IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

O R D E R
ON
IA NO. 354 OF 2019 IN APPEAL NO. 78 OF 2019
ON THE FILE OF THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

Dated: **3rd April, 2019**

Present: **HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER**
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF

Sai Wardha Power Generation Limited
(Previously Sai Wardha Power Limited)
8-2-293/82/A/431/A,
Road No. 22, Jubilee Hills,
Hyderabad 500 033 **…. Appellant(s)**

VERSUS

1. **Maharashtra Electricity Regulatory Commission**
   Through its Secretary
   World Trade Centre,
   Centre No. 1, 13th Floor,
   Cuffe Parade, Colaba,
   Mumbai -400 005

2. **Maharashtra State Electricity Distribution Company Limited**
   Through its Managing Director
   5th Floor, Prakashgad,
   Plot No. G-9, Bandra East,
   Mumbai 400 051 **…. Respondent(s)**

Counsel for the Appellant(s)	…	Mr. M.G. Ramachandran Mr. Anand K. Ganesan Mr. Ashwin Ramanathan
Counsel for the Respondent(s)	…	Mr. S. Rungta, Sr. Adv. Mr. Buddy A. Ranganadhan Ms. Stuti Krishn for R-1 Mr. Ashish Singh Mr. Anup Jain Mr. Sankalp Singh for R-2

O R D E R

PER HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER

1. Sai Wardha Power Generation Limited, **Appellant herein**, in the instant Application, being IA No. 354 of 2019, most respectfully prayed that this Tribunal may be pleased to:

(a) Stay the operation of the impugned Order dated 15.02.2019 passed in Case No. 116 of 2018 on the file of the Maharashtra Electricity Regulatory Commission, Mumbai, first Respondent herein;

(b) Pass any such further order(s) as this Tribunal may deem fit in the interest of justice and equity.

2. The Appellant has filed the instant Application for interim orders under Rule 30 of the Appellate Tribunal for Electricity (Procedure, Form, Fee and Record of Proceedings) Rules, 2007.

3. The learned counsel, Mr. M.G. Ramachandran, appearing for the Appellant, has contended that, the present Appeal is being filed under Section 111 of the Electricity Act, 2003 being aggrieved by the impugned Order dated 15.02.2019 passed in Case No. 116 of 2018 on the file of the Maharashtra Electricity Regulatory Commission, Mumbai (in short, "**1st Respondent/MERC"**) for directions to Maharashtra State Electricity Distribution Co. Ltd. (hereinafter referred as **"2nd Respondent/MSEDCL"**) regarding the terms of Open Access granted for the period from 01.04.2018. The 1st Respondent/MERC by its impugned Order has upheld the grant of Open Access by 2nd Respondent/MSEDCL to the Appellant under Section 10 of the Electricity Act, 2003 wherein 2nd Respondent/MSEDCL has presumed the captive status of the Appellant at the beginning of the year contending that, the Appellant has allegedly not complied with the mandatory requirement of providing the needed details as to equity of the intended Captive Users while making application for open access and also the Appellant has allegedly not complied with the mandate of obtaining certification/validation from STU/SLDC that requisite metering arrangement of its CGP unit-3 is in place. The 1st Respondent/MERC, in its impugned Order, has grossly erred in upholding the grant of open access to the Appellant by the 2nd Respondent/MSEDCL, under Section 10 of the Electricity Act, 2003, as an

Independent Power producer **(IPP)**, instead of grant under Section 9 as a Captive Power Plant **(CPP)**. As a result of the impugned Order of the 1st Respondent/MERC, the action of 2nd Respondent/MSEDCL of presuming the Appellant's non-captive Status at the beginning of the year has been justified, which is contrary to the scheme and framework laid down in the provisions of Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005 and also the consistent orders of the 1st Respondent/MERC in the past as well as that of this Tribunal.

4. The counsel for the Appellant submitted that, impugned Order passed by the 1st Respondent/MERC is erroneous on the ground that, the order passed by the 1st Respondent/MERC is contrary to the settled principle that Captive Status is to be ascertained on an annual basis, and not at the beginning of the year and it is factually incorrect that the Appellant had not provided the necessary details of equity or there were any discrepancies in this regard while making the applications for open access and that the necessary metering arrangement is not in place, or that data has not been made available to MSEDCL and MSLDC. In view of this, the action of 2nd Respondent/MSEDCL to grant open access under Section 10 of the Act as an IPP, is contrary to the well settled principle that Captive Status cannot be presumed at the beginning of the year and that the same is only to be determined on an annual basis. The alleged

discrepancy in the shareholding provided of the Appellant to presume the non-captive status of the Appellant is also wholly misconceived.

5. Further, the counsel for the Appellant vehemently submitted that, the CA certificate provides for each individual shareholding of the shareholders of the Company. The first 11 shareholders, hold 6.96%, for whom the open access was applied for. This translates to 26% for the one unit. In the circumstances, the presumption of non-captive status at the beginning of the year is contrary to the Electricity Act and the Rules, the previous orders of this Tribunal and also the 1st Respondent/MERC and is bad in law. The issue raised with regard to unit wise metering arrangement is grossly erroneous. The unit wise meters have always been in place, with storage capacity of 35 days. It is submitted that, presuming the captive status at the beginning of the year would amount to putting the Appellant in grave prejudice based on conjectures. This is also contrary to the specific provisions of the Electricity Act and Rules. The 1st Respondent/MERC, in the past, as well as this Tribunal, have repeatedly prohibited the 2nd Respondent/MSEDCL for making such presumptions, however, the impugned order is in complete variance to the settled position of law.

6. The Appellant has, further, contended that, the 1st Respondent/MERC has failed to appreciate that the issue whether 26%

shareholders have consumed the 51% electricity on proportionate basis has to be considered only at the end of the year. There is no provision that all shareholding consumers have to consume electricity at all points of time or throughout the year. In fact, similar issue was raised by 2nd Respondent/MSEDCL for the year 2013-14, which was rejected by the 1st Respondent/MERC as well as by this Tribunal. The 1st Respondent/MERC also failed to appreciate that as per Section 10 in the Open Access issued is also contradictory to the mention of the customer being Group Captive, which is also provided in the same permissions and even duly deliberated by this 1st Respondent/MERC in Order dated 17.01.2018 passed in Case 23 of 2017 dealing with the procedure for grant of open access and considering the captive status at the end of the year. The 1st Respondent/MERC has already settled the position that the captive status can be determined only on an annual basis and the CSS if any can be levied only after such determination by a single bill for the entire year. This aspect of the matter has not been looked into nor considered nor appreciated by the 1st Respondent/MERC in the impugned Order. Therefore, the Appellant is entitled for the interim prayers as prayed for.

7. The 1st Respondent/MERC has, further, erred in holding that the Appellant has failed to comply with the 1st Respondent's/MERC's Order

dated 17.01.2018 in Case No. 23 of 2017 with regard to the issue of unit wise metering arrangement to be in place. Firstly, the meter reading was not downloaded unit wise by 2nd Respondent/MSEDCL and the transmission licensee and not for any default of the Appellant. It is stated that, while the unit wise meters are all in place, in terms of the Order dated 17.01.2018, the downloading of monthly data of all these meters shall be jointly undertaken by the Generator and Distribution Licensee, and the STU. Therefore, while the meters are already in place and located at the plant of the Appellant, it is left only for 2nd Respondent/MSEDCL to come and download the data. Therefore, the Appellant contended that the Appellant has a good case to succeed on the merits and, in fact, the Appellant has got a good prima facie case and balance of convenience lies in favour of the Appellant for an interim Order restraining 2nd Respondent/MSEDCL from raising and collecting monthly CSS bills and other charges, relying on the fact that the Open Access permission being under Section 10 of the Electricity Act, 2003. It is well settled that the jurisdiction to decide the captive status is that of the 1st Respondent/MERC which shall be decided at the end of the year and cannot be presumed to be non-captive at the beginning of the year itself.

8. The counsel for the Appellant has, further, contended that, the Appellant would be put to irreparable loss and prejudice if the supply is

treated as non-captive at this stage on the ground that the 2nd Respondent/MSEDCL has already issued disconnection notices to the consumers of the Appellant seeking payment of amounts failing which the 2nd Respondent/MSEDCL has threatened to disconnect within 15 days, as per disconnection Notice No. 1162 dated 21.02.2019 issued under section 56(1) of Electricity Act, 2003, being marked as Appendix-A to the instant Application. Therefore, the Appellant submitted that, the interim order, as prayed for, may kindly be granted till disposal of the main Appeal.

9. To substantiate his stand taken in the instant application for interim prayer, the counsel for the Appellant, Mr. M.G. Ramachandran, quick to point out and placed the daily Order dated 16.05.2017 passed in Miscellaneous Application No. 9 of 2017 in Case No. 62 of 2017 on the file of the 1st Respondent/MERC contending that CSS may not be levied in the monthly invoices to the Petitioner or Consumers till further orders of the Commission in this matter. He also placed reliance of the communication bearing Ref. MSEDCL,MUM/PSSR/4160101/526 dated 05.05.2018 regarding Short Term Open Access application of the Appellant Captive Consumer M/s Bekaert Industries Private Limited (Consumer No. 184059022303) for the month of June, 2018 vide Ref. MERC Distribution Open Access Regulations 2016 and also produced an Auditor's Certificate dated 19.04.2018 along with the said communication

in respect of the Class-A Equity Share Holders (sl no. 1 to 29) and Class-B Equity Share Holders (sl. nos. 1 to 5) mentioning the number of equity shares of Rs. 10/- each and voting rights percentage, wherein specifically put a note that out of the total capacity of 540 MW (4x135MW), 135 MW (Unit 3) is presently dedicated for Group Captive Users against which open access is applied. Hence, the above referred percentage held by captive consumers is more than the required percentage in the captive generating unit of 135 MW (Unit 3) presently for fulfilling the compliance requirements of Rule No. 3(1)(a)(1 & ii) and/or 3(1)(b) of Electricity Rules 2005 read in conjunction with Section 9 of the Electricity Act, 2003. Inspite of furnishing all the information and auditor's certificate, without any justification and without assigning any valid and cogent reason, the 1st Respondent/MERC has proceeded to pass the impugned Order contrary to the auditor's certificate fulfilling the compliance requirements of Rule No. 3(1)(a)(1 & ii) and/or 3(1)(b) of Electricity Rules 2005 read in conjunction with Section 9 of the Electricity Act, 2003. Therefore, he vehemently submitted that, interim Order, as prayed for, may kindly be granted and in the event, the interim order is not granted and the 2nd Respondent is not restrained to collect the amount as per the bills, the Appellant would be put to great hardship and irreparable loss and also will defeat the purpose for which the Appellant is redressing its grievances

contrary to the earlier order passed by the 1st Respondent/MERC. Therefore, the counsel for the Appellant submitted that, having regard to the facts and circumstances of the case and the grounds taken in the instant application, the Appellant has a very good prima-facie case on merits and the balance of convenience is in favour of the Appellant, and if, the instant application filed by the Appellant is not allowed and an interim order, as prayed for, is not granted, the Appellant and its consumers will be severely affected. Hence, keeping in view this fact into consideration, the stay in operation and execution of the impugned order may kindly be granted in the interest of justice and equity.

10. ***Per-contra,*** the learned senior counsel, Mr. S.K. Rungta, appearing for the 1st Respondent/MERC contended that, the only question raised by the Appellant in the instant application is whether the 1st Respondent/MERC was justified in upholding the action of 2nd Respondent/MSEDCL of determining the captive status of the Appellant at the beginning of year. As per the Electricity Rules 2005 Rule 3, require the fulfillment of two criteria for fulfilling the captive status, (i) 26 % Equity to be held by the clamed captive users; and (ii) 51 % of power to be consumed by the captive users on annual basis. Though undoubtedly, the "consumption" can be considered only at the end of the year, and so could the test of proportionality, if at all, the threshold test to even identify a Unit

of a Generating Station as a Captive Unit, would be only if the Captive Users hold 26% share of the unit. The fulfillment of this threshold test to wait for the completion of the year. This is, further, clarified by the 1st Respondent/MERC in its Order dated 17.01.2018 in Case No. 23 of 2017 at paragraph 19, which is also relied upon by the Appellant itself. It is, therefore, clear that the Appellant is bound to justify its shareholding pattern at the beginning of the year, at the time when open access is sought. After due thoughtful consideration of the entire material available on records and the case made out by the Appellant and the 2nd Respondent/MSEDCL, the 1st Respondent/MERC has assigned the valid and cogent reasons in paragraphs 18 & 19 in its order impugned, which is strictly in consonance with the relevant Electricity Act and Rules. Therefore, the prayer sought by the Appellant in the instant application has got no merit for consideration.

11. The senior counsel for the 1st Respondent/MERC was quick to point out and taken us through the provisions of Rule 3 of the Electricity Rules, 2005. The illustration given below will clarify the stand taken by the 1st Respondent/MERC and, accordingly, the Order passed by giving its rationale.

> *"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 percent of the equity shares in the company (being the 26 percent proportionate to unit A of 50 MW) and not less than fifty one percent of the electricity generated in unit A determined on an annual basis is to be consumed by the captive users."

Therefore, he submitted that, the Appellant has not fulfilled the first basic criterion of the captive status and not having correct Charted Accountant (CA) certificate of Unit 3 as it intends to supply to its captive users from Unit 3 only. The first CA Certificate relied upon by the Appellant pertains to "Unit 3 and 4". The second CA Certificate relied upon by the Appellant does not even identify any Units at all. It is merely identifying a "capacity" of 270MW. Therefore, the 1st Respondent/MERC had held that it does not fulfil the basic criterion and hence the claim for captive status is not justified. The 1st Respondent/MERC has rightly considered this aspect by assigning the valid and cogent reasons in paragraph 14 of its Order. Therefore, interference by this Tribunal at this stage is not justified on the ground that prima-facie the balance of convenience has not been made out by the Appellant and, hence, the instant application filed by the Appellant may be rejected.

12. The learned senior counsel for the 1st Respondent, further, submitted that, the Appellant has submitted the Short Term Open Access (STOA) /MTOA applications based on assumptions and stated that it

intends to operate Unit 3 as a Captive Generating Plant (CGP) and whenever the other consumers' requirements commence, it would submit the necessary Open Accesses applications in due course. The CA certificate does not clearly establish 26% equity held by the captive users for Unit-3. The CA Certificate clearly mentions that the shareholding of captive users in Unit 3 and 4 and SWPGL assumed that it intended to operate Unit 3 as a CGP for FY 2018-19. The application of STOA/MTOA was made identifying the injection point as Unit 3 and 4 as captive units. The Appellant had not provided the sufficient/ appropriate clarifications to the discrepancies raised by the 2nd Respondent/MSEDCL after repetitive correspondence from the 2nd Respondent/MSEDCL. The Appellant has contended that it had provided the CA certificate with the MTOA/STOA applications. However, it did not mean that the CA certificate should not be correct i.e. if supplying power from Unit 3, then it should also provide the CA certificate of Unit 3 only. These discrepancies can lead to undue benefits to the captive users as regards exemption from Cross Subsidy Surcharge (CSS). It is an undisputed fact that loss of CSS affects the interests of the remaining consumers of the Discoms and the same needs to be duly considered. In view of the aforesaid reasons, the learned senior counsel for the 1st Respondent/MERC submitted that, the prayers sought by

the Appellant in the instant application may not be granted and the same is liable to be rejected.

13. The learned counsel, Mr. Ashish Singh, for the 2nd Respondent/MSEDCL, has filed a detailed reply and written submission contending that there are four separate points that arise for our consideration in the instant application are:

(i) *Whether the Appellant filed MTOA application dated 25.12.2017 by identifying Unit-3 and Unit-4 as CPP units, Short Term Open Access applications for the month of April, 2018 by identifying Unit-3 and Unit-4 as CPP units and Short Term Open Access applications for the month of May, 2018 by identifying only Unit-4 as CPP but without providing a valid CA certificate for unit-3 establishing 26% equity shareholding of its captive users in Unit-3 only ("i.e 6.50% equity shareholding in Unit-3 as per the illustration in Rule-3, as SWPGL has 4 generating units, hence 6.50% in 1 unit would translate into 26% for the entire generating station"), which is the minimum eligibility criterion to be met at the start of the financial year as per the Electricity Rules, 2005 and various Orders passed by the first Respondent/MERC?*

(ii) *Whether the document dated 05.05.2018 ("Short Term Open Access Application dated 05.05.2018 for allowing open access for the month of June, 2018 along with a CA certificate establishing shareholding of captive users in Unit- 3 Only") tendered by the Appellant across the bar in its rejoinder arguments during the course of the hearing dated 13.03.2019, in any way establish 6.5% equity shareholding of its captive users in Unit-3 only i.e as per the illustration in Rule 3?*

(iii) *Whether reliance placed by the Appellant on "Similar Instances" in the past financial years wherein 2nd Respondent/MSEDCL denied Open Access permission under Section 9 and the daily order dated 16.05.2017 passed in M.A No. 09 of 2017 in Case No. 62 of 2017 by the 1st Respondent/MERC in any case help the case of the Appellant?*

(iv) *Whether the Appellant has the necessary metering arrangement to identify injection and drawal from CPP identified units and whether the SLDC has visibility of all generating units at all times?*

14. To substantiate the above four points that arise for our consideration, in the light of the statement made by the Appellant in its application, he contended that, there is no need to give a separate certificate for Unit-3 even after clarifying that Unit-3 is the only identified CPP and not Unit-4. The equity shareholding of captive users qua one unit i.e Unit- 3 could obviously be ascertained from the CA certificate itself which identifies Unit-3 and Unit-4 as CPP. This can be done by applying a simple mathematical/arithmetical formula. There is no need for all CPP users to consume electricity at all times throughout the year, hence, there is no need to identify equity of only active captive users who would actually consume power. Equity of any shareholder can be created to satisfy the threshold limit of 26% irrespective of them using power or not.

15. As per the provisions of Electricity Rules, 2005 read with the various Orders of the 1st Respondent/MERC clearly stipulate that in order to avail CPP power under Section 9, there are certain mandatory requirements to be fulfilled at the beginning of the financial year i.e. (i) Identification of unit/Units for captive use, (ii) if 26% equity shareholding with voting rights of captive users is not certified and validated in the intended units identified for captive use, then no permission can be granted under Section 9 of the Electricity Act, 2003 and, (iii) Creation of 26% equity shareholding with voting rights of captive users in the said generating

station/unit and it should not be less than 26% of proportionate of the equity related to the generating unit or units identified as the captive generating plant.

16. As per illustration to Rule 3 of Electricity Rules, 2005, the Appellant has created 13% equity shareholding of its captive users in Unit-3 and Unit-4 which translates to 26% equity in the generating station comprising of 4 units. MTOA application dated 25.12.2017 clearly establishes two important things i.e. (i) The Appellant identified both Unit-3 and Unit-4 as captive units and applied for open access through both the units and, (ii) The Appellant provided a CA certificate annexed to the said application establishing 26% equity shareholding of its captive users in Unit-3 and Unit-4. The 2nd Respondent/MSEDCL vide its letter dated 03.03.2018 clearly cited the discrepancies in the MTOA application of the Appellant with respect to non-fulfillment of the mandatory criteria of 26% equity shareholding of captive users in both Unit-3 and Unit-4. The response of the Appellant vide its letter dated 23.03.2018 clearly establishes the facts that, Appellant made a mistake in identifying Unit-3 and Unit-4 as CPP as the CA certificate submitted with the application was not making 26% equity shareholding. The discrepancies in the MTOA application of the Appellant with respect to non-fulfillment of the mandatory criteria of 26% equity shareholding of captive users in both Unit-3 and Unit-4 were

correctly pointed out by the 2nd Respondent/MSEDCL. The Appellant for the very first time clarified that it only sought open access from Unit-3 and is identifying only Unit-3 as CPP. 26% equity of active captive users were not made neither the active captive users were identified.

17. The Appellant filed its STOA on 08.03.2018 for availing open access for the month of April, 2018. The Appellant again made the same mistake which was made in the MTOA, even after the letter dated 03.03.2018 issued by the 2nd Respondent/MSEDCL. The said mistakes were namely:

(i) The Appellant identified both Unit-3 and Unit-4 as captive units and applied for open access through both the units and;

(ii) The Appellant provided a CA certificate annexed to the said application establishing 26% equity shareholding of its captive users in Unit-3 and Unit-4.

18. The 2nd Respondent/MSEDCL vide its letter dated 05.04.2018 once again highlighted the discrepancies with respect to the applications made by the Appellant and its reasoning's of not providing open access under Section 9 of Electricity Act, 2003. The 2nd Respondent vide its letter dated 17.04.2018 once again highlighted the discrepancies with respect to the applications made by the Appellant and its reasoning's of not providing open access under Section 9 of Electricity Act, 2003. The Appellant made

another STOA application dated 06.04.2018 for availing open access for the month of May, 2018. It is pertinent to note that this time, accepting the various objections of 2nd Respondent/MSEDCL, the Appellant applied for open access by identifying Unit-3 as captive unit, however, it still chose to submit a CA certificate which was not creating 26% equity i.e 6.50% equity shareholding of its captive users in Unit-3 only. It is also pertinent to mention that in the said CA certificate, no generating unit was identified as CPP unit. Hence, the Appellant even after identifying Unit-3 as CPP failed to provide a CA certificate for Unit-3 only. Moreover, the CA certificate provided by the Appellant did not even mention the CPP units identified for CPP uses. These facts manifest that, the Appellant has committed a mistake by identifying Unit-3 and Unit-4 as captive when equity shareholding of its captive users was not fulfilling the mandatory 26% and the Appellant acknowledged its mistake by clarifying that it was only Unit-3 which would be identified as CPP for the time being and the Appellant never provided a CA certificate for Unit-3 with the application dated 08.03.2018 and 06.04.2018 when it sought open access for the months of April, 2018 and May, 2018 which established 26% equity shareholding of its captive users in Unit-3 Only. This action is completely in violation of the mandate of Electricity Rules, 2005 as well as the various orders passed by the 1st Respondent/MERC. Therefore, he submitted that,

the Appellant has failed to comply with the relevant Rules inspite of giving sufficient opportunity. The 1st Respondent/MERC, after due evaluation of the entire material available on record, has rightly justified by passing just and equitable balanced order. Hence, the Appellant has failed to make out any case to consider the interim reliefs sought in the instant application. At this stage, in the event interim reliefs prayed by the Appellant are considered by this Tribunal, the 2nd Respondent/MSEDCL will be put in a great hardship, inconvenience besides financial difficulties. Therefore, he submitted that, the instant application filed by the Appellant is liable to be dismissed as misconceived.

OUR CONSIDERATION

19. After thoughtful consideration of the submissions of the learned counsel for the Appellant, learned senior counsel for the 1st Respondent/MERC and learned counsel for the 2nd Respondent/MSEDCL and after going through the oral and written submissions filed by the respective counsels and the grounds taken in the instant application and also the stand taken by the respective counsels in their written submissions, the only issue that arises for our consideration is:

> *Whether the Appellant has made out prima-facie case for seeking interim prayer for staying the operation and execution of the impugned Order* dated 15.02.2019 in Case No. 116 of

2018 passed by the 1st Respondet/MSEDCL *is justiceable or not?*

20. The principal bone contention of the learned counsel for the Appellant is that the impugned order passed by the 1st Respondent/MERC is patently erroneous for the following reasons: firstly, contrary to the settled principle that Captive Status is to be ascertained on an annual basis, and not at the beginning of the year; secondly, it is factually incorrect that the Appellant had not provided the necessary details of equity or there were any discrepancies in this regard while making the applications for open access; and thirdly, it is also factually incorrect that the necessary metering arrangement is not in place, or that data has not been made available to MSEDCL and MSLDC.

21. To substantiate his submissions, the counsel for the Appellant contended that, the issue whether 26% shareholders have consumed the 51% electricity on proportionate basis has to be considered only at the end of the year. There is no provision that all shareholding consumers have to consume electricity at all points of time or throughout the year. The issue of captive or non-captive supply only arises upon the determination whether the requirements of Rule 3 of the Electricity Rules are fulfilled, which is to be determined only on an annual basis, after the year is over. In fact, for the Financial Year 2012-13, while 2nd

Respondent/MSEDCL had sought to levy Cross Subsidy Surcharge on monthly basis, by order dated 28.08.2013, the 1st Respondent/MERC *inter-alia*, held that the cross-subsidy surcharge bills could be raised only after the year was over and after determination whether the conditions for captive consumption have been fulfilled or not. An inconsistent order has been passed by the 1st Respondent/MERC without giving any justification and reference to the above said order while the Appellant has satisfied all the criteria as envisaged in the relevant Electricity Act and Rules. Therefore, the action of the 2nd Respondent/MSEDCL to grant open access under Section 10 of the Act as an IPP, is contrary to the well settled principle that Captive Status cannot be presumed at the beginning of the year and that the same is only to be determined only on an annual basis. In the circumstances, the impugned order which presumes the captive status at the beginning of the year is a complete u-turn on the settled position of law and the previous orders of the 1st Respondent/MERC. The alleged discrepancy in the shareholding provided of the Appellant to presume the non-captive status of the Appellant is also wholly misconceived. In view of the delay in action of 2nd Respondent/MSEDCL, the Appellant was constrained to apply for Short-term open application on 08.03.2018 for the period from 01.04.2018 to 30.04.2018. The Appellant on 22.03.2018 specifically clarified that for the

present only Unit No. 3 was to be operated as a captive generating unit and the consumers meet the minimum 26% criteria for the said unit (which is about 6.92% for the company as a whole). The CA certificate provides for each individual shareholding of the shareholders of the Company. The first 11 shareholders, hold 6.96%, for whom the open access was applied for. This translates to more than 26% for the one unit. Therefore, there is no dispute on the shareholding. There is also no change in the shareholding. The identification of Unit No. 3 and the shareholders were made prior to 1st April, and it is not the case that during the year there is change in shareholders. The only issue of the 2nd Respondent/MSEDCL was that the first 11 shareholders are not aggregated and shown in the certificate. This is only an arithmetical process of adding up the shareholders. There is no change in shareholders. Therefore, it is also absurd to contend that while 26% shareholding for two units is fulfilled, it is not fulfilled for one unit. The issue raised with regard to unit wise metering arrangement is grossly erroneous. The unit wise meters have always been in place, with storage capacity of 35 days. Further, pursuant to the directions of the 1st Respondent/MERC dated 16.05.2017 in Case no. 62 of 2017, since August, 2017 the unit wise data has also been available with the licensees including the SLDC and, therefore, there is no issue for the year 2018-19 even as per the contention of 2nd Respondent/MSEDCL.

Therefore, he vehemently submitted that, presuming the captive status at the beginning of the year would amount to putting the Appellant in grave prejudice based on conjectures. This is also contrary to the specific provisions of the Electricity Act and Rules. The 1st Respondent/MERC in the past as well as this Tribunal have repeatedly prohibited 2nd Respondent/MSEDCL for making such presumptions, however the impugned order is in complete variance to the settled position of law. Therefore, he prayed that the interim order, as prayed for, may kindly be granted to meet the ends of justice.

22. The learned counsel for the Respondent Nos. 1 and 2, at the outset, submitted that, the only question raised the Appellant in the instant application is whether the 1st Respondent/MERC was justified in upholding the action of 2nd Respondent/MSEDCL of determining the captive status of the Appellant at the beginning of year and, vehemently, submitted that, The Electricity Rules 2005 Rule 3, require the fulfilment of two criteria for fulfilling the captive status: (i) 26 % Equity to be held by the claimed captive users; and (ii) 51 % of power to be consumed by the captive users on annual basis. Though, undoubtedly, the "consumption" can be considered only at the end of the year, and so could the test of proportionality, if at all, the threshold test to even identify a Unit of a Generating Station as a Captive Unit, would be only if the Captive Users

hold 26% of the unit. The fulfilment of this threshold test need not wait for the completion of the year. This is, further, clarified by the 1st Respondent/MERC in its Order dated 17.01.2018 in Case No. 23 of 2017 at para 19. It is, therefore, clear that the Appellant is bound to justify its shareholding pattern at the beginning of the year, at the time that open access is sought.

23. The 1st Respondent/MERC, after due consideration of the entire material available on record, by assigning the valid and cogent reasons in paragraphs 18 & 19 of its Order and as per the provisions of Electricity Rules 2005, Rule 3 and illustrations, as referred above, it emerges that the Appellant has not fulfilled the first basic criteria of the captive status and not having correct Charted Accountant (CA) certificate of Unit 3 as it intends to supply to its captive users from Unit 3 only. The first CA Certificate relied upon by the Appellant pertains to "Unit 3 and 4". The second CA Certificate relied upon by the Appellant does not even identify any Units at all. It is merely identifying a "capacity" of 270MW. Therefore, the 1st Respondent/MERC had held that it does not fulfil the basic criterion and, hence, the claim for captive status is not justified.

24. Further, he vehemently contended that, the Appellant has submitted the Short Term Open Access (STOA) /MTOA applications based on assumptions and stated that it intends to operate Unit 3 as a Captive

Generating Plant (CGP) and whenever the other consumers' requirements commence, it would submit the necessary Open Accesses applications in due course. The CA certificate does not clearly establish 26% equity held by the captive users for Unit-3. The CA Certificate clearly mentions that the shareholding of captive users is in Unit 3 and 4 and SWPGL intended to operate Unit 3 as a CGP for FY 2018-19. The application of STOA/MTOA was made identifying the injection point as Unit 3 and 4 as captive units. Therefore, it is submitted that, the Appellant had not provided the sufficient/ appropriate clarifications to the discrepancies raised by the 2nd Respondent/MSEDCL after repetitive correspondence from the 2nd Respondent/MSEDCL. It is, further, submitted that, the Appellant has contended that it had provided the CA certificate with the MTOA/STOA applications. However, it did not mean that the CA certificate should not be correct i.e. if supplying power from Unit 3, then it should also provide the CA certificate of Unit 3 only. These discrepancies can lead to undue benefits to the captive users as regards exemption from Cross Subsidy Surcharge (CSS). It is an undisputed fact that loss of CSS affects the interests of the remaining consumers of the Discoms and the same needs to be duly considered. Therefore, the learned senior counsel for the 1st Respondent/MERC submitted that, the Appellant has failed to make out any case for seeking interim prayer to stay the operation of the

impugned Order. The relief sought is misconceived and liable to be rejected at threshold.

25. After careful consideration of the submissions of the learned senior counsel/counsel for both the parties, as stated supra, the only question raised by the Appellant in the instant Application is whether the 1st Respondent/MERC was justified in upholding the action of 2nd Respondent/MSEDCL of determining the captive status of the Appellant at the beginning of year. It is significant to note that, the Electricity Rules 2005 Rule 3, require the fulfilment of two criteria for fulfilling the captive status, (i) 26 % Equity to be held by the clamed captive users; and (ii) 51 % of power to be consumed by the captive users on annual basis. The consumption can be considered only at the end of the year.

26. It is the specific case of the Appellant that the Appellant has got a good prima-facie case and balance of convenience lies in favour of the Appellant for an interim Order restraining 2nd Respondent/MSEDCL in raising and collecting monthly CSS bills and other charges, relying on the fact that the Open Access permission being under Section 10 of the Electricity Act, 2003. It is well settled that the jurisdiction to decide the captive status is up to the 1st Respondent/MERC which shall be decided at the end of the year and cannot be presumed to be non-captive at the beginning of the year itself whereas, the learned counsel for the

Respondent Nos. 1 and 2, inter-alia, contended that, the 1st Respondent/MERC, after assigning valid and cogent reason in para 18 & 19 has passed the impugned Order which is strictly in consonance with the relevant Electricity Act and Rules. Therefore, the prayer sought by the Appellant in the instant application has got no merit for consideration.

27. After careful consideration of the submissions of the learned counsel for both the parties, we are of the considered view that, prima-facie, the matter requires consideration on merits taking into consideration the hardship of the Appellant and the consumers and keeping in mind the facts and circumstances of the case in hand, as stated supra, prima-facie, taking a holistic and balanced view and to safeguard the interest of the Appellant and its consumers and also the 2nd Respondent/MSEDCL which would suffice for this Tribunal at this stage for passing an appropriate order.

28. It is significant to note that in the earlier occasion, the Commission has granted interim Order in favour of the Appellant specifying the prima-facie case made out by the Appellant for consideration and balance of convenience lies in favour of the Appellant. Keeping this fact into consideration also, we deem fit to pass just and equitable and balanced order to meet the ends of justice.

O R D E R

Having regards to the facts and circumstances of the case, as stated above, 2nd Respondent/MSEDCL is hereby directed not to take any coercive action in pursuance of the impugned Order dated 15.02.2019 passed in Case No. 116 of 2018 on the file of the Maharashtra Electricity Regulatory Commission, Mumbai until further orders.

The consumers of the Appellant are hereby directed to deposit 50% of the bills raised or to be raised by the 2nd Respondent/MSEDCL subject to the outcome of this Appeal.

With these observations, the instant IA, being IA No. 354 of 2019, stands disposed of.

PRONOUNCED IN THE OPEN COURT ON THIS 03RD DAY OF APRIL, 2019.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

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