Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No116 of 2009 and IA No. 218 and 219 of 2009

Dated : May 18, 2010

Present: Hon'ble Mr. Justice M.Karpaga Vinagayam, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member

Chhattisgrh State Power Distribution Co. Ltd.
Daganiya, Raipur. ....Appellant(s)

V/s.

1. Hira Ferro Alloys Ltd.
   567B/568/553B Industrial Area
   Urla, Raipur- 492001

2. Chhattisgarh State Electricity Regulatory Commission
   Civil Lines, G.E. Road
   Urla Raipur-492001 ..... Respondents

Counsel for Appellant : Mr. K. Gopal Choudary
Mr. A. Bhatnagar
Ms Shikha Ohri (Deleted)*

Counsel for Respondent : Mr. V.K. Munshi
Mr. Manoj Sharma
Mr.Kapil Kaudhik for Res.I
Mr. Anand K. Ganesan for CSERC
Mr. M.G. Ramachandran for CSERC
Mr. Sanad K. Jha
Mr. Swapna Seshadri

** The name of Ms Shikha Ohri is deleted as per Orders dated 26.5.2010 of the Hon'ble Chairperson*

Judgment

Per Hon'ble Shri H.L. Bajaj, Technical Member.

This Appeal has been filed by the Appellant, Chattisgarh State Power Distribution Co. Ltd. (CSPDCL in short) against the order dated 27.08.2008 passed by the Chattisgarh State Electricity Regulatory Commission (State Commission in short) in Petition No. 5 of 2008 wherein, the State Commission has considered the Captive Generating Plant status of the Respondent No. 1 and its sister concerns with regard to Rule 3 of the Electricity Rules, 2005 (The Rules in short).

2. Brief facts of the case are as follows.

3. M/s Hira Ferro Alloys Ltd., the first Respondent had filed Petition No. 36 of 2005 before the State Commission for permission to supply power through open access to six "sister concerns" which together held 9.04% of its equity as captive consumers of its 20 MW captive power plant. By an order dated 5.4.2006, the Commission rejected the petition as the said sister concerns held only 9.04%

and not at least 26% as required under Rule 3 of The Electricity Rules, 2005.

4. Nevertheless, the first Respondent continued to give supply to two of the sister concerns (HCL & RRIL) through dedicated feeders. The Commission initiated suo motu proceedings under Section 142 of the Electricity Act, 2003 (The Act in short) in Petition 27 of 2007. By an order dated 15.02.2008, the Commission found violation of the Act and the Chhatisgarh State Electricity Regulatory Commission (Licence) Regulation 2004, and imposed penalty of Rs. One Lakh, and directed cessation of supply to RRIL and HCL allowing one month time for securing other supply of electricity.

5. The first Respondent intimated vide letter dated 22.02. 2008 to the Appellant herein that: (i) the three companies- Hira Cement Ltd. (HCL), RR Ispat Ltd. (RRIL) and Hira Industries Ltd. (HIL)- together held 33.49% of its equity and so qualified as captive users in terms of Rule 3 of Electricity Rules, 2005, (ii) sought open access for supply of 12 lakh units annually to HIL at Jagdalpur which was

a 33 kV consumer with 400 kVA contract demand. As the application was not made in the prescribed form, the first Respondent was advised by the Appellant to apply afresh in the manner prescribed.

6. The first Respondent filed Petition No. 5 of 2008 on 26.02.2008, under Sections 9,42 and 86, before the Commission seeking: (i) a declaration of its power plant as a captive generating plant, (ii) to hold that HCL, RRIL and HIL were captive users of the captive power plant together with the first Respondent and (iii) to direct the CSEB to give permission for wheeling of power to HIL and Jagdalpur. By an ex-parte order dated 10.03.2008 the Commission allowed HFAL to continue to supply power to RRIL and HCL till the disposal of the Petition.

7. As per the averments in the Petition, 139 MU (net) was expected to be generated, of which 92 MU (66.2%) was proposed to be consumed by the first Respondent itself in its own two Ferro

Alloys units, one of which was co-located and the other was to be supplied through a dedicated feeder 500 meters away.

8. The balance of 47 MU (33.8%) was proposed to be consumed as shown in the table below:

Sl.No.	Company	Share in Ist Respdt. %	Consumption (of 139 MU Net available)		How conveyed for consumption
			MU	%	
1	Hira Cement (HCL)	3.32	45.80	32.94	Dedicated feeder of Ist Respondent
2.	RR Ispat (RRIL)	10.06	-	-	Dedicated feeder of Ist Respondent
3.	Hira Industries (HIL)	20.11	1.2	0.86	Wheeling through licensee
	Total	33.49	47.00	33.80	

9. While the first Respondent's petition was pending before the Commission, it submitted another Petition dated 04.04.2008 for long-term open access for 1 MW for two years as captive users of HFAL. This Petition was returned by letter dated 28.04.2008 for the discrepancies that long-term open access should be for more than

two years, and that the Commission's order recognizing HFAL as captive generator and HIL as captive user was not submitted.

10. Accordingly HIL submitted a Petition dated 28.04.2008 for long-term open access for 1 MW for 15 years as captive user of HFAL. This Petition was rejected vide letter dated 24.06.2008 as the same could not be processed in the absence of the decision of the Commission on captive status.

11. Therefore, State Commission passed the impugned order in Petition No. 5 of 2008 dated 27.08.2008 holding inter- alia, that it had the jurisdiction to entertain the Petition as already decided in the order dated 13.11.2007 passed in Petition No. 37 of 2006 wherein it was held that since permission for open access under Sections 39, 40 and 42(2) of the Act is given by the Commission, and that therefore, the State Commission would have to take on the responsibility of declaring a generating plant as a captive one and monitoring it on an annual basis on the criteria in Rule 3.

12. The State Commission concluded that Rule 3 of the Electricity Rules 2005 has been examined by the Tribunal in the batch of cases including Appeal Nos. 32/2007 and 164 and 165/2006 and Revision Petitions 1 and 2 of 2007; and accordingly the shareholders of the Company in this case are entitled to be treated as captive consumers, and there is no requirement of consumption proportional to the shareholding in this case.

13. The State Commission further inferred that as the application for long term open access to the wires of the Board has not been rejected by the Board on any ground so far and presumably is still under its consideration, there is no ground on which the Commission may at that point of time hold that the company is not entitled to open access under the Open Access Regulations, and there is no ground to hold that open access would be denied to Hira Industries Ltd. and that the Commission is not convinced that there is any legal basis for treating Hira Industries Ltd. as not entitled to open access applied for. Consequently, the first Respondent was declared as a captive power plant and the three sister companies

Hira Cement Ltd., RR Ispat Ltd. and Hira Industries Ltd. as captive users and the temporary permission granted to the three captive users for use of electricity produced by the first Respondent was confirmed.

14. The Appellant has challenged the impugned order on the following grounds:

(i) The State Commission has no jurisdiction to entertain the petition of the Respondent No. 1 or otherwise declare whether or not the proposed consumer was a captive consumer with reference to Rule 3 of the Rules.

(ii) The State Commission cannot declare a power plant and the consumer to be captive consumer as the requirements of Rule 3 have to be fulfilled on a continuous basis and not at any one point of time.

(iii) The Respondent No. 1 being the owner of the power plant and itself consuming electricity from the power plant, the shareholders of the Respondent No. 1 cannot also claim

to be the captive users of electricity. The shareholders of the Company do not own the assets of the company and as such cannot claim captive status for use of electricity from the power plant.

(iv) Even assuming that the shareholders in the Respondent No. 1 can claim captive status, the State Commission has not applied the proportionality criteria to be followed for captive use of electricity by such shareholders.

15. Learned counsel for the Appellant, Mr. Choudary, contends that there is no provision in the Act conferring power or jurisdiction upon the Commission for determining any generating plant as a captive power plant and the energy thus generated as a captive user in relation to that generating plant. While powers and jurisdiction of the Commission are strictly only those specifically and explicitly conferred upon it by the statute, the Commission proceeded upon the erroneous consideration that , since there is no provision in the Act enabling the State Government to declare the status of a captive generating plant and/or captive users, the Commission would have

to take on the responsibility of declaring a captive generating plant as a captive one and monitoring it on an annual basis on the criteria laid down in Rule 3. Though the Commission relied upon Sections 39,40 and 42(2) on the ground that the permission for open access thereunder is given by it, there is nothing in Sections 39 or 40 which empowers the Commission to give any permission, and the said Sections themselves grant the right of open access. Section 42(2) only requires the Commission to introduce open access by Regulations, and there is no provision for the Commission to entertain any petitions and/or give any permission for open access in individual or particular cases.

16. Learned counsel for the Appellant further submitted that the Commission had no power, jurisdiction or function to entertain the Petition and the same was not maintainable.

17. Learned counsel for the Appellant pointed out that the definition of "captive generating plant" is comprised of two distinct categories. The first category is the case of a power plant set up by

any person to generate electricity primarily for his own use. The person himself is the only captive user in such a case. The second category, by reason of the inclusive part of the definition, is the case of a power plant set up by a Cooperative Society or Association of Persons for generating electricity primarily for the use of members. In the case of an Association of Persons, it must be set up as a joint-venture, or co-promoted and/or co-owned or as a special purpose vehicle for generating electricity primarily for use of its members. In such cases, the Association of Persons/Special Purpose Vehicle is itself not a consumer, and it is only the members consuming electricity from such plant who would be "captive users" in relation to such plant. The question of 26% ownership by proportion of shareholding would be applicable only to the latter second category, and not to the aforesaid first category.

18. Mr. Chaudary further submitted that the captive plant has been set up by the first Respondent, who is a company and owns 100% of the plant, primarily to generate electricity for its own use

as more than 51% of the net generation is consumed by it who is a company and owns 100% of the power plant.

19. Mr. Chaudary also contended that unless the power plant has been set up specifically and primarily for generating electricity for the use of members, the shareholding in the company is not relevant or applicable, and the shareholders cannot all be considered to be captive users of the captive generating plant of the company.

20. Learned counsel for the Appellant submitted that whereas the Commission has relied upon the common judgment dated 6/12/2007 of this Tribunal in Appeal Nos. 32/2007, 165/2006 and Revision Petition Nos. 1 and 2 of 2007 (Malwa Industries Ltd. vs Punjab Electricity Regulatory Commission & Anr and CSEB vs Bajrang Power & Ispat Ltd. & Ors) in holding that the HCL, RRIL and HIL together holding 33.49% in HFAL are entitled to be declared as captive users in relation to the captive generating plant of HFAL, the judgment did not specifically deal with the

submissions and arguments of the CSEB in those cases. He further submitted that the CSEB (predecessor in interest of the Appellant herein) has filed appeals before the Hon'ble Supreme Court against the aforesaid common judgment, and that the said appeals have been admitted and are pending.

21. Mr. Chaudary contended that even if the shareholding sister concerns were considered as captive users, their consumption as captive users could only be in proportion to their shares in the ownership within a variation not exceeding 10% as provided for in Rule 3 but the proposed consumption by HCL, RRIL and HIL of 47% was totally disproportionate to the inter se proportion of the shareholdings of the three companies. As this was not in conformity with the requirement of proportional captive consumption, the Commission could not have therefore considered the proposed consumption as being in conformity with the provisions of the Rule 3.

22. Mr. Chaudary contended that HIL could not have been granted open access for 1 MW when it had only a 500 kVA transformer, and HIL could not therefore have been considered as a captive users. Consequently neither RRIL nor HCL who have less than 26% shareholding could be considered as captive users of HFAL.

23. Learned counsel for the Hira Ferrow Alloys, the first Respondent and the Second Respondent Commission supported the impugned order mainly on the reasoning given in the Order itself. We will therefore refer to the portions of the order on various issues that arise for our consideration in this Appeal.

24. We deal with the first issue of jurisdiction of State Commission as to whether or not it can determine the captive status of the first Respondent. The Commission in the Impugned Order has dealt with the question of jurisdiction at para 6 as under:

> *6. First, we would like to deal with the issue of jurisdiction raised by the respondent. We have already held in another case (petition No. 37 of 2006) in which the present respondent was also a party, that declaration of a captive generating plant as such is necessary for compliance of the various provisions of the Act. We have held in para 4 of our order dated 13.11.2007 as under: "The Act thus makes special provision regarding the captive generating plant and such a plant has been provided the benefit of the right to open access for the purpose 'of carrying electricity from his*

captive generating plant to the destination of his use'. Rule 3 as above lays down the criteria by which to judge a captive generating plant and the captive user(s). The National Electricity Policy in paragraph 5.5.24 to 5.2.26 makes special provisions for such power plants. Special provision has been made in Act and the two national policies to promote captive generating plants as decentralized generation and as a source of supply of power to the grid. The State Government policy offers incentive to such plants by way of exemption from electricity duty for a specific period. Unless a power plant is declared upfront a captive generating plant, on the basis of the criteria laid down in the rule 3 of the Rules, it will not be able to avail the incentives offered by the State Government. More importantly, it will not be able to avail open access as a matter of right which the Act provides. Secondly, unless the captive users are identified right at the beginning, on the basis of qualification laid down in rule 3, an annualized assessment of total consumption by captive users to determine whether the plant is a captive generating plant would not be possible. This cannot be done by the state transmission utility or a distribution licensee; nor is there any provision in the Act enabling the State Government to do so. Since permission for open access under section 39, 40 and 42(2) of the Act is given by the Commission, we feel that the State Commission would have to take on the responsibility of declaring a generating plant as a captive one and monitoring on an annual basis if it satisfies the criteria laid down in Rule 3."

We have no reason to deviate now from this position.

25. Before we proceed to analyse the reasoning of the State Commission it is necessary to set out various definitions and provisions regarding captive generation in the Electricity Act, 2003 hereunder:

> ***Section 2(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.*

Section 2(28): *"Generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station.*

Section 2 (30): *" Generating station" or "station" means any station for generating electricity, including any building and plant with step-up transformer, switch-gear, switch-yard, cables or other appurtenant equipment, if any, used for that purpose and the site thereof; a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station .*

Section 2(47): *"Open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission.*

Section 9: Captive Generation- (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate captive generating plant and dedicated transmission lines:

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

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

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

Provided that such open access shall be subject to availability

of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

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

Duties of Distribution Licensees and Open Access:

Section 42(2): *The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:*

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

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

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

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

Provided also that the State Commission shall, not later than five years from the date commencement of the Electricity (Amendment) Act ,2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

26. From a conjoint reading of Section 2(8), 2(30) and 2(28) of the Act it can be inferred that owner of the captive generating plant is also a generating Company within the meaning of Section 2(28) as captive generating plant specifies the conditions of being a generating station and generating Company. Rule 3 of the Electricity Rules, 2005 issued by the Central Government in exercise of powers conferred by Section 176 of the Act, gives requirements of a captive generating plant. Rule 3 is reproduced below:

Rule 3 of Electricity Rules, 2005

*" **Requirements of Captive Generating Plant** (1) No power plant shall qualify as a 'Captive Generating Plant' under Section 9 read with clause (8) of Section 2 of the Act unless-*

(a) in case of a power plant-

(i) not less than twenty six per cent of the ownership is held by the captive user(s) and

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

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

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

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

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

(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generation plant.

Illustration

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

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

Explanation0(1) For the purpose of this rule-

(a) "annual basis" shall be determined based on a financial year;

(b) "captive user" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "captive use" shall be construed accordingly;

(c) "ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;

(d) "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity.

27. A generating Company which fulfils the special conditions prescribed in Section 2(8) read with Rule 3 above is categorized as captive power plant. Therefore, the captive generating plant will also be subject to the regulatory control of the State Commission inasmuch as a generating company. The proviso of Section 42(2) exempts a captive consumer from payment of cross subsidy surcharge. It is the State Commission which has the jurisdiction to determine whether the exemption provided under Section 42(2) can be accorded or not in the same manner as it is entrusted with the responsibility of determination of tariff and charges payable by the consumers in the State.

28. In view of the aforementioned discussions we have no manner of doubt that the State Commission has the jurisdiction to determine the captive generating plant status of the first Respondent which in turn will determine whether or not surcharge is payable.

29. Main issues in this Appeal to be decided are (i) whether the Commission was right or not in declaring the First Respondent's captive generating plant status within the meaning of Section 2(8) read with Rule 3 and (ii) the 3 sister concerns namely Hira Cement Ltd. (HCL), R.R. Ispat Ltd. (RRIL) and Hira Industries Ltd. (HIL) as captive users under the provision of Rule 3 of the Rules.

30. M/s Hira Ferro Alloys Ltd. the first Respondent here is a Company incorporated under the provisions of Company Act, 1956 which has industrial units manufacturing Ferro Alloys in Raipur and 3 sister concerns named above who have shareholding in HFAL. The 3 sister concerns HCL, RRIL and HIL hold 3.32, 10.06

and 20.11% shares respectively in the first Respondent Company. Based on the judgment of this Tribunal in Malwa Industries Ltd. vs. Punjab Electricity Regulatory Commission, CSEB vs. Bajrang Power and Ispat Ltd in Appeal No. 32 of 2007, 165 of 2006 and Revision Petition No. 1 and 2 of 2007, the State Commission has concluded that the 3 sister concerns are captive users by virtue of ownership of captive power plant being more than 26% and the total captive consumption exceeding 51% under the provision of Rule 3 of the Rules. Relevant portion of the Commission's order is reproduced below:

> *"The provisions of this rule have been examined by the Hon'ble Appellate Tribunal for Electricity (ATE) in the case of Malwa Industries Limited v/s Punjab Electricity Regulatory Commission and Punjab State Electricity Board and, CSEB v/s Bajrang Power & Ispat Limited and this Commission, in appeal No. 32 of 2007, 165 of 2006 and revision petition No. 1 and 2 of 2007. The Hon'ble ATE has confirmed the decision of this Commission that shareholders of a company can partake of the electricity produced by the CGP of the company. The Hon'ble ATE has interpreted the use of the term "captive user(s)" in Rule 3(1)(a) and has held that the framers of the rule have not used the letter 'a' before captive users in rule 3, rather it has used the letter 's' in brackets suffixed (s) to the word 'user' thereby clearly indicating that the ownership of a CGP can be of more than one captive user. The only conditionality is that the ownership of the captive users in the power plant should not be less than 26%. Since "ownership" has been defined in explanation 1(c) of rule 3 of the Rules to mean the equity share capital with voting rights in a power plant set up by a company, holding of 26% shares in the company by captive users would satisfy the requirement of rule 3. It has also been ruled by the Hon'ble Tribunal*

that the second proviso to rule 3(1)(a) requires that only in case of association of persons the captive user(s) are entitled to electricity generated by the CGP in proportion to their shares in ownership of the power plant. On the authority of various rulings of the Hon'ble Supreme Court on the implication of a 'proviso', the Hon'ble ATE has concluded in para 13 of their judgement thus: "Having regard to the aforesaid decisions, it can be safely stated that a proviso is in the nature of a qualification or an exception and it does not nullify, subsume or swallow the general rule". "This being the position, the two provisions, which are exceptions to the aforesaid main rule, have no application to the instant case as the case of the Appellant squarely falls in Rule 3(1)(a)". This judgement of the Hon'ble Tribunal is fully applicable to the present case. The three captive users satisfy the two requirements of the captive generating plant laid down in Rule 3(1)(a). The three sister concerns hold more than 26% of the ownership of the power plant by virtue of their total shareholding of more than 33.49% in the petitioner company which has set up the power plant; and the company which is the main captive user, alongwith the three shareholding companies, consume 100% of the power produced by the CGP for the captive use. The three sister concerns, therefore, meet the requirements of rule 3 and are eligible to be declared captive users. In fact, the petitioner company itself is using about 92MU which is more than 66% of the net available electricity from the CGP and therefore there is no doubt about the power plant being a CGP. The only issue for consideration is whether the three sister concerns could be categorized as captive users. As we have already stated, by virtue of ownership of captive power plant being more than 26% and the total captive consumption exceeding 51%, these are entitled to be categorized as captive consumers under the provisions of rule 3 of the Rules."

31. The State Commission has determined the captive generating plant status of the first Respondent and the captive user status of its three sister concerns by relying upon this Tribunal's judgment in Malwa Industries (Supra) case facts of which squarely apply to the case in hand. In view of this we agree with the decision of the State Commission and hold that the first Respondent's generating plant

is a captive plant and its three sister concerns are captive users along with the first Respondent who is the main captive user.

32. On the next issue raised by the Appellant on the principle of proportional consumption, the State Commission has in the impugned order held that the principle of proportionality of consumption to the shareholding does not apply in the case of a company and that the principle is restricted in its application only to an 'Association of Persons'. The relevant part of the impugned order on this issue reads as under:

> *"9. As to the question that quantum of electricity in use should be in proportion to the shareholding, this is applicable only in case of a plant which has been set up by 'an association of persons' as per second proviso to rule 3(1)(a). The ownership of a CGP set up by a company or any other body corporate means the equity share capital with voting rights as per explanation 1(c) to section 3 and this is the main provision of the rules which is only qualified by the second proviso."*

33. In the case of Kadodara Power Private Limited & Others vs. Gujarat Electricity Regulatory Commission & Ors, 2009 ELR 1037 decided on 22.9.2009, this Tribunal has held that the principle of proportional consumption applies to a company formed as a Special Purpose Vehicle and has interpreted that the

shareholders of a Special Purpose Vehicle company consuming electricity for captive use are an Association of Persons and thus having to adhere to the consumption of electricity in proportion to their shareholding in the company. The relevant part of the decision of the Tribunal reads as under:

> "*15) The question has arisen because the word 'association of persons' is not defined anywhere in the Act or in the Rules. The proviso to Rule 3 (1)(a)(ii) makes two special conditions for cooperative societies and association of persons. If the CGP is held by a person it is sufficient that the person consumes not less than 51% of the aggregate electricity generated in such plant. In case the plant is owned by a registered cooperative society then all the members together have to collectively consume 51% of the aggregate electricity generated. In case the CGP is owned by an association of persons the captive users together shall hold not less than 26% of the ownership of the plant in aggregate and shall consume not less than 51% of the electricity generated in proportion to their shares of the ownership of the plant within a variation not exceeding + 10%. A special purpose vehicle is a legal entity owning, operating and maintaining a generating station with no other business or activity to be engaged in by the legal entity.*
>
> *Now if three companies need to set up the power plant primarily for their own use they can come together and form another legal entity which may itself be a company registered under the Companies Act. This company may set up a power plant. In that case the company formed by three different companies would become a special purpose vehicle. If a company which is a special purpose vehicle is one person then all that is necessary is that this company should consume 51% of the generation. However, if it is treated as association of persons apart from a condition of consuming minimum 51% of its generation the three share holders will also have to consume 51% of the generation in proportion to their ownership in the power plant. It is contended on behalf of some of the appellants before us who are special purpose vehicles that they are not an association of persons and accordingly it is only necessary for them to consume 51% of their generation collectively without adhering to the Rule of proportionality of consumption to their*

share. This does not appear to us to be the correct view. Section 2(8) of the Act, as extracted above, says that a captive generating plant may be set up by any person and includes the power plant set up by any cooperative society or association of persons. Mr. M. G. Ramachandran contends that going by this definition if the special purpose vehicle is not an association of persons it cannot set up a captive generating plant because the definition does not mention any person other than a cooperative society and association of person. There is small flaw in the argument of Mr. M. G. Ramachandran in as much as the definition of captive generating plant is inclusive. In other words, the captive generating plant may be set up by any person including a cooperative society or association of persons. In other words, the person to set up a generating plant may be somebody who does not fulfill the description of either a cooperative society or association of persons. Nonetheless, reading the entire Rule 3 as a whole it does appear to us that a CGP owned by a special purpose vehicle has to be treated as an association of person and liable to consume 51% of his generation in proportion to the ownership of the plant. Every legal entity is the person. Therefore, the special purpose vehicle which has to be a legal entity shall be a person in itself. Any generating company or a captive generating company is also a person. The Rules specially deals with cooperative society. In an association of persons it has to be a 'person' because without being a person it cannot set up a captive generating plant. Therefore it will be wrong to say that since the special purpose vehicle is a 'person' in itself it cannot be covered by a definition of 'association of persons' and has to be covered by the main provision which requires the owner to consume 51% or more of the generation of the plant. In our view the definition is somewhat strange in as much as the term 'person' is said to include an 'association of persons'. One therefore cannot say that a CGP owner can be either a 'person' or an 'association of persons' a special purpose vehicle thus can be a 'person' as well as an 'association of persons'. A cooperative society is an 'association of persons' in the sense that some persons come together to form a cooperative society. However, the moment an association or society is formed according to the legal provisions it becomes a person in itself. A special provision has been made permitting a cooperative society from consuming 51% collectively. The first proviso 3 (1)(a)(ii) itself suggests that a special privilege has been conferred on a cooperative society. Other persons who are also legal entities formed by several persons coming together have not been given such special privilege. Who can such association of persons be? Of the various legal entities comprehended as persons owning a CGP the special purpose vehicle does seem to fit the description of 'association of persons'. We fail to comprehend who other than a special purpose vehicle can be an

'association of persons'. None of the lawyers arguing before us gave example of 'association of persons' other than a special purpose vehicle. Therefore, we have no hesitation to hold that special purpose vehicle is an association of persons.

16) In case the special purpose vehicle was not required to maintain the rule of proportionality of consumption, the Central Government could have specifically mentioned the same just as it has done for a cooperative society. The Rule having not exempted a special purpose vehicle from the requirement of consuming 51% of the generation in proportion to the ownership of the persons forming the special purpose vehicle as has been done in the case of cooperative society it will only be rational and logical to hold that a special purpose vehicle is also subject to the rule of proportionality of consumption to the percentage share of ownership as an 'association of persons'.

34. In the above decision, the Tribunal has taken the view that the principle of proportional consumption is applicable to the consumption of electricity by the shareholders of a company being a Special Purpose Vehicle. The above decision is in the context of a Special Purpose Vehicle only and not in the context of an operating company which acts as a captive generator for its own use and also generates and supplies electricity to its shareholders. Such a combination was considered in *Malwa Industries'* case as to be permissible and valid.

35. We are not inclined to agree with the contentions of the Appellant that in view of this Tribunal judgment in appeal Nos. 171

of 2008 and Kadodara Power Ltd. & Ors., 2009 ELR (APTEL) 1037, the principle of proportional consumption should be applied even if the shareholding sister concerns were considered as captive users.

36. In conclusion we decide as under:

i) The State Commission has the jurisdiction to declare the captive generating plant and captive consumer status of the first Respondent and also the captive consumer status of its three sister concerns.

(ii) We agree with the decision of the State Commission holding that the first Respondent is a captive generator and its three sister concerns are also the captive users. This is in line with this Tribunal's judgment in Malwa Industries case (Supra);

(iii) We uphold the decision of the State Commission that principle of proportional consumption will not apply in the present case as the Respondents are covered by the Rule 3(1)(a).

37. Appeal is dismissed and IAs stand disposed of. No costs.

(H.L. Bajaj)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

INDEX: REPORTABLE/NON-REPORTABLE

Dated: May 18, 2010