has invoked the jurisdiction of the State Commission (MERC), the onus is on them to establish that the requirements of Rule 3(1) of the 2005 Electricity Rules are fulfilled. Failure on their part to submit adequate documentary evidence in this regard may justify MERC drawing an adverse inference against them, and to arrive at an appropriate conclusion on the basis of the available information.

XIV. MULTIPLICITY OF LITIGATION:

Sri Hemant Singh, Learned Counsel for the appellant, would submit that another argument put-forth by MSEDCL was that, in the event more than one distribution licensees located in different States dispute the captive status of the CGP, then the same will lead to different petitions being filed before the respective State Commissions; the argument is that the same may lead to multiplicity of proceedings, as well as possible contrary views being taken by different State Commissions; the above argument is also not tenable and is flawed, for the reason that the same cannot be an argument to invoke jurisdiction under the provisions of an Act, when the same does not exist otherwise; in the event of conflicting

decisions by State Commissions, then the CGP as well as the distribution licensee can always prefer statutory appeals before this Tribunal under Section 111 of EA 2003, which would be adjudicated; it is settled law that interpretation of statutory provisions does not depend upon hardship which may be caused on account of correct interpretation given by Courts; in this regard, reference may be made to the **Tata Power** judgment (*Supra*); during the course of arguments, the Appellant also referred to the following judgments, wherein it is mandated that verification of captive status is to be undertaken by the respective State Commissions: (a) **Chhattisgarh State Power Distribution Co. Ltd. vs. Shri J.P. Saboo, Urla Industries Association Ltd (**Order in *Appeal No. 270 of 2006* dated 21.02.2011); and (b) **Chhattisgarh State Power Distribution Co. Ltd. vs. Hira Ferro Alloys Ltd. (**Order in Appeal No. 116 of 2009 dated 18.05.2010); however, the Appellant also pointed out that the above judgments did not deal with a case wherein a CGP is situated in one State, while the captive users are situated in other States; and, as such, it is left to the wisdom of this Tribunal to consider the said judgments while adjudicating the present appeal.

A. ANALYSIS:

On the issue of jurisdiction of the State Commission to determine the captive status of the first Respondent, this Tribunal, in **Chhattisgarh State Power Distribution Co. Ltd. vs. Hira Ferro Alloys Ltd.(Order passed in Appeal No. 116 of 2009 dated 18.05.2010),** observed that, from a conjoint reading of Section 2(8), 2(30) and 2(28) of the Act, it can be inferred that owner of the captive generating plant is also a generating Company within the meaning of Section 2(28) as captive generating plant specifies the conditions of being a generating station and generating

Company; Rule 3 of the Electricity Rules, 2005 issued by the Central Government in exercise of powers conferred by Section 176 of the Act, gives requirements of a captive generating plant; a generating Company which fulfils the special conditions prescribed in Section 2(8) read with Rule 3 is categorized as captive power plant; therefore, the captive generating plant will also be subject to the regulatory control of the State Commission inasmuch as a generating company; the proviso of Section 42(2) exempts a captive consumer from payment of cross subsidy surcharge; it is the State Commission which has the jurisdiction to determine whether the exemption provided under Section 42(2) can be accorded or not in the same manner as it is entrusted with the responsibility of determination of tariff and charges payable by the consumers in the State; and the State Commission has the jurisdiction to determine the captive generating plant status of the first Respondent which in turn will determine whether or not surcharge is payable.

In **Chattisgarh State Power Distribution Co.Ltd vs Shri J.P. Saboo Urla Industries Association Ltd (Judgement in Appeal No. 270 of 2006 dated 21.02.2011 para 34 & 35)**, this Tribunal held that, since open access has to be regulated by the State Commission, the State Commission has to take the responsibility of declaring the generating plant as a captive one and monitoring on an annual basis if it satisfies the criteria laid down in Rule 3 of the Electricity Rules; this ratio has already been decided by the Tribunal in **CSPDCL Vs. M/s Heera Ferro Alloys (**Appeal No.116/2009 dated 18.5.2010); as mentioned in the said judgment, there is no prohibition in the Electricity Act, 2003 or the Electricity Rules, 2005 for the State Commission to determine the Captive Power Plant status; since the State Commission exercises regulatory powers in the State to decide about a dispute between the Captive Power

Plant and any Licensee in terms of Section 86(1)(f) of the Act, the State Commission alone would be the appropriate authority to decide about the status to monitor the said Captive Power Plant status.

As fairly stated by Sri Hemant Singh, Learned Counsel for the Appellant himself, the aforesaid judgements of this Tribunal do not relate to cases where the CGP and its captive consumers are located in two or more states. The said judgements may, therefore, not apply to the facts of the present case.

Section 111 of the Electricity Act relates to Appeal to this Tribunal and, under sub-section (1) thereof, any person aggrieved by an order made, among others, by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity.

The submission, that if distribution licensees in all the three States were to simultaneously hold that the Appellant does not fulfil the requirement of Rule 3(1) of the 2005 Electricity Rules, it may lead to multiplicity of litigation, is a possibility that cannot be ruled out. Suffice it therefore to hold that, on one of the State Commissions declaring that the CGP (in the present case, the Appellant) is or is not a Captive Generation Plant in terms of Rule 3(1) of the Electricity Rules, 2005 such a conclusion would ordinarily, and save for weighty reasons justifying a contrary view being taken, be followed by the other State Commissions concerned. In any event, the possibility of conflicting decisions being rendered by different State Commission can be resolved on the appellate jurisdiction of this Tribunal, under Section 111 of the Electricity Act, being invoked. The different views taken by different State Commissions, with respect to entities such as the Appellant, would be adjudicated and the order passed by this Tribunal would bind all the concerned State Commissions.

As noted hereinabove, the possibility of inconvenience or hardship would not confer jurisdiction on the CERC, since jurisdiction can be conferred only by a statutory enactment and not by judicial pronouncement. In the present case, it is evident that the jurisdiction, to adjudicate on whether or not the Appellant is a Captive Generation Plant in terms of Section 2(8) read with Section 9 of the Electricity Act and Rule 3(1) of the Electricity Rules 2005, lies with the State Commission under Section 86(1)(f) of the Electricity Act, and not with the CERC under Section 79(1)(f).

XV. CONCLUSION:

As the jurisdiction to adjudicate upon the CGP status of the Appellant lies only with the State Commission (in the present case, the MERC whose jurisdiction the appellant had unsuccessfully invoked) under Section 86(1)(f), the Respondent MERC was not justified in refusing to exercise jurisdiction, and in relegating the Appellant to invoke the jurisdiction of the CERC. The order passed by the MERC, impugned in these three Appeals, is set aside. The MERC shall, in the light of the observations made in this order, examine the Appellant's claim to be a CGP on its merits, and in accordance with law, with utmost expedition, preferably within four months from the date of receipt of a copy of this Order.

Before parting with the case, we place on record our deep appreciation of the valuable assistance rendered by the Amicus Curiae, Sri M.G. Ramachandran and Sri Sanjay Sen, Learned Senior Counsel and Sri Buddy Ranganadhan, Learned Counsel.

All the three appeals are, accordingly, disposed of. IAs, if any pending in these three appeals, shall also stand disposed of.

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~