IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NOs. 277 of 2014 & 278 OF 2014
AND
APPEAL NO. 07 OF 2015 & IA NO. 9 of 2015

Dated: 26th AUGUST, 2019

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 277 of 2014

In the matter of:

Chhattisgarh State Power Distribution Co.Ltd.,
4th Floor, Vidyut Seva Bhavan, Daganiya,
Raipur – 492001. **……Appellant**

VERSUS

1. Chhattisgarh State Electricity Regulatory Commission,
   Irrigation Colony,
   New Shanti
   Raipur- 492001.

2. Jindal Steel & Power Ltd.,
   O.P. Jindal Marg,
   Hisar ,
   Haryana and works at Kharsia Road,
   Raigarh– 496001, Chhattisgarh

3. Chief Electrical Inspector,
   Government of Chhattisgarh,
   26/437, Block No.-2,
   H-1, Indrawati Bhawan
   Naya Raipur. **….Respondent(s)**

APPEAL NO. 278 2014

In the matter of:

Chhattisgarh State Power Distribution Co.Ltd.,
4th Floor, Vidyut Seva Bhavan, Daganiya,
Raipur – 492001. **……Appellant**

VERSUS

1. Chhattisgarh State Electricity Regulatory Commission,
   Irrigation Colongy,
   New Shanti
   Raipur- 492001.

2. Jindal Steel & Power Ltd.,
   O.P. Jindal Marg,
   Hisar ,
   Haryana and works at Kharsia Road,
   Raigarh– 496001, Chhattisgarh

3. Chhattisgarh State Power Transmission Co.Ltd.,
   Daganiya, Raipur 492013.

4. Chief Electrical Inspector,
   Government of Chhattisgarh,
   26/437, Block No.-2,
   H-1, Indrawati Bhawan
   Naya Raipur. **….Respondent(s)**

Counsel for the Appellant : Mr. Gopal K. Choudhary
Mr. Arivnd Banerjee (Rep)

Counsel for the Respondent(s) : Mr. C.K. Rai
Mr. Sachin Dubey for R-1

Mr. Sanjay Sen, Sr.Adv.
Mr. Hemant Singh
Ms. Jyotshna Khatri for R-2

APPEAL NO. 07 OF 2015

In the matter of:

Jindal Steel & Power Ltd.,
O.P. Jindal Marg,
Hisar ,
Haryana – 125005,
Haryana, India ……Appellant

VERSUS

1. Chhattisgrh State Electricity Regulatory Commission,
   Shanti Nagr, Irrigation Colongy,
   New Shanti
   Raipur- 492001, Chhattisgarh.

2. Chhattisgarh State Power Distribution Co.Ltd.,
   Add. Chief Engineers,
   Daganiya, Raipur (Chhatisgarh) - 492013.

3. Chief Electrical Inspector,
   Government of Chhattisgarh,
   26/437, Block No.-2,
   H-1, Indrawati Bhawan
   Naya Raipur,
   Chhattisgarh-493222. **….Respondent(s)**

Counsel for the Appellant : Mr. Sanjay Sen, Sr.Adv.
Mr. Hemant Singh
Ms. Jyotshna Khatri

Counsel for the Respondent(s) : Mr. C.K. Rai
Mr. Sachin Dubey for R-1

Mr. Gopal K. Choudhary
Mr. Arivnd Banerjee (Rep)
for CSPDCL /R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The Appellant(s) herein questioning the legality, validity and correctness of the various Impugned Orders dated 13.10.2014 In Petition Nos. 74 of 2013(D) (Appeal Nos. 277 of 2014 & 7 of 2015) and 15.10.2014 In Petition Nos. 79 of 2013(D) (Appeal No.278 of 2014) passed by the Chhattisgarh Electricity Regulatory Commission. The Appellant in Appeal Nos. 277 & 278 of 2014 is aggrieved by the decision of the Commission that cross subsidy surcharge shall not be levied to colony / township of the 2nd Respondent whereas the Appellant in Appeal No.7 of 2015 is aggrieved due to declaration of its plant as non-captive during the year 2006-07.

1.1 The Appellants are aggrieved by the aforesaid Impugned Orders and have preferred the present appeals.

2. Brief Facts of the Case(s):-

2.1 Appeal No.277 of 2014 & 278 of 2014 has been filed by the Appellant, Chhattisgarh State Power Distribution Company Limited (CSPDCL), the Discom which provides electricity to consumers across the Chhattisgarh State.

2.2 Appeal No.7 of 015 has been filed by the Appellant, Jindal Steel and Power Ltd. which is a leading steel manufacturer and is operating a steel plant of 3.00 MTPA situated in district Raigrah, Chhattisgarh. In order to run its steel plant, the Appellant had set up and is operating a captive generating plant of 893 MW capacity. In the FY 2006-07, the power generation of the Appellant stood at 347.7 MW. Therefore, the Appellant is a generator of electricity as well as the consumer. The power plant of the Appellant qualifies as a captive generating plants as per the provisions of the Electricity Act, 2003.

3. <u>Questions of Law raised in Appeal Nos. 277 & 278 of 2014</u>:-

The Appellant (CSPDCL) has raised following questions of law in these Appeals for our consideration:-

3.1 Whether in the facts and circumstances of the case, the impugned orders dated 13.10.2014 passed in the Petition No.74 of 2013 (D) and dated 15.10.2014 passed in the Petition No.79 of 2013 (D) is not erroneous, unjustified, perverse, arbitrary, contrary to law and unsustainable insofar as the Commission has held and ordered that cross subsidy surcharge shall not be levied to colony / township of the 2nd Respondent?

3.2 Whether, in the facts and circumstances of the case, the Commission was not erroneous in considering that an industrial unit settling up a captive generating plant is also a generating station for generating electricity and/or that the operating staff of an industrial unit are also the operating staff of the generating station?

3.3 Whether, in the facts and circumstances of the case, the Commission was not arbitrary, irrational and without any basis in law in holding that the supply to housing colony is exempted from payment of any cross subsidy surcharge?

3.4 Whether, in the facts and circumstances of the case, the Commission had not unduly, irrationally and unreasonably stretched the provisions of section 2(30) and/or the Removal of Difficulties 4th Order; and whether those provisions could not have had any such effect as construed by the impugned order?

4. **<u>Questions of Law raised in Appeal No.07 of 2015</u>**:-

The Appellant (JSPL) has raised following questions of law in this Appeal for our consideration:-

4.1 Whether the Respondent Commission failed to correctly compute the percentage of captive consumption by not deducting the power supplied by the Appellant to the CSEB (erstwhile Respondent No.2) under the PPAs dated 15.07.1999 and 01.08.2002?

4.2 Whether the Respondent Commission failed to consider the fact that the PPAs dated 15.07.1999 and 01.08.2002 executed with the CSEB were saved under Section 185 of the Electricity Act, 2003, and as such could not be run down / taken away by the Electricity Rules, 2005?

4.3 Whether the Respondent Commission was correct in passing the impugned order without even dealing with the legal argument of Section 185 of the Electricity Act, 2003 even though the same was raised in writing in the written submissions filed by the Appellant?

4.4 Whether the Respondent Commission failed to appreciate that on account of the binding long term prior agreements made under the PPAs dated 15.07.1999 and 01.08.2002, which agreements are saved under Section 185 of the Electricity Act, 2003, the Appellant could not have reduced / managed its generation so as to fulfill the captive consumption criteria as per Rule 3 of the Electricity Rules, 2005?

4.5 Whether the Respondent Commission failed to consider that in the case of the distribution business of the Appellant, there was a commitment for the Appellant to supply power from its captive power plant in Raigarh. The said commitment was also recognized in the order dated 29.09.2005, passed in Petition No.3 of 2005 wherein the distribution license was granted to the Appellant. Hence, the Respondent Commission was required to make a harmonious construction of the order granting license and of Rule 3 of the Electricity Rules 2005, by deducting the said quantum of power from the net generation while calculating captive consumption for the FY 2006-07.

4.6 Whether the Respondent Commission failed to invoke its "regulatory" power envisaged under Section 86 of the Electricity ct, 2003 and treat the prior agreements / commitments of the Appellant in supplying power to the distribution licensees as "deemed" captive consumption, or by deducting the said quantum of power from the net generation, while calculating the net generation from the Captive Power Plant in the FY 2006-07?

4.7 Whether the Respondent Commission failed to appreciate that it is not proper for a distribution licensee on one hand to forcibly consume electricity from the power plant of the Appellant, and on the other hand collect Cross Subsidy Surcharge when the said surcharge has been levied owing to the agreements which have been saved under Section 185 of the Electricity Act 2003? The same is evident by letter dated 25.04.2006 of the Appellant and the letter numbered as 02-02/ACE-I/ of the Respondent No.2.

4.8 Whether the Respondent Commission failed to consider that the compulsory power supply to the CSEB, as evident by letter dated 25.04.2006 of the Appellant and the letter numbered as 02.-02/ACE-I / of the Respondent No.2, was analogous to directions issued under Section 11 of the Electricity Act, 2003, wherein the State Governments direct generators / CPPs into generating surplus power so as to be supplied to the grid, and as such the said power was either required to be treated as “deemed ” captive consumption, or was required to be deducted from the net generation of the Appellant?

4.9 Whether the Respondent Commission failed to correctly appreciate the order dated 06.02.2006 passed by the said Commission, wherein the

power supplied to the CSEB was to be exempted / deducted while determining captive status of the CPPS?

4.10 Whether the Respondent Commission was correct to penalize the Appellant when the Appellant was acting pursuant to the peculiar electricity regulatory framework prevalent in the State of Chhattisgarh?

4.11 Whether the Respondent Commission failed to consider that imposition of cross subsidy surcharge when a CPP fails to maintain 51% captive consumption, is a civil right granted by the Electricity Rules,2005. The Respondent Commission, and the Respondent No.2, through the above order dated 06.02.2006, have waived the said right, and once having waived the same, the Respondent No.2 could not have claimed to the contrary?

4.12 Whether the Respondent Commission failed to appreciate that the power supplied to M/s Nalwa by the Appellant was under Section 43 A of the Electricity Act, 1948, and was exempted from payment of cross subsidy surcharge as per the Electricity [Removal of Difficulties] Second Order, 2005, dated 08.06.2005?

5. <u>Learned counsel, Mr. Gopal K. Chowdhary, appearing for the CSPDCL in the batch of Appeals (277 & 278 of 2014) has filed</u>

following written submissions for our consideration:-

5.1 By an order dated 18.06.2013 in Petition No 14 of 2012 (M), wherein the Commission was considering the captive status of several generating plants including that of JSPL, the Commission decided that JSPL's generating plant did not qualify as a captive generating plant under Rule 3 of the Electricity Rules 2005 for 2006- 2007. Pursuant to the aforesaid order dated 18.06.2013, the CSPDCL raised a demand for Rs 47,94,04,080/- towards cross subsidy surcharge for FY 2006-2007.

5.2 JSPL filed Petition No 58 of 2013(M) purporting to be for clarification and issuance of appropriate directions pursuant to the order dated 18.06.2013. JSPL also filed an Appeal before this Tribunal against the order dated 18.06.2013 raising issues relating to captive status and also computation of cross subsidy surcharge. By a common order dated 23.09.2013 in Appeal Nos 217 and 224 of 2013, this Tribunal was pleased to remand the matter back to the State Commission to decide the matters afresh.

5.3 While so, JSPL filed Petition No 74 of 2013(D), purportedly under sections 86(1)(f) and 86(1)(k), and purportedly as a petition pursuant to

the order dated 23.09.2013 passed by this Tribunal. The prayers in the said petition were, briefly, (a) to hold that that JSPL's generating plant was a captive generating plant in FY 2006-2007 considering various exclusions claimed on various grounds, (b) to hold that JSPL was not at all liable for cross subsidy surcharge in FY 2006-2007, and (c) to hold that JSPL was not liable for cross subsidy surcharge for the power supplied to Nalwa.

5.4 The Commission proceeded to hear the matter considering the Petition No 74/2013 as part and pursuant to the remand by the Tribunal and also merging the Petition No 58/2013 into Petition No 74/2013.

5.5 The Commission passed the impugned order dated 13.10.2014 in Petition No 74 of 2013(D) holding that the 2nd Respondent JSPL did not satisfy the condition in Rule 3 of 51% captive consumption during 2006-2007 and was not therefore a captive generation plant for that year and, inter alia, held that cross subsidy surcharge shall not be levied on power supplied to colony / township of JSPL .

5.6 The Appellant CSPDCL has filed this appeal insofar as the Commission

has held that no cross subsidy surcharge shall be levied on the power supplied to the colony of the township. The main issues that arise in this appeal are as to –

(a) Whether the power supplied to JSPL's colony / township is exempt / not liable for cross subsidy surcharge by reason of the Electricity (Removal of Difficulty) Fourth Order 2005, or otherwise?

(b) Whether the power supplied to JSPL's colony / township for consumption by the residents of the colony and/or non-residential establishments in the colony is captive consumption by JSPL ?

5.7 The second of the above issues is academic in nature for 2006-2007 (Appeal 277 of 2014) because the Commission has held that the generating plant was not a captive generating plant for that year whereby cross subsidy surcharge is payable by JSPL also for the extent of captive use. However, the issue is dealt with here since it is relevant to the tagged Appeal No 278 of 2014.

Whether the power supplied to JSPL's colony / township is exempted / not liable for cross subsidy surcharge by reason of the Electricity (Removal of Difficulty) Fourth Order 2005, or otherwise:

5.8 The State Commission has held that technically speaking, there is no difference between power unit or units of captive generating plant and generating station. The difference between captive generating plant and

generating plant is that while captive generating station is set up primarily for his own use a generating station is established to supply electricity or sell electricity. An industrial unit setting up a captive generating plant is also a station for generating electricity, and includes any building and plant with step-up transformer, switch-gear, switch yards, 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. So housing colonies of operating staff of an ndustrial unit can also be an integral part of a industrial unit which has also set up a captive generating plant, an industrial unit which has set up a captive generating plant i.e. a power plant for his own use can feed electricity to housing colonies of operating staff of whole industrial unit

including its captive generating plant. Accordingly, supply of power by JSPL to its housing colony is exempted from payment of any cross-subsidy surcharge.

5.9 The Commission has referred to Section 2(30) of the Act and the Removal of Difficulties 4th Order. The Commission has grossly erred in

misconstruing the same. The Commission failed to see that both Section 2(30) and the Removal of Difficulties 4th Order refer only and particularly to the "operating staff of a generating station". The entire operating staff of the industrial unit cannot be considered as operating staff of the generating station. The Commission has stretched the term "operating staff of a generating station" too far unreasonably, irrationally and arbitrarily.

5.10 The Commission grossly erred in considering, thereby or otherwise, that the operating staff of an industrial unit are also the operating staff of the generating station. The Commission failed to distinguish properly between "operating staff of a generating station" and "operating staff of an industrial unit".

5.11 The Commission failed to see that the term "operating staff of a generating station" are only those personnel who are directly and exclusively involved in the operation of the generating station. Without prejudice, at best, only the residential premises of the personnel who are directly and exclusively involved in the operation of the generating station could be considered as falling within the fold of the Electricity (Removal of Difficulty) Fourth Order 2005. It must however be noticed that the said

Order only exempts from requirements of a license to supply, and there is no mention whatsoever of any exemption from cross subsidy surcharge.

5.12 The Commission failed to see that the Removal of Difficulties 4th Order only exempts a generating company from the requirement of a licence in the case of supply to the housing colony of only the "operating staff of its generating station". But for this exemption, it is implicit that the supply by a generating company even to the housing colony of the operating staff of its generating station requires a licence. The Removal of Difficulties 4th Order does not exempt supply of electricity to housing colony of all operating staff of an industrial unit from a licence. Supply of electricity to housing colony of operating staff which is not exclusively for the direct operating staff of a generating station is not exempted.

5.13 The Removal of Difficulties 4th Order has no application to cross subsidy surcharge. The Commission has erroneously and illegally extended the scope of the Removal of Difficulties 4th Order beyond what was expressly intended. The Commission has not given any reason or basis for holding that the supply to housing colony is exempted from payment of any cross subsidy surcharge; and the same is only an ipse dixit without any basis or

foundation in law.

5.14 The Commission grievously erred in considering that an industrial unit which has set up a generating plant can feed electricity to housing colonies of operating staff of the whole industrial unit including the generating plant. The Commission failed to see that this was not permissible without a licence being tantamount to distribution of electricity. In similar circumstances, Bhilai Steel Plant was given a distribution licence for supply of electricity generated by it within its township.

5.15 The Commission's order does not even appear to distinguish cases where the generating plant has not qualified as a captive generating plant. It would appear that the exemption from cross subsidy surcharge as per the order would be irrespective of whether or not the generating plant is qualified as a captive generating plant.

<u>Whether the power supplied to JSPL's colony / township for consumption by the residents of the colony and/or non-residential establishments in the colony is captive consumption by JSPL</u>

5.16 The consumption of electricity in a housing colony of an industrial unit is consumption by the residents for their own use and consumption by non-residential and commercial establishments for their own purposes. Such consumption cannot be considered as consumption by the industrial unit. The Appellant had specifically made the following averments in the Appellant's reply before the Commission:-

> *"With reference to the averments in para 23 and Ground XIII, the petitioner had not made true representations with regard to the residents of the township / housing colonies. The 4th Removal of Difficulties order is not applicable to the Petitioner's township. The Respondent is given to understand that the residents of the township / housing colony are not restricted only to the operating staff of the generating station. There are other residents unconnected to the generating station and there also appear to be commercial and other establishments within. The supply of electricity to such a township without a license is an offence.*
>
> *Insofar as the claim that the electricity consumed by any of the residents of such township / colony is captive consumption, it is submitted that the consumption by the residents is not free. It cannot be said that the consumption by the residents for their own use is consumption by the Petitioner. This aspect requires enquiry by the Commission with respect to the legality of such supplies and the nature of such supplies".*

5.17 The allegations were not denied by the 2nd Respondent. The 2nd Respondent evaded answering or clarifying the nature of the consumers or consumption in the colonies. The Commission failed to draw an adverse inference against the 2nd Respondent and also did not make the

necessary enquiry to ascertain the facts. Without prejudice to the contention that the entire consumption in the colony including the residential consumption is not captive consumption and is liable to cross subsidy surcharge. In any case, the non-residential and the commercial and other consumption within the colony cannot at all be considered as captive and/or exempted from cross subsidy surcharge.

5.18 The consumption in the housing colony by residents and commercial and other establishments cannot be considered as captive consumption by the industrial unit. The persons / entities consuming the electricity and the purpose of consumption is relevant. The ownership of the premises is not at all relevant.

5.19 The 2nd Respondents' written note dated 19.02.2019 erroneously considers the impugned order as for 2007-2008 and 2008-2009. The order impugned in Appeal 277 of 2014 is with respect to 2006-2007 and the Commission has specifically held that JSPL has not qualified as a captive generation plant in terms of Rule 3 for 2006-2007.

5.20 The judgments in Appeal 10 of 2008 & batch and Appeal 252 of 2014 are not relevant to the issues raised in this Appeal though those judgments

discuss the effect and import of Rule 3 in different facts. The contention of the 2nd Respondent that cross subsidy surcharge is exempted merely on the ground of 26% of the ownership of the generating plant, and completely ignoring the other requirement of 51% of captive consumption is grossly erroneous.

6. <u>Learned counsel, Mr. Hemant Singh, appearing for the Respondent No.2 in Appeal No. 277 of 2014 & 278 of 2014 has filed following written submissions for our consideration:-</u>

6.1 The issue in the present appeal concerns as to whether the supply of electricity by the Respondent No. 2 (as a captive generating plant) to its township(where employees of RespondentNo.2 are housed) comes within the scope of captive consumption for FYs 2007-08 and 2008-09.

6.2 Before going into the issue involved, it is necessary to understand what is meant by a captive generating plant. In this context, reference be made to Sections 2(8) and 9 of the Electricity Act, 2003. As per the said provisions, a captive generating plant is a power plant which has been set up by a person (in the present case, the Respondent No. 2) primarily for 'ownuse'.

6.3 The Electricity Act ,2003 (hereinafter referred to as the "Act")

introduced the concept of 'open access' as provided under Section 42. As per 'open access', a consumer can avail power from a source other than his area distribution licensee. However, for availing such supply of electricity through 'open access', such consumer has to pay certain charges, such as "wheeling charges" and "cross subsidy surcharge" to the distribution licensee. "Wheeling charges" are defined under Section 2(76) of the Act, and the same are the charges for utilizing the network/ grid of the distribution licensee for sourcing power from a third-party source by a consumer. The "cross subsidy surcharge" is a token compensatory charge levied by a distribution licensee upon a consumer going away(by seizing to be a consumer of such licensee) and opting to take power from third party source. In other words, a "cross subsidy surcharge" is a token compensation against the loss of revenue for a distribution licensee when a consumer leaves the said licensee and opts to take power from a third- party source. The said surcharge is utilized by the distribution licensee to subsidize certain categories of consumes such as agricultural consumers, etc..

6.4 As per the 4th proviso of Section 42(2) of the Act, "cross subsidy surcharge" is exempted upon a consumer who avails electricity from

its own generating source. This is called as captive consumption of electricity.

6.5 Rule 3 of the Electricity Rules, 2005 (hereinafter referred to as the "Rules") provides the qualification criteria for a captive generating plant and its captive users/ consumers. As per Rule 3, the said qualifying criteria is as follows:

(a) a minimum of 26% of the ownership of the generating plant is held by its captive user/ consumer; and

(b) a minimum of 51% of the aggregate electricity generated by a captive generating plant should be utilised by the captive users/ consumer on an annual basis.

6.6 As per Rule 3(2) of the Rules, in the event the above qualifying test is not satisfied for a particular FY, then the entire power consumed in the said FY is treated as a normal open access transaction, meaning thereby that the exemption to pay "cross subsidy surcharge" provided under the 4th proviso of Section 42(2) of the Act, goes away.

6.7 The above has been interpreted by this Tribunal in various judgments, which are provided hereinbelow:

a. Appeal Nos. 10, 171, 172 of 2008 and Appeal No. 117 of 2009.

b. Appeal No. 252 of 2014.

6.9 The Respondent Commission held in the impugned order that the Respondent No. 2 qualifies as a captive generating plant for FYs 2007-08 and 2008-09. As per the impugned order, the Respondent No. 2 supplied power for captive use to its steel manufacturing unit, township, coal mines and washery in FYs 2007-08 and 2008-09. This meant that the Respondent No. 2 is exempted from paying "cross subsidy surcharge" to the Appellant for the entire power consumed by the steel manufacturing unit, township, coal mines and washery of the Respondent No. 2 in FYs 2007-08 and 2008-09.

6.10 In the impugned order, while holding the Respondent No. 2 as a captive generating plant for FYs 2007-08 and 2008-09, the Respondent Commission held that the consumption of power by the township from the generating plant of the Respondent No. 2, which houses employees of the said Respondent, comes within the category of self/ captive use. The Appellant has filed the present appeal against the said finding qua township. As per the Appellant, the consumption

of power by township in FYs 2007- 08 and 2008-09 cannot be considered as captive consumption, which means that qua the said consumption there cannot be any exemption from payment of "cross subsidy surcharge".

6.11 On the issue of township, the Respondent Commission in para 29(f) of the impugned order referred to The Electricity (Removal of Difficulty) 4th order, 2005. The said removal of difficulty order is setout hereinbelow:

> *"1. Short Title & Commencement:- (1) This order shall be called the Electricity [Removal of Difficulty] (Fourth) Order 2005.*
>
> *(2) This order shall come into force on the date of its publication in the Official Gazette.*
>
> *2. Supply of electricity by the generating companies to the housing colonies of its operating staff:-*
>
> *The supply of electricity by a generating company to the housing colonies of, or townships housing, the operating staff of its generating station will be deemed to be an integral part of its activity of generating electricity and the generating company shall not be required to obtain licence under this Act for such supply of electricity."*

As per The Electricity (Removal of Difficulty) 4th order, 2005, a township or housing of the staff of a generating station is an integral part of the activity of generating electricity, and that no license is required for sourcing electricity to such township.

6.12 The contention of the Appellant is that the Respondent No. 2 has a steel manufacturing unit, which consumes the captive power from its generating plant. As such, the township also houses the staff of the steel manufacturing unit of the Respondent No. 2, apart from the staff of the generating station. Hence, the benefit of the above removal of difficulty order is limited to the township housing the staff of the generating station, and not of the steel manufacturing unit, even if both generating station and steel manufacturing unit are owned by the Respondent No.2.

6.13 The above stand of the Appellant is completely erroneous as well as fundamentally flawed. This is for the reason that under the provisions of the Act and the Rules, a company has to hold more than 26% equity shareholding of the generating plant in order to captively consume power and avail the exemption from payment of "cross subsidy surcharge" as per the 4th proviso of Section 42(2).

Hence, once a company holds more than 26% equity shareholding of the captive generating plant ,then any power consuming load centre/unit of the said company, be it steel plant or the housing society, is eligible for captive consumption. There is no distinction in the Act and the Rules, which provides that while a steel unit will be considered as a captive user, the housing society owned by the same company will not be considered as captive user.

6.14 Further, on the above premise, the Respondent Commission also holds in the impugned order as follows:

> *"51. The Act, considers building used for housing operating staff of a generating station as a generating station. Further The Electricity (Removal of Difficulty) Fourth Order, 2005 specified as under:-*
>
> > *"Supply of electricity by the generating companies to the housing colonies of its operating staff. The supply of electricity by a generating company to the housing colonies of, or township housing, the operating staff of its generating station will be deemed to be an integral part of its activity of generating electricity and the generating company shall not be required to obtain license under this Act for such supply of electricity."*
>
> *Removal of Difficulty order further clarifies that the generating company is not required any distribution license for supply of electricity in the colony or township meant for operating staff of its generating station because it is deemed to be an integral part of its activity of generation of electricity.*

Section 2(8) of the defines captive generating plant.

> *(8) "Captive generating plant" means 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.*

Technically speaking there is no difference between power unit or units of captive generating plant and generating station. The difference between captive generating plant and generating plant is that while captive generating plant is set up primarily for his own use a generating station is established to supply electricity or sell electricity. An industrial unit setting up a captive generating plant is also a station for generating electricity. and includes any building and plant with step-up transformer, switch-gear, switchyard, 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. So housing colonies of operating staff of an industrial unit can also be an integral part of an industrial unit which has also set up a captive generating plant. An industrial unit which has set up a captive generating plant i.e. a power plant for his own use can feed electricity to housing colonies of operating staff of whole industrial unit including its captive generating plant. Accordingly, supply of power by JSPL to its housing colony is exempted from payment of any cross-subsidy surcharge."

(Underline supplied)

6.15 Therefore, in the present case, the housing society is owned by the Respondent No. 2, and as such the consumption by such society cannot at all be excluded from self/ captive consumption for FYs 2007-

08 and 2008-09. There is no legal backing to the argument being put-forth by the Appellant.

In view of the above, the appeal filed by the Appellant ought to be dismissed.

7. <u>Learned counsel, Mr. Hemant Singh, appearing for the Appellant in Appeal No.07 of 2015 on behalf of JSPL has filed following written submissions for our consideration:-</u>

7.1 The present Appeal is filed against the impugned order dated 13.10.2014 passed by the Respondent Commission in Petition No. 74 of 2013 (D).

7.2 Vide the impugned order, the Appellant has been held as a non-captive generating plant for FY 2006-07, and as a result of the same, the industrial unit of the said Appellant has been levied with cross subsidy surcharge. It is the case of the Appellant that it qualifies as a captive generating plant for FY 2006-07. Hence, the only issue in the Appeal is with regard to the captive generating plant status of the Appellant in FY 2006-07.

7.3 The present written note of arguments raises the following propositions:

a) What is a captive generating plant; and

b) Whether the Commission committed an error while "aggregating" electricity as per Rule 3(1)(a)(ii) of the Electricity Rules, 2005

I. What is a captive generating plant

7.4 In this context, reference is made to Sections 2(8), 9 and 42(2) of the Electricity Act, 2003 (hereinafter "Act"). As per the said provisions, the following can be ascertained:

a) As per Section 2(8) of the Act, a captive generating plant can be set-up by any person for generating electricity primarily for his own use;

b) As per Section 9 of the Act, a captive generating plant is free to construct, maintain and operate dedicated transmission lines for transmitting/ sourcing power for use by its own load center unit (captive user);

c) As per Section 42(2) of the Act, open-access was for the first time introduced, whereby a consumer can avail electricity from a source of its own choice, i.e. from a source other than his area distribution licensee, by using the transmission/ distribution network of the concerned area;

d) As per the 1st proviso of Section 42(2) of the Act, a consumer has to pay cross subsidy surcharge to the distribution licensee whose lines are being utilized by such consumer to avail power from a third party source; and

e) As per the 4th proviso of Section 42(2) of the Act, in the event a person sources electricity from its captive generating plant, then the said person is not liable to pay any cross subsidy surcharge. Hence, the Act promotes captive generation and consumption of power.

Hence, the crux of the matter is that for availing the exemption from payment of cross subsidy surcharge, upon availing power from a 3rd party source (i.e. source other than the area distribution licensee), a generator has to qualify as a captive-generating plant.

7.5 The requirements for qualifying as a captive-generating plant are provided in Rule 3 of the Electricity Rules, 2005 (hereinafter "Rules"). As per Rule 3 of the said Rules, the following conditions are to be fulfilled by a captive-generating plant:

a) As per Rule 3(1)(a)(i), minimum 26% of the equity in the generating plant has to be held by the captive user;

b) As per Rule 3(1)(a)(ii), minimum 51% of the electricity generated by the power plant has to be consumed for his own use by a captive user; and

c) As per Rule 3(1)(a)(ii) read with explanation (1)(a) of Rule 3(2), the above verification of consumption has to be done annually after the end of a financial year.

Once the above conditions are fulfilled, then no cross subsidy surcharge can be imposed upon a person or captive user who is consuming power from a captive generating plant. Vide the impugned order, the generating plant of the Appellant has been held as a non-captive generating plant for FY 2006-07, thereby subjecting the said Appellant (qua its industrial steel manufacturing unit) to pay cross subsidy surcharge to the Respondent No. 2.

7.6 As regards the first condition for qualifying as a captive generating plant, as specified in Rule 3(1)(a)(i) of the Rules, the Appellant has 100% equity ownership of its captive generating plant. This is much beyond the

required threshold of 26% equity ownership, and as such the Appellant fulfills the above condition. This fact/ aspect is not under dispute by the Respondents.

7.7 As per the impugned order, it has been held that the Appellant did not fulfill the second condition for qualifying as a captive generating plant, as specified in Rule 3(1)(a)(ii) of the Rules for FY 2006-07, and as such the said Appellant is liable to pay cross subsidy surcharge to the Respondent No. 2 for the electricity consumed by its industrial steel unit in the above financial year.

II. The Commission committed an error while "aggregating" electricity as per Rule 3(1)(a)(ii) of the Electricity Rules, 2005

7.8 While passing the impugned order, the Respondent Commission did not appreciate the following with respect to the determination of the captive status as per Rule 3(1)(a)(ii) of the Rules:

a) the Appellant executed two (2) power purchase agreements (PPAs) with the Chhattisgarh Electricity Board (erstwhile Respondent No. 2) dated 15.07.1999 and 01.08.2002 for a quantum of 30 MW and 70 MW respectively (totaling to 100 MW);

b) as per Rule 3(1)(a)(ii), while computing the consumption of minimum 51% of the "aggregate" energy generated by the power plant of the Appellant in FY 2006-07, the energy pertaining to abovementioned 100 MW had to be excluded from such aggregation;

7.9 Much before the enactment of the Electricity Act, 2003, on 15.07.1999, the Appellant executed a Power Purchase Agreement (PPA) for supplying 30 MW power to the Chhattisgarh State Electricity Board (erstwhile Respondent No. 2). Thereafter, the Appellant executed a PPA for supply of another 70 MW power to the Chhattisgarh State Electricity Board (erstwhile Respondent No. 2).

7.10 At the stage of the execution of the above agreements, neither the Act nor the Rules were in existence. This means as follows:

a) the criteria for qualification as a captive generating plant, as contemplated in the Rules of 2005, was not in existence;

b) there was no requirement to first self-consume 51% of the aggregate electricity generated by the captive user of the captive

generating plant, and to thereafter contemplate any third party power sales from balance power;

c) this is because after the enactment of the Act and the Rules, under Section 42(2) of the Act, for a captive user to avail the exemption from paying cross subsidy surcharge to the distribution licensee, the said user has to first make sure that it is in a position to consume minimum 51% of the aggregate electricity generated by its captive generating plant.

It is only thereafter that a captive generating plant would contemplate selling the balance power to third parties. This is for the reason that, as per Rule 3(1)(a)(ii) of the Rules, the minimum 51% consumption will be computed after considering both, electricity consumed for self-use as well as any surplus electricity supplied to third parties including any distribution licensee;

d) therefore, after enactment of the Act and the Rules, if a captive generating plant supplies/ sells power to third parties without first making provisioning for consuming minimum 51% of the aggregate electricity generated for its self-use, then its captive user would be subjected to levy of cross subsidy surcharge.

7.11 On 08.06.2005, the Central Government enacted the Electricity Rules, 2005.

After the notification of the above Rules, whereby the Appellant had to fulfill the conditions mentioned under Rule 3 (1)(a)(ii), it wrote a letter dated 25.04.2006 wherein the said Appellant requested the distribution licensee (CSEB)/ Respondent No. 2 that the obligation to supply 100 MW of power, under the above PPAs dated 15.07.1999 and 01.08.2002, may be reduced on account of the fact that the captive consumption requirement of the said Appellant had increased, and that there is not much surplus power available.

7.12 Against the above letter, the Respondent No. 2 issued a letter,wherein the request of the Appellant to reduce power supply against the aforementioned PPAs, was rejected.

This resulted in the following:

a. the Appellant was not allowed to streamline its supply of electricity generated to both, its captive industrial unit and to the Respondent No. 2 in order to fulfill condition mentioned under Rule 3(1)(a)(ii);

b. on account of being forced/ compelled to mandatorily supply 100 MW of power to the Respondent No. 2, the balance power to be generated by the Appellant was not enough to fulfill the condition of minimum 51%consumption by its own industrial unit.

The above resulted in the Appellant being declared as a non-captive generating plant for FY 2006-07 in the impugned order.

7.13 Hence, the Respondent No. 2 got double benefit on account of the following:

a) on one hand, forcing the Appellant to supply the entire 100 MW contracted under the PPAs; and

b) on the other hand by benefitting through recovery of cross subsidy surcharge, as the Appellant failed to fulfill the requirement of 51% captive consumption in terms of Rule 3(1)(a)(ii), which was solely on account of the above compulsion to supply 100 MW of power.

7.14 The above is a deliberate misuse by the Respondent No. 2, of the provisions of the Act and the Rules, simply to doubly benefit at the cost of the Appellant. Such an application/ interpretation of the statutory provisions which lead to absurdity, requires an intervention from this

Tribunal. In this context, reference be made to the following judgments of the Hon'ble Supreme Court:

a) H.S. Vankani v. State of Gujarat, reported in ***(2010) 4 SCC 301***

In the above judgment, it has been held that the courts have to avoid a construction of an enactment that leads to an unworkable, inconsistent or impracticable results, which was unlikely to have been envisaged by the rule-making authority. It was further held that the rule-making authority never visualises absurd results. In the present case, the above double benefit of the Respondent No. 2, at the expense of the Appellant, is an absurdity;and

b) Mahadeolal Kanodia v. Administrator-General of W.B., reported in ***AIR 1960 SC 936***

In the above judgment, it has been held that if the strict grammatical interpretation gives rise to an absurdity or inconsistency such interpretation should be discarded, and an interpretation which will give effect to the purpose for which the Legislature enacted the statute, has to be considered, and if necessary even by modification of the language used. In the present case also, Rule 3(1)(a)(ii) has to be interpreted in a manner which prevents any misuse of the said

provision to unnecessarily collect cross subsidy surcharge from a captive user of a captive generating plant.

7.15 It is pertinent to mention herein that in the above PPAs the power contracted was in MW terms (i.e. capacity terms), and not in energy terms (million units).The captive status is determined on energy terms (number of units), and not on capacity (MW) terms. This is evident from the fact that under Rule 3(1)(a)(ii), it is the generated electricity which has to be considered. The generated electricity is the actual energy generated, i.e. in energy terms.

The above evidences the fact that the moment the Appellant executed the above PPAs, the entire generation capacity, equivalent to 100 MW, irrespective of actual energy generated, was for the exclusive use of the Respondent No. 2/ CSEB. In other words, the said capacity was of the Respondent No. 2, and not available with the Appellant at all.

Hence, while determining the "aggregate" electricity generated for the purpose of fulfilling the consumption requirement under Rule 3(1)(a)(ii), the above capacity (100 MW), over which the Respondent No. 2 had a lien, could not have been considered.

7.16 The Commission erred in computing 51% of the "aggregate" electricity generated as per Rule 3(1)(a)(ii) on account of the fact that the PPAs were executed much prior to the enactment of the Act and the Rules. As such, the Appellant did not consider or deliberate as to how much power is to be self-consumed and how much can be sold to third parties as the same was not required.

It is the Act and the Rules, enacted much after the above PPAs, which for the first time contemplated the condition for minimum self-use of electricity generated by a captive generating plant, in order to enjoy captive status and avail exemption from payment of cross subsidy surcharge.

7.17 In this regard, the Appellant refers to the Table provided at para 44 of the impugned order. The said Table provides details of the power generated by the Appellant and the various heads under which consumption happened. From the said Table, it is evident that Net Generation is 1992.91 MUs, and power supplied to CSEB/ CSPDCL/ Respondent No. 2 is 622.94 MUs. The captive consumption is recorded as 758.62 MUs. The power supplied to other third parties is 577.63 MUs (power supplied to OP Jindal Industrial Park), 30.35 MUs (power supplied to M/s Nalwa Steel).

7.18 In the present appeal, the issue is limited to the sale to CSEB/ CSPDCL/ Respondent No. 2. Hence, if out of net generation of 1992.91 MUs, then for 51% captive power consumption as per Rule 3 of the Electricity Rules, 2005, the consumption required is 1016.3 MUs, which the Appellant has consumed 758.62 MUs. This, the Appellant submits, was wrong on the part of the Respondent Commission as it ought to have excluded the power supply of 622.94 MUs made to the Respondent No. 2. If the same is excluded from net generation (i.e. 1992.91 MUs), then the net generation comes to 1369.97 MUs, and then the 51% (as per Rule 3) would have been 698.68 MUs. Whereas, the Appellant has consumed 758.62 MUs for captive purpose in FY 2006-07, i.e. in excess of the required 698.68 MUs. If the above approach had been adopted by the Respondents, then the Appellant would have qualified as a captive generating plant for FY 2006-07.

7.19 Further, under Section 185(2)(a) of the Act, the agreements/ PPAs dated 15.07.1999 and 01.08.2002, which were valid agreements executed prior to the advent of the Electricity Act 2003, have been saved.

7.20 It is a settled principle of law that rules/ regulations are for furthering/ supplementing the parent Act, and not to take away something provided

in the said Act. In the present case, the PPAs/ agreements of the Appellant with CSEB/ Respondent No. 2 have been saved under Section 185 of the Act, and as such the Electricity Rules 2005 could not be interpreted so as to take away/ not consider the said agreements which have been saved by the parent Act. Section 185 of the Act, is conceptualized as per Section 6 of the General Clauses Act, 1897. In this context, reference be made to the following judgment:

c) Punjab v. Mohar Singh, reported in ***AIR 1955 SC 84***

In the above judgment, it has been held that insertion of a saving clause in the repealing statute is with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment. Hence, the PPAs of the Appellant with the Respondent No. 2 were valid and subsisting after the enactment of the Act, and as such Rule 3(1)(a)(ii) cannot be interpreted by ignoring that the Respondent No. 2 had a lien over the capacity of 100 MW of the Appellant.

7.21 When the Appellant was acting as per PPAs which have been saved under the Act, then the same cannot be construed in a manner detrimental to the Appellant based upon a delegated legislation (i.e. Rules). Hence, the Commission was required to harmoniously construe the PPAs with Rule 3 of the Rules, by either treating the supply made to

Respondent No. 2 as “deemed” captive consumption, or by excluding the said quantum before "aggregating" the generated electricity for the purpose of computing 51% as per Rule 3(1)(a)(ii). Such exclusion was also required since it was the Respondent No. 2 which had a lien over 100 MW capacity of the Appellant, meaning thereby that for the period of subsistence of the PPAs, the said capacity was not with the Appellant.

7.22 The Appellant refers to an order dated 06.02.2006 passed by the Respondent Commission itself, in Petition No. 17 of 2005 (M), wherein the said Commission held as follows:

a) the order laid down the entire protocol as to how captive generating plant status is to be determined;

b) the order also discussed the issue of supply of "surplus" electricity by captive generating plants to the Respondent No. 2. The said "surplus" electricity is the electricity which remains for disposal at the hands of the captive generating plant after meeting its requirements;

c) the order also discusses as to how the status of captive generating plants be monitored ;

d) the order finally concludes that the same will not apply to subsisting PPAs, as on the date of the said order, which the captive generating plants have with the CSEB (erstwhile Respondent No. 2).

7.23 Hence, while monitoring the captive status, as provided under para 16 of the above order, the power supply to CSEB cannot be considered. Accordingly, the supply of 100 MW of power by the Appellant to CSEB/ Respondent No. 2 under the PPAs dated 15.07.1999 and 01.08.2002 ought not to be considered while "aggregating" the electricity generated as per Rule 3(1)(a)(ii).

7.24 Rule 3(1)(a)(ii) of the Rules simply provide that minimum 51% of the "aggregate" electricity generated by the power plant has to be consumed for captive use. Therefore, it becomes necessary to interpret as to what "aggregating" electricity means. The dictionary meaning of the word "aggregate" means combining several separate elements. As such, while "aggregating" the entire energy generated by the power plant of the Appellant, the portion sold under the aforementioned PPAs ought to be

excluded, as such PPAs were entered much before the enactment of the Act and the Rules.

7.25 In the event the above is not followed while "aggregating" electricity as per Rule 3(1)(a)(ii), then the same will lead to an absurdity or abuse of process of law by the Respondent No. 2 in a manner that the Appellant will be subjected to penalty/ cross subsidy surcharge on account of supply of electricity to the said Respondent itself.

7.26 The Commission in the impugned order has relied upon a judgment passed by this Tribunal in Appeal No. 33 of 2012 dated 18.02.2013, wherein it has been held that there is no power available with the State Commission to relax the provisions of the Electricity Act.

The above judgment is not applicable in the present case, on account of the following:

a) In the above judgment, the case did not relate to any prior agreement executed before the enactment of the Act and the Rules;

b) The distribution licensee did not benefit doubly by forcing the generator, on one hand to supply electricity to it, and on the other

hand impose penalty/ cross subsidy surcharge on account of such supply; and

c) There was no applicability of Section 185 of the Act;

7.27 In view of the above, the present Appeal ought to be allowed, thereby preventing the Appellant from being unnecessarily subjected to levy of cross subsidy surcharge at the hands of the Respondent No. 2.

8. <u>Learned counsel, Mr. Gopal Choudhary, appearing for the Respondent No.2 / CSPDCL in Appeal No.07 of 2015 has filed following written submissions for our consideration:-</u>

8.1 The Commission passed the impugned order dated 13.10.2014 in Petition No 74 of 2013(D) holding that the 2nd Respondent JSPL did not satisfy the condition in Rule 3 of 51% captive consumption during 2006-2007 and was not therefore a captive generation plant for that year and, inter alia held that -

a) supply of electricity to CSPDCL, being a distribution licensee, will not be excluded from the net generation of electricity from the power plant for determination of its captive status for the year 2006-2007; and

b) supply of electricity to OP Jindal Industrial Park, being a distribution licensee, also will not be excluded from the net generation of electricity from the power plant for determination of its captive status for the year 2006-2007; and

c) Electricity supply to JSPL's sister concern M/s Nalwa will be treated as supply of electricity by a generator to a consumer and not as captive consumption.

8.2 The Appellant JSPL has filed this appeal limited to the aforesaid three issues. At the hearing of the case on 19.02.2019, it was submitted on behalf of the Appellant JSPL that only the issue of exclusion of supply to CSPDCL is being pursued, and the issues in relation to supply to OP Jindal Industrial Park and M/s Nalwa were not being pressed. Nevertheless, even those issues have been briefly addressed hereinafter.

8.3 Thus, only the following issue remains in this appeal, namely - The main issues that arise in this appeal are as to –

(a) Whether the power supplied to CSPDCL could, or ought to have been, excluded from the net generation for determination of the captive status of the power plant in terms of Rule 3 of the Electricity

Rules 2005 ?

8.4 The contention of the Appellant is, briefly, to the effect that the supply to CSPDCL during 2006-2007 was under PPA dated 15.07.1999 for 30 MW and PPA dated 01.08.2002 for 70 MW which were entered into before the Electricity Rules 2005, and that therefore the supply under these PPAs ought to be excluded from the net generation while computing the percentage of captive consumption to net generation in terms of Rule 3 for determination of captive status for 2006-2007.

8.5 The Appellant also seeks support from para 16 and 17 of the CSERC order dated 06.02.2006 to contend that the CSERC itself had provided for non-consideration of the earlier and subsisting PPAs for the purposes of Rule 3. The contentions of the Appellant are misconceived and incorrect.

Nature of the PPAs dated 15.07.1999 and 01.08.2002

PP-cum-Wheeling Agreement dated 15.07.1999

8.6 The following facts relating to the Power Purchase-cum-Wheeling Agreement dated 15.07.1999 with the Board may be noticed –

i. The PP-cum-WA entered into in 1999 was at a time when the

aggregate generating station capacity of 4 units was only 78.70 MW. The generation capacity of the JSPL in 2006-2007 was 347.7 MW.

ii. Clause 6 specifically provides that the exported power to the Board would be restricted upto the contracted power, which was 30 MW from 12.10.1998. The restriction was on a maximum amount of power that could be supplied.

iii. Clause 7 clearly states that JSPL may feed electricity generated at the power plant in surplus after meeting its requirement. Thus, the Board only agreed to purchase the surplus generated after JSPL had met its own requirement. If JSPL had no surplus, they were not under any obligation to supply.

iv. Clause 15 also states that JSPL shall sell its surplus power, and provided for a tariff varying according to the monthly load factor of supply. Thus the supply of power less than the contracted capacity of 30 MW was all along envisaged as only surplus power after JSPL has met its own requirement has been met.

v. There is no consequence of non-supply provided for in the Agreement.

vi. It cannot therefore be contended that the supply of power to the Board / CSPDCL was of such nature as to be obligatory on the part of JSPL to supply the power even if it did not generate, more particularly beyond the 78.7 MW capacity as existing in 1999, or if there was no surplus power after meeting its own requirement.

PPA dated 01.08.2002

8.7 The following facts relating to the PPA dated 01.08.2002 with the Board may be noticed-

i. The first recital clearly states that the Appellant offered to sell power to Gujarat Electricity Board (GEB) through CSEB. The Appellant's own averment is to the effect that this was a back-to-back arrangement for sale to GEB through CSEB since direct sale to GEB was not possible before the advent of the Electricity Act, and it necessarily had to be routed through CSEB. It is thus clear that the 70 MW under the agreement was in pursuance of the Appellant's arrangement to sell to GEB and that the

CSEB was only an intermediary to purchase and re-sell the power generated by the Appellant for supply to GEB.

ii. Clause 3.1.2 makes it clear that CSEB shall accept the 70 MW power so long as it is accepted by GEB. Clauses 5.2 and 5.2.1 (Appellant's Rejoinder) clearly provide for CSEB making payment to the Appellant is subject to receiving payment from GEB. This further makes it clear that the sale of power was essentially between the Appellant and GEB, and that the CSEB was only a mere facilitating intermediary.

8.8 These agreements continued to be in effect even after the 2003 Act came into force is relevant only for the purpose of the mutual rights and obligations as between the parties. No other extended or stretched effect can be given to the continuing validity of the said agreements. It cannot be contended that the subsistence of such agreements have any effect on the operation of law in terms of Rule 3 and the determination of the captive status of the generating plant for the purposes of all provisions of the Act relating to captive generating plants.

Appellant's contention on request to reduce supply under the PPAs

8.9 The contention of the Appellant that it tried to reduce the quantum of the

subsisting power supply agreements which was denied by the CSEB, and that therefore the Appellant abided by the directions of CSEB fearing financial implications on account of reneging on the commitments made is unsustainable on facts.

8.10 The Appellant's letter dated 25/04/2006 for reduction in the contracted power was purportedly on the ground that there is an increase in their captive consumption requirements and consequently a drastic decrease in the surplus power available. That was not at all true.

8.11 The Appellant could not have asked the CSEB for a reduction in the contracted power of 70 MW with respect to the back to back PPA dated 01/08/2002 because this was an enabling arrangement for the back-to-back supply of 70 MW power to the GEB through the CSEB. That request was not bona fide or permissible. There is nothing to show that GEB was approached by JSPL for any reduction and/or the consent of GEB.

8.12 The request in respect of the PPA dated 15/07/1999 was also not bona fide. It is clear from the admitted figures of the generation and the disposition of the generation during 2006-2007 that the contentions of the Appellant are unsustainable on facts. The gross generation of 2225.55

MU during 2006-2007 from the 347.7 MW power plant is at a PLF of only 73.07%. Out of the net generation of 1992.91 MU, a mere 38% was captive consumption. It cannot be said that there was any increase in captive consumption such as to decrease the available surplus power.

8.13 The Appellant has itself admitted in Ground VII that it could not have increased the power demand of its steel plant since it was still under construction. As against the 90 MW said to have been committed to JSPL (distribution licensee for OP Jindal Industrial Park), 29% of the net generation was actually supplied at a load factor of only 73.07%. The power supplied to the CSPDCL against the 30 MW and 70 MW contracted capacities under the PPAs dated 15/07/1999 and 01/08/2002 was at a load factor of only 71.11%.

8.14 On these facts, it cannot at all be contended that the non-reduction of the contracted capacity with CSPDCL or the supply to other entities was any cause at all for the Appellant not to have consumed at least 51% of its net generation towards captive consumption.

8.15 The contention that the Appellant was left with no ability to bring the captive consumption above 51% of the net generation, whether by

lowering its generation or otherwise, is untenable and contrary to facts. The Appellant could have shut down one or more units to bring down its generation. It was not a matter of ability but one of choice consciously made clearly with an eye on the revenue from the sale of power.

8.16 The State Commission has correctly noticed the facts of the case and found and held that the Appellant is not correct in saying that it could not maintain captive status due to earlier commitments to supply to CSEB, and that the Appellant had met its own power requirement and supplied only the surplus energy available to CSEB and other users including the Jindal Industrial Park (distribution licensee).

8.17 It is wholly misconceived and inappropriate for the Appellant to contend that it was not proper for the distribution licensee to consume electricity from the Appellant's power plant and also collect cross subsidy surcharge. The Appellant has itself willingly entered into a PPA for sale of surplus power. There was no restriction on the Appellant for captive consumption. The PPA only enabled the surplus power after meeting captive consumption to be disposed of up to 30 MW. The agreement for 70 MW was only an enabling PPA for the Appellant to sell its surplus power to the Gujarat Electricity Board. The commitment for supply to OP Jindal Park

(distribution licensee) is of the same nature as that of supply to CSEB. The Appellant self-servingly does not make any similar allegations on that commitment. In the teeth of such facts, it is not becoming of the Appellant to make unwarranted allegations against the CSEB/Respondent. There is no question whatsoever of the CSEB / Respondent forcing the Appellant to fall foul of the 51% captive consumption criteria as alleged or otherwise. It is entirely misconceived to say that the supply to CSEB was analogous to directions issued under section 11 of the Act. The notifications said to have been issued by the Government of Odisha are wholly irrelevant. No such directions have been issued by the Government of Chhattisgarh. In any case, there is no scope or power for any Government to require any supply to be treated as deemed captive generation for the purposes of Rule 3. The contention is entirely specious and cannot be countenanced.

Operation of Rule 3

8.18 Rule 3 of the Electricity Rules 2005 is a statutory rule which must be necessarily followed for determining the captive status of any generating plant for the purposes of section 2(8) and the word “primarily” therein. The Rule has been held to be reasonable and valid for the purposes of section

2(8), and not ultra vires (vide Judgment of Hon'ble Supreme Court dated 13.11.2017 in CA Nos 18506-18507 of 2017).

8.19 There is no provision in Rule 3 for its relaxation under any circumstances. There is no provision is the said Rule to exclude any supply under pre-existing agreements or otherwise from the net generation in the determination of the captive status for a financial year. There is no power with the Commission to vary from the provisions of the said Rule under any circumstances.

8.20 A statutory rule or regulation cannot be read in a convoluted manner so as to defeat its very intents and purposes. Rule 3 is to be applied strictly to ascertain and determine the captive status or otherwise of a generating plant. The question that has to be addressed is whether the captive consumption of the generating plant has been at least 51% of the aggregate generation. There is no scope for any other consideration. There is no scope whatever for treating any part of the non-captive supply to be deemed as captive consumption in Rule 3 or any other statutory provision. There is no scope whatever for deducting the quantum of non-captive supplies from the net generation while calculating percentage of

annual captive consumption as contended or otherwise. If it was intended that any supply of electricity is to be excluded for the purposes of Rule 3, the said Rule itself would have, and ought to have, provided for such exclusion. In the absence of any such provision, nothing of the sort could be read in. Rule 3 is not concerned with any financial burden being imposed. Its only purpose is to provide a method for determining whether the generating plant can be considered as a captive generating plant for the purposes of the Act.

8.21 The State Commission has correctly referred to and followed the judgement dated 18/02/2013 of this Tribunal in Appeal No 33 of 2012 in the matter of Godawari Power & Ispat Ltd vs CSERC & Ors.. The Tribunal held that the State Commission has no powers to relax the provisions of the Electricity Rules 2005.

8.22 In the present case also, the Appellant was essentially asking that the Commission relax the provisions of Rule 3 considering the circumstances and/or reasons put forth by the Appellant for non- fulfilment of the 51% captive consumption criterion. The State Commission could not consider or grant relaxation according to settled law and accordingly the State

Commission was bound to apply the Rule strictly for determining the captive status of the Appellant for 2006- 2007.

Appellant's reliance on CSERC Order dated 06.02.2006:

8.23 The Appellant's reliance on paragraphs 16 and 17 of the State Commission's order dated 06/02/2006 in Petition 17/2005(M) and the contentions put forth therefrom are wholly misconceived and incorrect. The said paragraphs 16 and 17 merely provide that the provisions of that order (with regard to the terms of purchase of power from CPPs as in paragraph 9.6 of that order would not apply to subsisting PPAs. The State Commission has correctly held accordingly. The Commission has no power under the Act or Rule 3 to vary the manner of determination of captive status.

Other Submissions

8.24 No permission and/or consent was ever given under section 43A(1)(c) of the Supply Act 1948 for supply to M/s Nalwa as contended or at all. The CSEB's letter dated 09/08/2002 cannot be said to be a permission under or in terms of section 43A(1)(c); and in any case the CSEB was not the authority to grant any such permission under the said provision. The

notification dated 06/06/2003 is also ex-facie not a permission under section 43A(1)(c) of the Supply Act 1948. It is expressly stated to have been given in terms of section 28 of the 1910 Act. The Removal of Difficulties 2nd Order has no application whatsoever in the facts of the present case.

8.25 The present Appeal is, therefore, without any merit. The order of the Commission does not warrant any interference by this Tribunal in respect of any of the grounds or issues raised in the present appeal. The supply of electricity by the Appellant to the CSEB during 2006-2007 cannot be excluded from the net generation of electricity of the power plant while calculating captive consumption, and the same cannot also be treated as deemed captive consumption for the determination of the captive status for 2006-2007.

8.26 The supply of electricity by the Appellant to the OP Jindal Industrial Park (distribution licensee) during 2006-2007 cannot be excluded from the net generation of electricity from the power plant for the determination of captive status for 2006-2007. There is no question of exemption of levy of cross subsidy surcharge on M/s Nalwa under the Removal of Difficulties

2nd order or otherwise. The levy of cross subsidy surcharge by letter dated 20/08/2013 is no longer in effect as the levy is now required to be made in accordance with the Commission's order and the orders of this Tribunal in the pending appeals. The Appellant is not entitled to any of the reliefs prayed for or otherwise.

9 We have heard learned counsel appearing for the Appellant, learned counsel for the Respondent Commission and learned counsel for the Respondent/DISCOM at considerable length of time and have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeals for our consideration:-

Issue No.1: Whether the State Commission has correctly held that the power supplied to Respondent/JSPL' colony/township is not liable for payment of cross subsidy surcharge (Appeal Nos. 277 & 278 of 2014)?

Issue No.2: Whether the State Commission has correctly computed the percentage of captive consumption with specific regard to the PPAs' executed before the enactment of the Electricity Act, 2003 to hold that JSPL plant was not captive for FY 2006-07 (Appeal No.07 of 2015) ?

10. Our Consideration & Analysis:

10.1 ISSUE NO.1:-

Learned counsel, Mr. Gopal K. Choudhary, appearing for the Appellant /CSPDCL in Appeal No.277 & 278 of 2014 submitted that the State Commission vide its order dated 18.06.2013 in Petition No 14 of 2012 (M) wherein the Commission was considering the captive status of several generating plants including that of JSPL, decided that JSPL's generating plant did not qualify as a captive generating plant under Rule 3 of the Electricity Rules 2005 for 2006- 2007. The learned counsel further submitted that the Respondent/JSPL filed a Clarificatory Petition before the State Commission and also filed an appeal before this Tribunal against the order dated 18.06.2013 raising issues relating to captive status and also computation of cross subsidy surcharge. Vide its judgment dated 23.09.2013 in Appeal Nos. 217 and 224 of 2013, this Tribunal remanded the matter back to the State Commission to decide the matters afresh. The Respondent Commission passed the impugned order dated 13.10.2014 holding that the Respondent/JSPL did not satisfy the condition stipulated in Rule 3 of 51% of captive consumption during 2006-2007 and was not, therefore, a captive generation plant for that year. Learned counsel for the Appellant pointed out that in spite of

holding that the generating plant of the Respondent was not qualified as a captive generating plant during 2006-07, the State Commission, inter alia, held that cross subsidy surcharge shall not be levied on power supplied to colony / township of the Respondent /JSPL .

10.2 Learned counsel vehemently submitted that the State Commission has erroneously held that technically, there is no difference between captive generating plant and generating station except that while captive plant is set up primarily for its own use, the generating station is established to supply of electricity or sell electricity. Further, the industrial unit setting up a captive generating plant is also a station for generating electricity and may include any building and plant with all associated equipment or other appurtenant equipment, if any, used for that purpose and the site thereof including any building used for housing the operating staff of a generating station. Learned counsel for the Appellant alleged that the State Commission has erroneously and arbitrarily concluded that supply of power by Respondent/JSPL to its housing colony is exempted from payment of cross subsidy surcharge. The State Commission has grossly erred in interpretation of Section 2 (30) of the Act and the Removal of Difficulties 4th Order. In fact, these two provisions refer only and

particularly to the "operating staff of a generating station" and not the entire operating staff of the industrial unit. The State Commission has unduly stretched the term "operating staff of a generating station" too far to consider under it the operating staff of the industrial unit also.

10.3 Learned counsel further pointed out that the Electricity (Removal of Difficulty) Fourth Order 2005 only exempts a generating company from the requirement of a licence to supply and there is no mention whatsoever of any exemption from payment of cross subsidy surcharge. Learned counsel further contended that such findings of the State Commission are without any basis or foundation in law as such power supply to housing colony including all the operating staff of the whole industrial unit cannot be permitted without a license being tantamount to distribution of electricity. Learned counsel referred a similar case of Bhilai Steel Plant wherein a licence for supply of electricity generated by it within its township was given. The learned counsel highlighted that on the one hand, the State Commission has held the Respondent' plant to be non-captive for the reference year and on the other hand, it has exempted the colony and township from payment of cross subsidy surcharge. The learned counsel for the Appellant submitted that the allegations so made

by it were not denied by the Respondent/JSPL, but the Respondent evaded answering or clarifying the nature of consumers / consumption in the township. In any case, the non-residential and commercial consumption within a township cannot be considered as the captive consumption to avail exemption from paying cross subsidy surcharge.

10.4 Learned counsel pointed out that the judgments of the Tribunal relied upon by the Respondent in Appeal No.10 of 2008 & batch and Appeal 252 of 2014 are not relevant to the issues raised in these Appeals regarding the contention of the Respondent/JSPL that cross subsidy surcharge is exempted merely on the ground of 26% of the ownership of the generating plant. Learned counsel submitted that such averments completely ignored the other requirement of 51% of captive consumption and hence, it is beyond comprehension. Learned counsel for the Appellant in Appeal No.277 of 2014 & 278 of 2014 reiterated that in view of the above facts, the impugned order passed by the State Commission cannot be sustainable as per law and is liable for setting aside.

10.5 ***Per contra,*** learned counsel for the Respondent/ JSPL after referring to various sections namely Sections 2(8) and 9 of the Electricity Act, 2003 submitted that when a consumer avails electricity from its own

generating sources, it is not liable to pay any cross subsidy surcharge. Learned counsel placed reliance on this Tribunal's judgment in Appeal Nos. 10, 171, 172 of 2008 , Appeal No. 117 of 2009 and Appeal No. 252 of 2014 which have interpreted in detail the definition and applicability of such provisions in the Act and Rules. Learned counsel on the issue of electricity consumption in the township referred para 29(f) of the impugned order which in turn has taken reliance to the Electricity (Removal of Difficulty) 4th order, 2005. As per these provisions, a township or housing of the staff of the generating station is an integrated part of the activity of generating electricity and no license is required for sourcing electricity to such township. The relevant clause is reproduced as under:-

> *"1. Short Title & Commencement:- (1) This order shall be called the Electricity [Removal of Difficulty] (Fourth) Order 2005.*
>
> *(2) This order shall come into force on the date of its publication in the Official Gazette.*
>
> *2. Supply of electricity by the generating companies to the housing colonies of its operating staff:-*

> *The supply of electricity by a generating company to the housing colonies of, or townships housing, the operating staff of its generating station will be deemed to be an integral part of its activity of generating electricity and the generating company shall not be required to obtain licence under this Act for such supply of electricity."*

Learned counsel vehemently submitted that under the provisions of the Act and the Rules, the company has to hold more than 26% equity shareholding of the generating plant in order to captively consume power and avail the exemption from payment of cross subsidy surcharge, as per the 4th proviso of Section 42 (2). In fact, there is no distinction in the Act and the Rules, which provides that while a steel unit will be considered as a captive user, the housing colony owned by the same company will not be considered as captive users. Learned counsel accordingly emphasised that in the present case, as the whole township is owned by the Respondent No. 2/JSPL, the electricity consumption by such colony /township cannot at all be excluded from self/ captive consumption. Learned counsel has drawn our attention over the analysis and findings of the State Commission in the impugned order specifically the Para 51 which has provided cogent reasoning for the said decision and allowed residential complex to be exempted from payment of cross subsidy surcharge.

10.6 Learned counsel contended that in view of above facts, there is no merit in the Appeals filed by the Appellant and the same may be dismissed.

Our Findings:-

10.7 We have carefully gone through the rival contentions of the learned counsel for the Appellant and learned counsel for the Respondent and also taken note of the various judgments relied upon by the learned counsel. As the per the provisions and requirements under the Act/Electricity Rules, the generating plant of the Respondent/JSPL was not held captive during 2006-07 but considered as captive generating plant for the subsequent years 2007-08 and 2008-09. The respective decision of the State Commission for holding the plant as captive or non-captive based on the twin conditions stipulated in the Electricity Rules is admittedly not in dispute in these appeals except that electricity consumption in the township of the plant can qualify for the exemption of cross subsidy surcharge or not. While it is the contention of the Appellant that in the township besides operating staff for the generating plant, other staff of the industrial unit and many commercial establishments consume electricity for different purposes and as such it tantamounts to supply of electricity similar to that of distribution of electricity. As such, such

consumption should not be exempted from paying the cross subsidy surcharge. On the other hand, the Respondent contends that the township is an integral part of the industrial unit which also uses the generating plant set up and being operated for captive use of the steel industry of the Respondent. As such, all the consumption of the inbuilt township would need to considered as the captive consumption at par with the captive consumption of the industrial unit.

10.8 While going though the various provisions of the Electricity Act and the Electricity Rules, 2005, it is crystal clear that a generating plant to be considered as captive has to meet twin qualifying criteria i.e. a minimum of 26% of ownership of the generating plant and a minimum of 51 % consumption by the captive users on an annual basis. The State Commission has adequately analysed the issue and has reasonably brought out the same under Para 29(F) of the impugned order under which a reference to the Electricity (Removal of Difficulty) 4th order, 2005 has also been made. In view of these facts, we hold that housing colonies of operating staff as a whole of an industrial unit can also be an integral part of an industrial unit which has set up a captive generating plant for its use. Further, an industrial unit

which has setup a captive generating plant i.e. a power plant for his own use can feed electricity to housing colonies of operating staff of whole industrial unit including its captive generating plant. We, accordingly opine that the State Commission had decided the matter in judicious manner and has passed the impugned order by assigning cogent reasoning. We do not notice any perversity or infirmity in the impugned order and as such intervention of this Tribunal is not called for.

11. Issue No.2:-

11.1 Learned counsel for the Appellant submitted the despite meeting the twin criteria under the Electricity Rules for consideration of captive or non-captive status, the Respondent Commission has declared the generating plant of the Appellant as non-captive for FY 2006-07 by erroneous computations of the consumption of electricity. Learned counsel highlighted that the Appellant had already executed two power purchase agreements (PPAs) with the Respondent dated 15.07.1999 and 01.08.2002 for a quantum of 30 MW and 70 MW respectively much prior to the enactment of the Electricity Act, 2003. Learned counsel pointed out that as per Rule 3(1)(a)(ii), while computing the consumption of minimum

51% of the "aggregate" energy generated by the power plant of the Appellant in FY 2006-07, the energy pertaining to abovementioned 100 MW had to be excluded from such aggregation. Learned counsel vehemently submitted that at the time of the execution of the Agreements, neither the Act nor the Rules were in existence and as such, there was no requirement to first self-consume 51% of the aggregate electricity generated by the captive user of the captive generating plant, and to thereafter contemplate any third party power sales from balance power. It was only on 8.6.2005 that the Central Government enacted the Electricity Rules, 2005 which under Rule 3 stipulated certain criteria for consideration of captive status of such generating plants. After the notification of these Rules, the Appellant requested the Respondent No. 2 /distribution licensee that the obligation to supply 100 MW of power, under the above PPAs may be reduced on account of the fact that the captive consumption requirement of the Appellant had increased and there is not much surplus power available. Learned counsel, however, pointed out that the Respondent rejected the request of the Appellant to reduce power supply against the aforementioned PPAs.

11.2 Learned counsel emphasized that as a result of the refusal of the Respondent to reduce power supply, the balance power to be generated

by the Appellant was not sufficient to fulfil the condition of minimum 51% consumption by its own industrial unit. Consequently, the plant of the Appellant got declared by the State Commission as a non-captive generating plant for FY 2006-07 in the impugned order. Learned counsel alleged that Respondent/Discom got double benefit due to fact that on one had it forced the Appellant to supply entire 100 MW contracted power under PPAs and on the other, charged cross subsidy surcharge as the Appellant failed to establish 51% captive consumption in terms of Rule 3. Learned counsel was quick to submit that such action on the part of Respondent/Discom is nothing but a deliberate misuse of the provisions of the Act and the Rules to get double benefit at the cost of the Appellant. Learned counsel placed reliance on the following judgments of the Hon'ble Supreme Court to substantiate his submissions that rules should not be interpreted in a manner that they result into misuse of the provisions :

i) ***H.S. Vankani v. State of Gujarat***, reported in ***(2010) 4 SCC 301***

ii) ***Mahadeolal Kanodia v. Administrator-General of W.B.***, reported in ***AIR 1960 SC 936***

11.3 Learned counsel for the Appellant invited our attention to the para 44 of the impugned order which has provided details of power generated and

consumed by the Appellant which indicates that Net Generation during 2006-07 was 1992.91 MUs, power supplied to Discom is 622.94 MUs, the captive consumption is recorded as 758.62 MUs, the power supplied to other third parties is 577.63 MUs and power supplied to M/s Nalwa Steel is 30.35 MUs. Learned counsel highlighted that the Respondent Commission ought to have excluded the power supply of 622.94 MUs made to the Respondent No. 2./Discom and if the same is excluded from net generation, then the energy consumed by Appellant for 2006-07 would be in excess of required amount(51%). However, the Commission has calculated otherwise and included the energy supplied to Respondent/Discom in its aggregation.

11.4 Learned counsel further submitted that under Section 185(2)(a) of the Act, the Agreements/ PPAs which were valid agreements executed prior to the advent of the Electricity Act 2003, have been saved and accordingly as per settled principle of law, the prior agreements cannot be taken away and the Electricity Rules 2005 could not be interpreted so as to take away the provisions of the said agreements of 1999 & 2002 which otherwise have been saved by the parent Act. In fact, Section 185 of the Act, is conceptualized as per Section 6 of the General Clauses Act, 1897 and to support the same, learned counsel releied upon the judgment

of Hon'ble Supreme Court in ***Punjab v. Mohar Singh,*** reported in ***AIR 1955 SC 84***. Learned counsel emphasized that in the above judgment, it has been held that insertion of a saving clause in the repealing statute is with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment.

11.5 Advancing his arguments, learned counsel for the Appellant further submitted that the Respondent Commission passed an order dated 06.02.2006 wherein various modalities for establishing the status of captive generating plant was elaborated. Hence, while monitoring the captive status, as provided under para 16 and 17 of the above order, the power supplied to Respondent/Discom cannot be considered for calculating the consumption of 51%. Learned counsel also clarified that the Commission in the impugned order has relied upon the judgment passed by this Tribunal in Appeal No. 33 of 2012 dated 18.02.2013, which is not applicable in the present case due to the fact that in the above judgment, the case did not relate to any prior agreement and the distribution licensee did not benefit double as in the present case.

11.6 ***Per contra,*** learned counsel for the Respondent/Discom submitted that the main issue involved in this Appeal is that whether the power supplied

to CSPDCL ought to have been excluded from the net generation for determination of the captive status of the generating plant so as to qualify in terms of Rule 3 of the Electricity Rules, 2005. In short, the principal contention of the Appellant is that the supply to DISCOM during 2006-2007 was under PPA dated 15.07.1999 for 30 MW and PPA dated 01.08.2002 for 70 MW which were entered into before the Electricity Rules 2005, and that, therefore, the supply under these PPAs ought to be excluded from the net generation while computing the percentage of captive consumption. Learned counsel further submitted that Para 16 & 17 of the State Commission's order dated 06.02.2006 as relied upon by the Appellant is entirely not applicable in the present case.

11.7 Learned counsel for the Respondent further submitted that the State Commission in the impugned order dated 13.10.2014 in Petition No.74 of 2013(D) inter alia held that a) supply of electricity to CSPDCL being distribution licensee will not be excluded from the net generation of electricity from the Appellants generating plant for determination of captive status in terms of Rule 3 for FY 2006-2007; b) supply of electricity to OP Jindal Industrial Park (distribution licensee) will also not be excluded; and c) electricity supply to JSPL's sister concern M/s Nalwa would be treated as supply of electricity by a generator to a consumer and

not as a captive consumption. Learned counsel contended that the Appellant/JSPL during the course of proceedings informed that they are only contesting the issue of exclusion of supply to CSPDCL and issues in relation to supply of OP Jindal Industrial Park and M/s Nalwa were not being pressed.

11.8 Learned counsel for the Respondent/CSPDCL highlighted the nature of PPAs dated 15/07/1999 and 01/08/2002 and pointed out that CSPDCL only agreed to purchase the surplus energy after JSPL had met its own requirement and if the Appellant had no surplus, it was not under any obligation to supply to DISCOM. Further, there were no consequences of non-supply provided for in the agreement and as such it cannot be contended by the Appellant that the supply of power to CSPDCL was of such a nature as to be obligatory. Learned counsel vehemently submitted that vide PPA dated 01.08.2002, the Appellant offered to sell power to Gujarat Electricity Board (GEB) through the CSEB (erstwhile discom) as a back to back arrangement since direct sale to GEB was not permitted before the advent of Electricity Act. Learned counsel was quick to submit that as such 70 MW power supply was exclusively in pursuance of the Appellant's arrangement to sell to GEB and the

CSEB/CSPDCL was only a intermediary to facilitate sale and purchase of power through it.

11.9 Learned counsel contended that subsistence of such agreements have no effect on the operation of law in terms of Rule 3 for the determination of the captive status of the generating plant. Regarding the contention of the Appellant that it tried to reduce the quantum of subsisting power supply agreements which were denied by CSEB, learned counsel for the Respondent submitted that the contention of Appellant that it abided by the directions of CSEB fearing financial implications, is unsustainable on facts. In fact, the Appellant's letter dated 25/04/2006 for reduction in the contracted power was purportedly on the ground that there is an increase in their captive consumption requirements and consequently a drastic decrease in the surplus power available. That was not at all true while seeing the quantum of generation vis-à-vis consumption for the reference year.

11.10 Learned counsel further submitted that there is nothing to show that GEB was approached by JSPL for any reduction and/or the consent of GEB. While looking at the generation pattern of the generating station during

2006-07, it is evident that the power plant has operated at a PLF of only 73.07% and out of the net generation, a mere 38% was captive consumption. It is, therefore, crystal clear that there is no increase in captive consumption such as to decrease the available surplus power. Even the power supply to CSPDCL against the 30 MW and 70 MW contracted capacities under the PPAs dated 15/07/1999 and 01/08/2002 was at a load factor of only 71.11%. Learned counsel vehemently submitted that based on these facts, it cannot at all be contended that the non-reduction of the contracted capacity by CSPDCL or the supply to other entities was any cause at all for the Appellant not to have consumed at least 51% of its net generation towards captive consumption.

11.11 Learned counsel for the Respondent further contended that the Appellant should have shut down one or more units to bring down its generation as the same was not a matter of ability but one of choice consciously made clearly with an eye on the revenue from the sale of power. Learned counsel emphasized that the State Commission has correctly noticed the facts of the case and categorically held that the Appellant has not qualified as captive generating plant. Learned counsel was quick to submit that Rule 3 of the Electricity Rules 2005 is a statutory rule which

must be followed in true spirit for determining the captive status of any generating plant. The Rule has been held to be reasonable and valid for the purposes of section 2(8), and not ultra vires (vide Judgment of Hon'ble Supreme Court dated 13.11.2017 in CA Nos 18506-18507 of 2017). Further, there is no provision in Rule 3 for its relaxation under any circumstances including the exclusion of any pre-existing agreements or otherwise for the determination of the captive status for a financial year. Besides, there is no power with the Commission to vary from the provisions of the said Rule under any circumstances.

11.12 To substantiate his submissions, learned counsel placed reliance on the judgment of this Tribunal dated 18.02.2013 in Appeal No 33 of 2012 in the matter of Godawari Power & Ispat Ltd vs CSERC & Ors. in which this Tribunal held that the State Commission has no powers to relax the provisions of the Electricity Rules 2005. The State Commission has also referred to the said judgment in the impugned order.

Our Findings:-

11.13 We have carefully considered the rival contentions of the learned counsel for the Appellant and the learned counsel for the Respondents. While the

Appellant is aggrieved by the findings of the State Commission in the impugned order which has disqualified the Appellant's generating plant to be a captive power plant in view of the captive consumption being less than 51 %. The principal contention of the Appellant is that it had executed two PPAs - one in 1999 and another in 2002 much prior to the enactment of Electricity Act, 2003 and notification of the Electricity Rules, 2005 and accordingly, the conditions stipulated thereafter for qualifying the captive status for the Appellant's generating plant do not apply. The learned counsel for the Appellant also contends that the electricity supplied to Respondent/CSPDCL should be excluded from the net generation of plant in computation of 51% captive consumption. The Appellant has alleged that despite request to reduce supply of power to the Respondent/Discom, the same was not accepted resulting into reduction of the captive consumption and thereby being declared as a non-captive generating plant for FY 2006-07. The Appellant pointed out that in the process, the Respondent/Discom has been benefitted on double accounts i.e. on one hand forcing the Appellant to supply the entire 100 MW contracted capacity under the PPAs and on the other hand by benefitting through recovery of CSS as the Appellant failed to fulfil the requirement of 51% captive consumption.

11.14 Learned counsel for the Appellant also invited our reference towards Section 185(2)(a) of the Act which envisages the saving of valid agreements executed prior to the advent of the Electricity Act 2003, only to contend that the power supply effected under these two agreements should be excluded from the net generation of the generating plant while ascertaining the captive status. To substantiate his submissions, learned counsel for the Appellant placed reliance on various judgments of the Apex Court as well as this Tribunal to emphasise that the Rule 3(1)(a)(ii) has to be interpreted in such a manner which prevents any misuse of the said provision to unnecessarily benefit other party beyond proportion.

11.15 On the other hand, learned counsel for the Respondent/Discom contended that the State Commission has applied the provisions of the Act and Electricity Rules, 2005 in true spirit and found that the Appellant's generating plant do not meet the criteria of captive power plant during the year 2006-07. Learned counsel for the Respondent/DISCOM reiterated that Rule 3 of the Electricity Rules, 2005 is a statutory rule which have to be scrupulously applied for determining the captive status of any generating plant and even the State Commission has no powers to

provide any relaxation in the said rules. The reasonability and validity of the said rules have been upheld in a host of judgments of the Apex court as well as this Tribunal.

11.16 Having regard to the rival contentions of both the parties, we note that the power generation from the Appellant plant and its supply to various beneficiaries including Respondent/Discom was a commercial decision of the Appellant. While the Appellant supplied to its full quantum to the beneficiaries including Gujarat Electricity Board and Respondent / Discom but it could not increase its captive consumption so as to achieve up to desired 51% level. It is not in dispute that the 2 PPAs executed by the Appellant during 1999 & 2002 were prior to advent of the Electricity Act, 2003 and stand saved as per Section 185(2)(a) of the Act but the provisions under Rule 3 of the Electricity Rules, 2005 would need to be complied with mandatorily by any generating plant so as to qualify as a captive plant. These rules do not permit any relaxation by any authority including the State Commission. It is also relevant to note that out of 100 MW power being supplied to outside agencies, 70 MW goes to GEB for which State Discom is only a facilitator/intermediary for back to back arrangement.

11.17 We do not find force in the arguments of the learned counsel for the Appellant that the Respondent/Discom did not accept its request for lowering the power supply in lieu of drastic increase in the captive consumption. Admittedly, the Appellant plant could run at a PLF of about 71% only and their captive consumption also could be achieved only 38% during the year 2006-07. The State Commission, accordingly declared the generating plant of the Appellant as non-captive during the said year as the same could not meet the statutory requirement of captive consumption as 51 %. In the light of these facts, we hold that the State Commission has rightly decided the matter after taking into consideration all the relevant materials placed before it. We do not find any infirmity or ambiguity in the impugned order, hence interference of this tribunal is not called for.

ORDER

For the forgoing reasons, as stated supra, we are of the considered opinion that issues raised in the instant appeals being Appeal No. 277 of 2014, 278 of 2014 and 07 of 2015 filed by the Appellants are devoid of merits and hence, the Appeals are dismissed.

The Impugned orders passed by Chhattisgarh State Electricity Regulatory Commission dated 13.10.2014 in Petition No. 79 of 2013 (D) and 15.10.2014 in Petition No. 74 of 2013 (D) 2015 are hereby upheld.

In view of the dismissal of the Appeals, the relief sought in the IA No. 09 of 2015 does not survive for consideration and accordingly stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **26th Day of August, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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