APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 322 OF 2016

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APPEAL NO. 333 OF 2016

Dated : 09th April, 2019.

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

IN THE MATTER OF :

APPEAL NO. 322 OF 2016

M/s Ultratech Cement Ltd.
Rajashree Cement Works
Aditya Nagar, Malkhed Road
Gulbarga District
Karnataka - 585292 .... **APPELLANT**

Versus

1. **Karnataka Electricity Regulatory Commission**
   6th & 7th Floor, Mahalaxmi Chambers
   # 9/2, M. G. Road
   Bangalore – 560001 .... **RESPONDENT**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Neha Garg
Mr. Ashwin Ramanathan
Ms. Parichita Chowdhury

Counsel for the Respondent(s) : Mr. Darpan K. M.
Mr. Rahul Jain

IN THE MATTER OF :

APPEAL NO. 333 OF 2016

JSW Steel Limited
Vijayanagar Works,
PO: Vidyanagar
Torangallu, Sandur Taluk
Ballari – 583 275 .... **APPELLANT**

Versus

1. **Karnataka Electricity Regulatory Commission**
   No. 9/2, 6th & 7th Floor
   Mahalaxmi Chambers
   M. G. Road, Bangalore
   Karnataka – 560 001 .... **RESPONDENT**

Counsel for the Appellant(s) : Mr. M. G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Ms. Poorva Saigal
Mr. Shubham Arya
Mr. Pulkit Agarwal

Counsel for the Respondent(s) : Mr. Darpan K. M.
Mr. Rahul Jain

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. Appeal No. 322 of 2016 is directed against order dated 25.08.2016 passed by the Respondent - Karnataka Electricity Regulatory Commission ("**State Commission**") whereby it had modified its earlier order dated 08.05.2013, in a *suo-moto* proceedings. The controversy

pertains to imposition of Renewable Purchase Obligation (hereinafter referred to as RPO) on captive cogeneration plants using fuel other than renewable source for power generation. By the impugned order, State Commission has recalled its order dated 08.05.2013 ("**2013 order**") wherein it had not imposed RPO on captive consumers or open access consumers consuming electricity obtained from cogeneration plants. Now, with the modification and different reasoning for its order, the order dated 04.08.2015 has merged with the impugned order dated 25.08.2016.

2. The Appellant contends that the impugned order is erroneous since the State Commission has erred in initiating the *suo-moto* proceedings to recall its previous order dated 08.05.2013. In the 2013 order, the State Commission held that RPO cannot be imposed on co-generation plants. The State Commission in the impugned order failed to appreciate the legal position that a cogeneration plant itself is to be promoted in terms of Electricity Act, 2003 and it cannot be subjected to renewable RPO. The State Commission also failed to note various judgments of the Tribunal on this aspect.

3. According to Appellant, the State Commission has wrongly interpreted the view of this Tribunal in the case of ***Lloyd Metals and Energy Limited vs. Maharashtra Electricity Regulatory Commission***

(Appeal No. 53 of 2012). According to Appellant, the said case did not deal with the issue involved in the present Appeal, i.e. whether cogeneration plants are subjected to RPO. As a matter of fact, according to Appellant, in *Lloyd Metals* case**,** this Tribunal clarified that cogeneration is to be promoted by other means. The only condition is that there cannot be a preferential tariff for the procurement of cogeneration by the distribution licensees. With these submissions, the Appellant sought for setting aside the order dated 25.08.2016 passed in review petition.

4. As against this, the Respondent - State Commission raised the following stand:

5. According to the Respondent Commission for the reasons stated in the impugned order, the issues raised by the Appellant have to be answered in negative and the impugned order deserves to be upheld. According to them, the inference drawn by the Appellant with reference to full bench judgment of this Tribunal in *Lloyds Metal and Energy Limited* case seems to be incorrect. Subsequent to the decision of the Tribunal in *Lloyds Metal and Energy Limited* case, the decision of the High Court of Gujarat in *Hindalco Industries Limited vs. Uttar Pradesh Electricity Regulatory Commission and Ors. (Appeal No. 125 of 2012 dated 10.04.2013)* and the decision of the Hon'ble

Supreme Court in *Hindustan Zinc Limited vs. Rajasthan Electricity Regulatory Commission (Civil Appeal no. 4417/2015 dated 03.05.2015)* clearly indicate that the inference drawn by the Appellant is incorrect. As a matter of fact, before this Tribunal in *Century Rayon vs. Maharashtra Electricity Regulatory Commission & Ors. (Appeal No. 57 of 2009 dated 26.04.2010)*, the issue that arose for consideration was whether a person consuming the electricity produced from cogeneration plant using fuel other than renewable source of energy, was liable to comply with the RPO? On this issue, the Tribunal held that such person was not liable to comply with the RPO. In the full bench decision of this Tribunal in *Lloyds Metal and Energy Limited* case, it had opined that the State Commission can promote fossil fuel based cogeneration by other measures such as, facilitating the sale of the surplus electricity available at such plants and to exempt the cogeneration plants from the definition of 'Obligated Entity' etc. Therefore, the contention of the Appellant that the quantum of electricity generated from cogeneration process will definitely be considered for fulfilment of the RPO by co-generator himself could have been accepted, if the energy from cogeneration was on par with the energy from renewable sources. Since in *Lloyds Metal and Energy Limited* case, the Tribunal opined that the energy generated from cogeneration plants using fossil fuel cannot be

equated with the energy generated from renewable sources, at any stretch of imagination, one cannot infer that the said full bench decision of the Tribunal opined that quantum of electricity from cogeneration process on fossil fuel could be considered for fulfilment of the RPO of the co-generator himself. With these submissions, they sought for dismissal of the Appeal.

6. The questions of law raised in the Appeal are as under:

"(a) Whether the State Commission is justified in imposing the renewable purchase obligation on cogeneration plants using sources other renewable sources for generation of electricity?

(b) Whether the State Commission is justified in ignoring the judgments passed by its Appellate Authority i.e. this Tribunal and passing the Impugned Order and Review Order?

(c) Whether the State Commission has erred in dismissing the Review Petition on the basis of the Tariff Policy dated 28.01.2016 even when the Tribunal had clearly settled the present issue by interpreting Section 86(1)(e) of the Electricity Act, 2003 in consonance with the intent of the legislature in Century Rayon case and other judgments following the same?

(d) Whether the State Commission has erred in recalling its Order dated 08.05.2013 and imposing the renewable purchase obligation on co-generation plants using sources other renewable sources for generation of electricity?"

(e) Whether Section 86(1)(e) of the Act mandates the co-generation plants to fulfil the RPO?

7. Appeal No. 333 of 2016, filed by Appellant, the very same order dated 25.08.2016 is challenged wherein the Appellant contends that this Order is nothing but withdrawing the earlier order of the State Commission. According to the Appellant, in the light of New Tariff Policy of 2016, the Commission proceeded to consider implementation of the order dated 04.08.2015, wherein the State Commission opined that the electricity generated under cogeneration shall not be considered for fulfilment of the RPO of the Appellant herein. According to the Appellant, the Order dated 04.08.2015 got merged with the impugned order dated 25.08.2016 (Review Petition).

8. The Appellant claims that it has cogeneration plants utilizing the flue gas (waste heat/blast furnace/pressure gas/steam) from its operations of integrated steel plant owned by it. If the above heat generated from the coke oven is not channelized, it would damage environment;

therefore, the Appellant has installed heat recovery boilers to generate 55 MW power. Similarly, the pressure energy of blast furnace gas is utilised to generate 30 MW through Top Gas Pressure Recovery Turbines. The Appellant is not using fossil fuel to generate electricity in the above process. The fossil fuel is utilised only in the manufacturing of primary products other than production of electricity. Therefore, the generation of electricity cannot be compared to conventional generation of electricity utilising the fossil fuel.

9. The Appellant further contends that the Electricity Act of 2003 especially Section 86(1)(e) read with the definition of cogeneration clearly indicates the intention to promote cogeneration irrespective of the nature of fuel used; it does not merely refer to cogeneration from renewable energy sources. This came to be recognised in *Century Rayon* case, so also in the case of *Hindalco Industries Limited.* Though the above judgments were not overruled by the full Bench decision of the Appellate Tribunal for Electricity in *Lloyds Metal and Energy Limited* case, the Respondent Commission without recognising any of these facts totally ignored the fact that the cogeneration is towards fulfilment of the RPO.

10. It is further contended by the Appellant that the State Commission totally ignored the actual intension/opinion of the Tribunal and

proceeded on the wrong premise that the view of the Tribunal in *Century Rayon* is inapplicable. They reiterate that the decision of the Tribunal in *Century Rayon* case was never set aside nor overruled by any subsequent judgment. Even the Tariff Policy of 2016 does not overrule the decision of the Tribunal in *Century Rayon's* case. Even otherwise also, being a subordinate legislation, it cannot overrule or *ultra vires* the main Statute/enactment. If Tariff Policy is inconsistent with the provisions of Electricity Act of 2003, the same has to be read as per the settled legal position. With these submissions, they sought for setting aside the impugned order.

11. The question of law raised in this Appeal is as under:

"Whether in the facts and circumstances of the case, the State Commission is right in law in not considering the quantum of electricity generated through co-generation process towards fulfilment of the RPO of the Appellant under Section 86 (1) (e) of the Electricity Act, 2003?"

12. During the pendency of these Appeals, in Appeal No. 278 of 2015 in *JSW Steel Limited vs. Tamil Nadu Electricity Regulatory Commission and Ors.*, this Tribunal on 02.01.2019 opined that RPO cannot be imposed on a person consuming electricity from cogeneration sources

(irrespective of the nature of fuel used). Therefore, the Appellants' counsel contend that same view has to be taken in the instant Appeals. Apart from the said submission, they contend that in a number of decisions of the Tribunal while interpreting Section 86(1)(e) it has been held that Renewable Purchase Obligation cannot be imposed on a person/entity consuming electricity from a cogeneration plant. They further contended that some of the State Commissions were taking divergent views by relying on other decisions of this Tribunal and the Hon'ble Supreme Court, though those decisions had no application to the facts of the present case. They rely upon the following judgments:

(a) *Century Rayon v. Maharashtra Electricity Regulatory Commission & Ors.* (Appeal No. 57 of 2009 dated 26.04.2010)

(b) *Hindalco Industries Ltd. v. Uttar Pradesh Electricity Regulatory Commission & Ors.* (Appeal No. 125 of 2012 dated 10.04.2013)

(c) *Vedanta Aluminium Ltd. v. Orissa Electricity Regulatory Commission* (Appeal No. 59 of 2012 dated 31.01.2013).

(d) *Emami Paper Mills Ltd. v. Odhisha Electricity Regulatory Commission* (Appeal No. 54 of 2012 dated 30.01.2013).

(e) *India Glycols Limited v. Uttarakhand Electricity Regulatory Commission & Ors.* (Appeal Nos. 112, 130 and 136 of 2014 dated 01.10.2014).

13. With these submissions, they sought for allowing the Appeals by answering the questions of law in affirmative in favour of the Appellants.

14. As against this, the Respondent Commission contended that the full bench decision of the Tribunal, as referred above, still holds the field. According to the Respondent Commission, the contention of the Appellants that the order dated 4.8.2015 passed by the Commission in fact withdraws its earlier order dated 8.5.2013 wherein the Commission did not impose RPO on cogeneration plants is erroneous. It is contended by the Respondent Commission that the subject matter of the appeal which came to be disposed of on merits by the Order dated 4.8.2015 is different from the subject matter in the present appeal. The Appellants ought to have filed Original Petitions before the Commission seeking appropriate relief. In the present case, the electricity is generated through waste heat recovery process and is quite different from the subject matter of Appeal which resulted in the Order dated 4.8.2015. With these arguments, the Commission has sought for dismissal of the Appeals.

15. We have gone through the Appeal papers and have heard counsel for both the parties at length.

16. The point that would arise for our consideration is "whether the State Commission erred in its opinion by not considering the quantum of electricity generated through cogeneration process towards fulfilment of RPO of the Appellants in terms of Electricity Act of 2003?"

17. Apparently, the impugned order is passed in Review Petition Nos. 04 and 05 of 2016 dated 4.8.2015. The relevant paragraphs pertaining to this order read as under:

"O R D E R

I] Preamble:

1) The Commission has issued KERC (Procurement of Energy from Renewable Sources) Regulations, 2011, which came into effect from 01.04.2011.

2) The above said Regulations specify that every grid connected captive consumer consuming electricity from grid connected captive generating plant or plants having total capacity exceeding 5 MW using fuel other than renewable sources, shall purchase from renewable sources of energy, a minimum quantity of 5% of its consumption from captive source.

3) The above Regulations were also applicable to Captive Co-generation plants using fuel other than renewable source for power generation.

4) *Meanwhile the Hon'ble Appellate Tribunal for Electricity (ATE) in appeal No: 57/2009 had passed orders on 26.04.2010 holding that fastening of the obligation on the consumers consuming electricity obtained from co-generation plants, to procure electricity from renewable energy sources would defeat the object of section 86 (1) (e) of the Electricity Act, 2003 and that, such plants should be treated at par with other renewable energy sources and is to be promoted irrespective of the nature of fuel used.*

5) *The above order was challenged by the Gujarat Electricity Regulatory Commission through a review petition before the Hon'ble ATE in RP No: 1311/2012. The Hon'ble ATE had dismissed the said review petition vide its order dated 17.04.2013. Further, Hon'ble ATE passed an order in appeal No: 125/2012 on 10.04.2013 upholding its earlier order to exempt co-generation plant from RPO obligation.*

6) *This Commission after deliberating on the above orders, in its 226th meeting, held on 08.05.2013 decided not to impose Renewable Purchase Obligation [RPO] on any person consuming electricity generated from co-generation power plants using fuel other than renewable sources.*

7) *Subsequently the question of correctness of the Rajasthan's Electricity Regulatory Commission's Regulations imposing RPO on captive consumers arose in Civil Appeal No. 4417/2015 before the Hon'ble Supreme Court. The Hon'ble Supreme Court has passed orders on 13.05.2015 upholding Regulations imposing obligation upon captive consumers and open access consumers to purchase electricity from renewable sources. Hence, the following order:*

ORDER

In the light of the order dated 13.05.2015 of the Hon'ble Supreme Court in the Civil Appeal No. 4417/2015, the Commission hereby decides to recall with immediate effect, its decision taken in the Commission's meeting held on 08.05.2013, not to impose Renewable Purchase Obligation [RPO] on captive consumers or open access consumers consuming electricity obtained from cogeneration plants using sources other than renewable sources for generation of electricity."

18. The relevant paragraphs of the impugned order dated 25.8.2016 read as under:

"8) Contention No.(1) :

(a) The Petitioners have relied upon the Century Rayon case and also the Imami Paper Mills Limited case (Appeal No.54/2012 decided on 30.1.2013), in which the principles laid down in the Century Rayon case have been followed. In the Century Rayon case, the question that arose for consideration was, whether a person consuming energy produced from the Co-generation, using fuel other than the Renewable Source of Energy, was liable to comply with the RPO. The Hon'ble ATE held that, such person was not liable to comply with the RPO. The summary of the reasons stated by the Hon'ble ATE in the said case have already been extracted above.

(b) In the Imami Paper Mills Limited case, the same question arose for consideration by the Hon'ble ATE.

The Hon'ble ATE reiterated the principles stated in the Century Rayon case.

(c) *In their pleadings, the Petitioners have not referred to the decision of the Full Bench of the Hon'ble ATE in the Lloyds Metal and Energy Limited case. In that case, the Appellant, viz., Lloyds Metal and Energy Limited, was a Steel Manufacturing Company, which had commissioned a 13 MW capacity Co-generation Plant based on industrial waste heat generated by the Sponge Iron Plant of the Appellant with the use of fossil fuel (coal). The Appellant had filed a Petition before the State Commission for determination of tariff for supply of electricity from its fossil fuel based Cogeneration Plant to the Distribution Licensees in the State of Maharashtra and for fixing of the purchase obligation of the Distribution Licensees for the electricity produced from the fossil fuel based Cogeneration Plants under Section 86(1)(e) of the Electricity Act, 2003 (hereinafter referred to as the 'Act'). The State Commission, vide its Order dated 29.12.2011, refused to grant the reliefs sought for by the Appellant. After hearing the rival contentions, the Full Bench of the Hon'ble ATE concluded that, a Distribution Licensee cannot be fastened with the obligation to purchase a percentage of its consumption from the fossil fuel based co-generation under Section 86(1)(e) of the Act. Further, it held that, such purchase obligation can only be fastened from the electricity generated from Renewable Sources of Energy. Hence, the Appeal was dismissed by the Hon'ble ATE. Therefore, the effect of the Full Bench decision of the*

Hon'ble ATE is that, the energy generated from the Co-generation Plants using fossil fuel cannot be treated on par with the Renewable Sources of Energy to comply with the RPO.

(d) It may be true that, in the Hindustan Zinc case, the questions concerning the Co-generation Plants, as put forth in the Century Rayon case or in the Lloyds Metal and Energy Limited case, have not come up for decision. In the Hindalco Industries Limited case of the Hon'ble High Court of Gujarat, one of the questions was, whether for fulfilling the RPO, the electricity generated or cogenerated from the renewable sources should alone be considered. In this decision, approving the reasons stated in the Full Bench decision of the Hon'ble ATE in the Lloyds Metal and Energy Limited case, the Hon'ble High Court of Gujarat answered the said question in the affirmative and also further observed that the decision in the Century Rayon case on this controversy has no force of law.

(e) For the above reasons, the first contention raised by the Petitioners, relying only on the Century Rayon case, is not tenable.

9) <u>Contention No.(2)</u> :

(a) The definition of 'Renewable Sources of Energy' stated in Regulation 2(1)(e) of the RE Regulations, 2011 issued by this Commission reads thus:

> *"'Renewable sources of energy' means non-conventional, renewable electricity generating sources such as minhydel, micro-hydel, wind,*

> *solar, biomass (including bagasse based co-generation), urban/municipal waste, or such other sources as approved by the MNRE, Government of India, or Government of Karnataka"*

(b) In support of their second contention, the Petitioners in RP No.4/2015 and RP No.5/2015 have stated thus :

> *"The Petitioner submits that the above definition of the term, 'Renewable Sources of Energy' in the Regulation includes all non-conventional and renewable electricity generating sources including co-generation of the nature undertaken by the Petitioner. The primary clause in the opening part states, 'means non-conventional Renewable electricity generating sources'. The co-generation is definitely Non-Conventional, Renewable Generating Source within the meaning of the above clause. The specific types of Non-Conventional Renewable Electricity mentioned in the above definition, namely, Mini-Hydel, Micro-Hydel, Wind, Solar, Biomass, Urban/Municipal Waste etc. are illustrative in nature and would not exclude what is covered by the term 'Non-Conventional and Renewable Electricity Generating Sources'. …"*

(c) In RP No.2/2016, a similar contention is raised by the Petitioner on the ground that, co-generation is environmental-friendly, therefore co-generation should be treated as a 'Renewable Source of Energy'.

(d) In our view, the contention of the learned senior counsel for the Petitioners, that co-generation falls within the ambit of the definition 'Renewable Sources of Energy' cannot be accepted. The contention that, specific types of non-conventional Renewable sources of Energy mentioned in the definition are only illustrative in nature and would not exclude what could be covered by the

term 'non-conventional and renewable sources of energy', is not acceptable. That is so because, the definition of 'Renewable Sources of Energy' narrates in specific terms, the sources of renewable energy, such as mini-hydel, micro-hydel, wind, solar, biomass (including bagasse-based cogeneration), urban/ municipal waste or such other sources as approved by the MNRE, Government of India, or Government of Karnataka, and these enumerations are exhaustive and not illustrative in nature. If the enumeration is not followed by any generic word pertaining to that clause, the same should be limited to only those Renewable Sources of Energy that are specifically mentioned therein. Therefore, we are of the considered view that, the co-generation in general cannot be considered to be falling under the definition of 'Renewable Sources of Energy'. Hence, the second contention of the Petitioners cannot be accepted.

10) <u>Contention No.(3)</u> :

(a) The learned senior counsel for the Petitioners urged that the question, whether co-generation from sources other than the Renewable Sources of Energy should be excluded from the applicability of the RPO, had directly arisen in the Century Rayon case and that the decision of the Hon'ble Supreme Court in the Hindustan Zinc Limited case does not, in any way, support recalling of the decision of this Commission, taken in the meeting held on 8.5.2013, not to impose the RPO on the captive consumers or the open access consumers consuming

electricity obtained from Co-generation Plants using sources other than the Renewable Sources of Energy. As already noted, in the Hindustan Zinc Limited case, the questions raised in the Century Rayon case or in the Lloyds Metal and Energy Limited case had not come up for consideration. However, the decision to recall this Commission's decision dated 8.5.2013 was taken up, upon consideration of the Full Bench decision of the Hon'ble ATE in the Lloyds Metal and Energy Limited case and also the decision of the Hon'ble High Court of Gujarat in the Hindalco Industries Limited case, apart from referring to the decision in the Hindustan Zinc Limited case. The Full Bench decision of the Hon'ble ATE in the Lloyds Metal and Energy Limited case and also the abovementioned decision of the Hon'ble High Court of Gujarat, would certainly justify recalling of the decision taken in this Commission's meeting held on 8.5.2013. It is true that, it would have been appropriate to refer to the Full Bench decision of the Hon'ble ATE and the decision of the Hon'ble High Court of Gujarat, in support of the decision to recall this Commission's earlier decision taken in the meeting held on 8.5.2013 and that the Order dated 4.8.2015 in question of this Commission requires modification to that effect.

(b) *We are of the considered view that, the inferences that emerge out of the Full Bench decision of the Hon'ble ATE are that: (1) the co-generation from fossil fuel cannot be treated on par with the Renewable Sources of Energy for complying with the RPO; (2) the State Commission can promote fossil fuel based co-*

generation by other measures, such as facilitating sale of surplus electricity available at such Co-generation Plants and Grid security, etc.; and (3) as a promotional measure, the State Commission may even exclude the fossil fuel-based co-generation from the applicability of the RPO.

(c) This Commission had not excluded the fossil fuel-based co-generation from the RPO under its RE Regulations, 2011. Such exclusion was extended only in compliance with the directions issued in the Century Rayon case by the Hon'ble ATE. Subsequent to the Full Bench Decision of the Hon'ble ATE in the Lloyds Metal and Energy Limited case, this Commission decided to recall the exclusion from the applicability of the RPO granted earlier.

(d) Assuming that the above contention of the learned senior counsel for the Petitioners should be accepted, the same cannot now hold good in view of the new Tariff Policy dated 28.1.2016.

(e) Section 86(4) of the Act states that, in discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under Section 3 of the Act. The proviso to Clause 6.4(1) of the present Tariff Policy dated 28.1.2016 states that, co-generation from sources other than the renewable sources shall not be excluded from the RPO.

(f) The relevant portion of Clause 6.4(1) of the earlier National Tariff Policy, for our purpose, reads thus :

"6.4 Non-conventional and renewable sources of energy generation including co-generation.

(1) Pursuant to provisions of Section 86(1)(e) of the Act, the appropriate Commission shall fix a minimum percentage of the total consumption of electricity in the area of distribution licensee for purchase of energy from such sources, taking into account availability of such resources in the region and its impact on retail tariffs. Such percentage for purchase of energy should be made applicable for the tariffs to be determined by the SERCs latest by April 1, 2006. …"

(g) The relevant portion of Clause 6.4(1) of the present Tariff Policy, which replaces Clause 6.4(1) of the earlier Tariff Policy, reads thus :

"6.4 Renewable sources of energy generation including Co-generation from renewable energy sources:

(1) Pursuant to provisions of Section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage of the total consumption of electricity in the area of a distribution licensee for purchase of energy from renewable energy sources, taking into account availability of such resources and its impact on retail tariffs. Cost of purchase of renewable energy shall be taken into account while determining tariff by SERCs. Long term growth trajectory of Renewable Purchase Obligations (RPOs) will be prescribed by the Ministry of Power in consultation with MNRE.

Provided that cogeneration from sources other than renewable sources shall not be excluded from the applicability of RPOs. …"

(h) The changes effected in the new Tariff Policy would make it clear that, co-generation from sources other than the Renewable Sources of Energy cannot be equated to the Renewable Sources of Energy and that such co-generation shall not be excluded from the applicability of the RPO.

(j) The findings in the Century Rayon case were based on the interpretation of the Act along with the then existing Tariff Policy. We are of the considered opinion that, had the present Tariff Policy dated 28.1.2016 been taken into consideration, the findings given on the present controversy by the Hon'ble ATE in the Century Rayon case would have been different. Therefore, we cannot accept the third contention of the Petitioners.

17) For the foregoing reasons, we pass the following :

ORDER

(i) The above Review Petitions are dismissed.

(ii) The original of this common Order shall be kept in RP No.4/2015 and a copy of it be retained in the other two connected cases."

19. In Appeal No. 333 of 2016, the Appellant has placed on record the current status of Captive Power Plants and Cogeneration Plant of the Appellant, which is as under:

"	***Rated Capacity***	***Power from Waste Gas***	***Power from Waste Heat***	***Power from TRT***	***Total***
CPP-1	*100*	*100*			*100*
CPP-2	*125*	*125*			*125*
CPP-3	*300*	*35*			*35*
CPP-4	*300*	*35*			*35*
TRT-1 (BF-3)	*15*			*15*	*15*
TRT-2 (BF-4)	*15*			*15*	*15*
TRT-3 (BF-1)	*5*			*5*	*5*
CDQPP (JSWPL)	*76*		*76*		*76*
SIP (JSWPL)	*6*		*6*		*6*
Total	***942***	***295***	***82***	***35***	***412"***

20. The Appellant further claims the following process which results in generation of 412 MW of Power qualifies as cogeneration:

> *"(a) <u>Waste heat recovery - 82 MW:</u>*
>
> *The primary source of fuel in the Appellant's iron making process is coke. For this, the Appellant has set up coke ovens along with waste heat recovery system (WHRS) and coke dry quenching (CDQ) for coke making facilities wherein, metallurgical coal is converted into coke. The waste heat through hot flue gases during the coke making process is utilized for power generation through WHRS. The sensible heat from the Hot coke oven normally possess a temperature of about 1000^0. In order to capture the sensible heat during quenching, which otherwise would go to the atmosphere, if not channelized and may cause environmental damage, the Appellant has*

installed Coke dry quenching system for Power generation.

(b) Top Gas Pressure Recovery Turbine (TRT) - 35 MW

Blast Furnace (BF) is the most widely used iron making process for production of liquid iron. Iron bearing raw material is charged into the Blast Furnace along with metallurgical coke and fluxes. Hot air blast is injected through the tuyeres to burn the coke carbon to CO and CO2. The reduction process generates large amount of process gas (named as BF Gas). This gas comes out of the BF shell through gas off-take duct. The Appellant operates four blast furnaces at its Vijayanagar Works, out of which, 3 blast furnaces have got power generation facility through Top Gas Pressure Recovery Turbine(TRT). These three blast furnaces (BF – 1,3&4) operate at 2.5 bar pressure and thus the pressure of the gas coming out of the blast furnace has energy generating potential. The BF gas coming out of the gas off-take duct at high pressure of2.5 bar and is subjected to gas cleaning and scrubbing in the gas cleaning plant. Its pressure is reduced to ~0.1 bar in the pressure reducing valve and then connected to intra plant gas network. The total pressure energy of the waste gas is lost in the pressure reducing valve. The Appellant utilizes the pressure energy of BF gas to generate power through Top Gas Pressure Recovery Turbines (TRT) to harness energy, which otherwise was lost during the pressure reducing process. TRT works on the similar principle of small hydel power plant wherein differential pressure is used for power generation.

(c) <u>Waste Gas - 295 MW:</u>

The Appellant states that it uses coke as primary fuel source in its manufacturing process as it is of higher calorific value. During the process of iron making at blast furnaces, gases are produced which would otherwise have been released into the atmosphere and may cause environmental damage. The hot exhaust gas from the coking oven and the blast furnace which has combustible residues such as carbon monoxide, hydrogen and nitrogen are used by the Appellant in power boilers and generate steam which in turn is used to power steam turbo generators and produce electricity."

21. Section 2 (12) of the Electricity Act 2003 defines what is 'co-generation', which reads as under:

> *"(12) "Cogeneration" means a process which simultaneously produces two or more forms of useful energy (including electricity);"*

22. Section 86(1)(e) is relevant to understand what is the intention of the legislature, i.e. for promoting co-generation, which reads as under:

> ***"Section 86. (Functions of State Commission): ---*** *(1) The State Commission shall discharge the following functions, namely: -*
>
> *…….*
>
> (e) *promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of*

electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;"

23. Section 61 refers to the powers of the Commission to determine the tariff which indicates that the appropriate Commission has to take guidance from the following which includes Sub-section (h) also. Section 61 reads as under:

"Section 61. (Tariff regulations):

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

……

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;"

24. According to Appellants, the electricity generated through the process of co-generation which is consumed by captive generation plant has to be treated towards fulfilment of RPO irrespective of the nature of fuel used. This is in terms of Renewable Regulations of 2011. Therefore, they contend that self-consumption of electricity by the Appellants, which is more than the prescribed percentage of use of electricity generated from co-generation sources further cannot be fastened with the liability of RPO.

25. They heavily rely upon decision of the co-ordinate Bench of this Tribunal in ***JSW Energy Steel Limited vs. Tamil Nadu Electricity Regulatory Commission*** (in Appeal No. 278 of 2015 and batch dated 2.1.2019). On perusal of this decision, we note that the controversy which arose for consideration of the Bench in those batch of Appeals is exactly the same in these Appeals. It would be just and proper to quote the issues raised in those Appeals and how they were considered by the co-ordinate Bench. The judgment in *Century Rayon,* the full Bench judgment in *Lloyd Metals* by this Tribunal as well as the Judgment of the Hon'ble Supreme Court in *Hindustan Zinc Limited*, are discussed at length and have answered ultimately that co-generation facilities irrespective of fuel are to be promoted in terms of Section 86(1)(e) of the Electricity Act. Therefore, they cannot be fastened with the obligation of Renewable Purchase Obligation under the same provisions of the Act. The relevant paragraphs are as under:

> *"I. Whether the appellants, co-generators are under a legal obligation to purchase power from renewable sources of energy in order to meet their Renewable Purchase Obligation?*
>
> *II. Whether the exemption granted to co-generation plants would depend on the type of fuel used by them?*

III. Whether the judgment of this Tribunal dated 26.04.2010 in Century Rayon vs. Maharashtra Electricity Regulatory Commission & Ors has been set aside in entirety or only in part by the Full Bench Judgment of this Tribunal dated 02.12.2013 in Lloyds Metal & Energy Ltd v. Maharashtra Electricity Regulatory Commission & ors.?

IV. Whether the judgment of the Hon'ble Supreme Court in Hindustan Zinc Ltd vs. Rajasthan Electricity Regulatory Commission 2015) 12 SCC 611 would apply to the present appeals?

...

RE: ISSUE NOS. (I) & (II)

Whether the appellants, co-generators are under a legal obligation to purchase power from renewable sources of energy in order to meet their Renewable Purchase Obligation?

Whether the exemption granted to co-generation plants would depend on the type of fuel used by them?

.....

OUR CONCLUSION ON ISSUE NOS. (I) & (II)

39. *The appellants are all captive co-generators. As per section 2(12) of the Electricity Act, 2003 defines cogeneration as under:*

"Cogeneration" means a process which simultaneously produces two or more forms of useful energy (including electricity).

The State to promote generation of electricity from co-generation and renewable sources as envisaged under section

86(1)(e) of the Electricity Act, 2003 casts a specific obligation on the various State Electricity Regulatory Commissions set up under the Act to promote generation of electricity from cogeneration and renewable sources of energy. The aforesaid question arose for consideration before this Tribunal in the case of Century Rayon vs. Maharashtra Electricity Regulatory Commission & Ors. reported in 2010 SCC OnLine APTEL 37 : [2010] APTEL 37 vide judgment dated 26.04.2010 wherein paragraphs 45 & 46 of the judgment read hereunder:

"45. Summary of our conclusions is given below:-

(I) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' mean Judgment in Appeal No. 57 of 2009 cogeneration from renewable sources alone. The meaning of the term 'co- generation' has to be understood as defined in definition Section 2 (12) of the Act.

(II) As per Section 86(1)(e), there are two categories of `generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories.

(III) The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86 (1)(e).

(IV) The clear meaning of the words contained in Section 86(1)(e) is that both are different and both are required to be promoted and as such the fastening of liability on one in preference to the other is totally contrary to the legislative interest.

(V) Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by State Commission through the suitable methods and suitable directions, in view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.

(VI) The intention of the legislature is to clearly promote cogeneration in this industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone.

46. In view of the above conclusions, we are of the considered opinion that the finding rendered by the Commission suffers from infirmity. Therefore, the same is liable to be set side. Accordingly, the same is set aside. Appeal is allowed in terms of the above conclusions as well as the findings referred to in aforesaid paras 16,17,22 and 44. While concluding, we must make it clear that the Appeal being generic in nature, our conclusions in this Appeal will be equally applicable to all co-generation based captive consumers who may be using any fuel. We order accordingly. No costs."

[Emphasis supplied]

40. *It is manifest on the face of the judgment, as stated supra, the Captive consumers having cogenerating plants cannot be fastened with the obligation to procure electricity from renewable energy sources, as that would defeat the object of section 86(1)(e) of the Electricity Act, 2003 and cogenerating plants have to be treated at par with renewable energy generating plants for the purpose of RPO obligations. It is pertinent to note that the aforesaid judgment has been consistently followed by this Tribunal in several cases e.g.*

Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission in Appeal No. 54 of 2012 dated 30.01.2013 reported in 2013 SCC OnLine APTEL 23 : [2013] APTEL 74 (Para 5, paras 38 to 40, which reads hereunder:

"5. In the light of the rival contentions, the following question may arise for consideration: "Whether the Appellant, the co-generator is under a legal obligation to purchase power from the renewable sources of energy for meeting the Renewable Purchase Obligation of its captive load?"

…. …. ….

38. As laid down by this Tribunal in Century Rayon case, we reiterate that the mere use of fossil fuel would not make cogeneration plant as a conventional plant. The State Commission cannot give its own interpretation on this aspect which is not available in the Regulations and which is against the ratio and the interpretation of provision given in the judgement by this Tribunal.

39. We feel anguished to remark that unfortunately, the State Commission has not followed the judicial propriety by ignoring the well laid principles contained in the judgement of this Tribunal, which is binding on the authority.

40. Summary of our findings: i) This Tribunal in its judgment in Appeal No.57 of 2009 has specifically observed that the intention of the legislature is to clearly promote the cogeneration also irrespective of the nature of the fuel used and fastening of the obligation on the cogenerator would defeat the object of Section 86(1)(e). The Tribunal also mentioned in the above judgment that the conclusion in Appeal No.57 of 2009 of being generic in nature, would apply to all the co-generation based captive consumers who may be using any fuel. Therefore, reasoning given by the State Commission for distinguishing the judgment of this Tribunal, which is binding on the State Commission, is wrong.

ii) The definition of the obligated entity would not cover a case where a person is consuming power from co-generation plant. iii) The State Commission by the impugned order, in order to remove difficulties faced by the obligated entities, has clarified that the obligation in respect of co-generation can be met from solar and nonsolar sources but the solar and non-solar purchase obligation has to be met mandatorily by the obligated entities and consuming electricity only from the co-generation sources shall not relieve any obligated entity. When such relaxation has been made, the same relaxation must have been allowed in respect of consumers meeting electricity consumption from captive Co-generation Plant in excess of the total RCPO Obligations. Failure to do so would amount to violation of Section 86(1)(e) of the electricity Act, which provides that both cogeneration as well as generation of electricity from renewable source of energy must be encouraged as per the finding of this Tribunal in Appeal No.57 of 2009. Unfortunately the State Commission has failed to follow the judgment given by this Tribunal in Century Rayon case." [Emphasis supplied]

Therefore, in view of the aforesaid judgment, this Tribunal consistently followed and position reiterated by this Tribunal in the above judgments. In spite of consistent view taken by this Tribunal, the Respondent/State Regulatory Commission has failed to take judicial note and appreciate the matter and on contrary, proceeded to pass the impugned Order without evaluation of the material available on records and the case made out by the Appellant. We are of the considered view that the Respondent/State Regulatory Commission has failed to consider the same and on contrary has passed the impugned order. Therefore, the impugned order passed by the Respondent/State Regulatory Commission is liable to be set

aside on this ground. ***Hence, we answered these issues in favour of the Appellants****.*

...

RE: ISSUE NO. (III)

Whether the judgment of this Tribunal dated 26.04.2010 in Century Rayon vs. Maharashtra Electricity Regulatory Commission & Ors has been set aside in entirety or only in part by the Full Bench Judgment of this Tribunal dated 02.12.2013 in Lloyds Metal & Energy Ltd v. Maharashtra Electricity Regulatory Commission & ors.?

OUR CONCLUSION ON ISSUE NO. (III)

43. *It is pertinent to note that the order of reference to the Full Bench dated 23.09.2013 in the case of Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission & Ors. order dated 23.09.2013 makes it clear that the limited question for reference to the Full Bench is as follows:*

"Whether the distribution licensee could be fastened with the obligation to purchase a percentage of its consumption from co-generation irrespective of the fuel used under Section 86(1)(e) of the Act 2003.

Registry is directed to get the Administrative Order from the Chairperson to post it before the Full Bench for re-examination of the interpretation given in the Century Rayon Case on this question."

The Full Bench of this Tribunal vide its order dated 02.12.2013 in the case of Lloyds Metal & Energy Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors., after thoughtful consideration of all the relevant material available on records, answered the question as referred for consideration which read thus:

"This important aspect has not been considered in the Century Rayon judgment, where in this Tribunal had held that the Sate commission has to promote both co-generation as well as generation of electricity from renewable sources of energy. Accordingly, we feel that the State Commission could promote the fossil fuel based co-generation by any other measures such as facilitate sale of electricity from such sources, grid connectivity, etc. by the State Commission could not compel the Distribution Licensee to procure electricity from fossil fuel based co-generation against the purchase obligation to be specified under Section 86(1)(e) of the Electricity Act, 2003." [Emphasis supplied]

It is evident that only paragraph 45(II) of the judgment in Century Rayon Case has been set aside by the Full Bench judgment in Lloyds Metal Case and not the Century Rayon judgment in its entirety. The effect of this being that the distribution licensee could not be compelled to procure electricity from fossil fuel based co-generation against its renewable purchase obligation. However, it has no effect on the finding in Century Rayon Case that a cogeneration based captive power plant cannot be fastened with Renewable Purchase Obligation irrespective of the nature of the fuel used for such cogeneration.

44. *It is, further, fortified by the fact that this Tribunal has in India Glycols Case dated 01.10.2014, much after the judgment of the Full Bench in Lloyds Metal case, continued to rely on Century Rayon case in so far as the question whether cogeneration based captive power plant can at all be fastened with renewable Purchase Obligation is concerned as held in para 10, 20 to 23 which read as under:*

"10. The only issue that arise for our consideration is whether cogeneration based captive power plant can at all be fastened with Renewable Purchase Obligation (RPO) and whether the Notification, dated 3.11.2010, could have at all fastened on each of the Appellants, in defiance of the statutory mandate of Section 86(1)(e) of the Electricity Act, 2003 as also ignoring the decision dated 26.4.2010 of this Appellate Tribunal in Century Rayon case?

....

20. In view of the above considerations and analysis, we note that the impugned order passed by the State Commission suffers from the vice of illegality and the same is against the legal proposition laid down by this Appellate Tribunal in its judgment, dated 26.4.2010, in Appeal No. 57 of 2009 in the case of Century Rayon vs MERC. The approach of the State Commission in passing the impugned orders appears to be quite illegal, invalid and unjust, which cannot be appreciated by this Appellate Tribunal by any stretch of imagination.

21. Consequently, we observe that the impugned orders, dated 13.3.2014 (subject matter in Appeal No. 112 of 2014) and, dated 10.4.2014 (subject matter in Appeal Nos. 130 and 136 of 2014), suffer from illegality and perversity. We find force in the submissions of the Appellants and they are entitled to the relief claimed by them before the State Commission in the form of filing reply to show cause notices and also by filing petitions. The findings recorded by the State Commission in the impugned order, are illegal, perverse and are based on improper and erroneous appreciation of the facts and law. The approach adopted by the State Commission is also not appreciable as the State Commission should have exercised its power to relax in order to implement the judgment, dated 26.4.2010, passed by

this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs. MERC, and also to give relief to the Appellants-petitioners. All the findings recorded by the State Commission in the impugned orders, so far as the Appellants-petitioners are concerned, are hereby set-aside and the impugned orders are liable to be quashed. Accordingly, in view of the above findings and observations, the issue is decided in favour of the Appellant and against the Respondent.

22. We further observe and make it clear that each of the Appellants, who filed the petitions before the State Commission, claiming that each of the them being a co-generation based captive power plant/captive user was under no obligation to make purchases of Renewable Energy Certificates under the Principal Regulations, 2010, is entitled to the benefit of the judgment, dated 26.4.2010, passed by this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs. MERC, and they are accordingly, exempted from the obligation of procuring renewable energy and fulfilling their renewable energy obligation for FYs 2011-12, 2012-13 and 2013-14 (upto 27.12.2013).

23. SUMMARY OF OUR FINDINGS

The Co-generation based Captive Power Plant/Captive user cannot be fastened with renewable purchase obligation as provided under UERC (Compliance of RPO) Regulations, 2010, as subsequently, amended by UERC (Compliance of RPO) (First Amendment) Regulations, 2013. The judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs. MERC, whereby the provisions of Section 86(1)(e) of the Electricity Act, 2003 were interpreted and in compliance of which the learned State Commission has amended the definition 'Obligated entity' as was then existing in

UERC (Compliance of RPO) Regulations, 2010 by UERC (Compliance of RPO) (First Amendment) Regulations, 2013, shall be held to be applicable from the date of the judgment itself. Though, in compliance of the said judgment, dated 26.4.2010, the Regulations were amended in the year 2013 by the State Commission. It was a fit case where the State Commission should have exercised its power to relax according to its own Regulations in order to give effect to the judgment, dated 26.4.2010, passed by this Appellate Tribunal in Appeal No. 57 of 2009, in the case of Century Rayon vs. MERC in letter and spirit, in order to give relief to the Co-generation based Captive Power Plants/Captive users entitled to it."

[Emphasis supplied]

In view of the aforementioned facts and circumstances, we are of the considered view that the reasoning assigned by the Respondent/State Regulatory Commission cannot be sustainable; hence, it is liable to be vitiated. Therefore, answered the issue No. (III) in favour of the Appellants.

...

RE: ISSUE NO. (IV)

Whether the judgment of the Hon'ble Supreme Court in Hindustan Zinc Ltd vs. Rajasthan Electricity Regulatory Commission 2015) 12 SCC 611 would apply to the present appeals?

OUR CONCLUSION ON ISSUE NO. (IV)

***51**. In the case of Hindustan Zinc Ltd. vs. Rajasthan Electricity Regulatory Commission (2015) 12 SCC 611, wherein the validity of the Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) Regulations, 2007 and Rajasthan Electricity Regulatory Commission (Renewable Energy Certificate and*

Renewable Purchase Obligation Compliance Framework) Regulations, 2010, has been questioned which imposed renewable energy obligation on captive gencos and open access consumers. It is significant to note that, the Hon'ble Apex Court was not considering the case of co-generation plants, as rightly pointed out by the learned counsel for the Appellants, is involved in the present appeals before this Tribunal. Therefore the said judgment is not applicable to the facts and circumstances of the instant appeals as the appellants are not questioning the correctness of the Regulations and are merely claiming exemption therefrom as envisaged under Section 86(1)(e) of the Electricity Act, 2003. It is also rightly pointed out by the learned counsel for the Appellants that, this Tribunal has consistently held that co-generation plants are exempted from these regulations by virtue of the special status granted to them in the light of Section 86(1)(e) of the Electricity Act, 2003. It is not in dispute that this Tribunal has proceeded to hold that even where the Regulations provide for the imposition of the Renewable Purchase Obligation on co-generation, the Regulations need to be read down in view of the interpretation of Section 86(1)(e) of the Electricity Act, 2003.

***52**. The above contention is further fortified by the fact that, Rajasthan Electricity Regulatory Commission has itself vide its Order dated 23.03.2017 in Petition Nos. RERC/839/16 and RERC/840/16 in para 15(xi) wherein considered that, "Various Special Leave Petitions (SLPs) were filed before the Hon'ble Supreme Court of India challenging the order dated 31.08.2012 of Hon'ble Division Bench of Rajasthan High Court and the Hon'ble Supreme Court of India vide order dated 13.05.2015 upheld the validity of the RPO Regulations, 2007 and RPO Compliance Regulations, 2010." Further, it referred in para 15(xxi) that, "In view of the judgments passed by the Hon'ble Supreme Court of India, Hon'ble High Court*

of Rajasthan and the Hon'ble APTEL upholding the validity of the Regulations of 2007 & 2010 and the directions issued by this Commission, it is, therefore, requested that the completed data regarding the Energy Generation and RPO Compliance may be ordered to be submitted to the Petitioner for assessment of RE Surcharge and after assessment of the shortfall, the Respondents be directed to pay the RE Surcharge assessed on the basis of the shortfall in RPO Compliance for the period 23.03.2007 to 22.12.2010" and also followed the well settled position of law and consistently followed is that there cannot be RPO being imposed on co-generation facilities wherein they discussed and considered the judgment of this Tribunal i.e. Century Rayon, Emami Paper Mills Ltd, Vedanta Aluminium Ltd, Hindalco Industries Ltd, India Glycols Ltd and observed that, as per the above judgment, it is a settled position of law that an entity which is to be promoted in terms of section 86(1)(e) of the Electricity Act, 2003 cannot be fastened with renewable purchase obligation under the same provision. Further, consumer meeting electricity consumption from captive co-generation plant in excess of the total specified RPO from waste heat technology does not have any obligation to procure electricity from other renewable source of electricity separately from solar or non-solar. Above position is followed by the various State Electricity Regulatory Commissions in the country. The Rajasthan Electricity Regulatory Commission has also considered Section 81(1)f) of the Electricity Act, 2003 and also taken note of the judgment of this Tribunal passed in Century Rayon vs Maharashtra Electricity Regulatory Commission & Ors in Appeal No. 57 of 2009 dated 26.04.2010, which reads as under:

"Summary of our conclusions is given below:-

(I) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' means cogeneration from renewable

sources alone. The meaning of the term 'co- generation' has to be understood as defined in definition Section 2 (12) of the Act.

(II) As per Section 86(1)(e), there are two categories of `generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories.

(III) The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86 (1)(e).

(IV) The clear meaning of the words contained in Section 86(1)(e) is that both are different and both are required to be promoted and as such the fastening of liability on one in preference to the other is totally contrary to the legislative interest.

(V) Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by State Commission through the suitable methods and suitable directions, in view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.

(VI) The intention of the legislature is to clearly promote cogeneration in this industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone."

[Emphasis supplied]

The Rajasthan Electricity Regulatory Commission has also considered the judgment of this Tribunal, as stated supra, in cases of

Emami Paper Mills Ltd; Vedanta Aluminum Ltd; Hindalco Industries Ltd.and India Glycols Ltd; and held that:

"In view of the settled legal position, Commission is of the considered view that no RPO liability shall be fastened on such generators who generate electricity through Waste Heat Recovery for their own purpose and consume it, subject to the condition that generation from Waste Heat Recovery generation plant is in excess of the total RPO required to be complied by the CPP. If generation is lesser than the requirement to the extent of shortfall general rule applies. So far as distinction tried to be made by RREC between solar and non-solar for the purpose of compliance, in the Commission's view does not merit acceptance. Once Captive Power Plant generating electricity through Waste Heat Recovery, cannot be fastened with RPO liability under Section 86 (1) (e), there is no question of imposition of solar RPO also as the same falls in the category of Renewable Energy."

[Emphasis supplied]

***53**. It is rightly pointed out by the counsel for the Appellant that, the judgment of the Hon'ble Apex Court actually covered co-generators as well has got some substance and it is highly unlikely that the Rajasthan Electricity Regulatory Commission, whose Regulations were under challenge before the Hon'ble Apex Court, would itself grant relief to the co-generators before it relying on the judgment of this Tribunal in Century Rayon case. Therefore, we hold that a co-generation facility irrespective of fuel is to be promoted in terms of section 86(1)(e) of the Electricity Act, 2003; an entity which is to be promoted in terms of section 86(1)(e) of the Electricity Act, 2003 cannot be fastened with renewable purchase obligation under the same provision; and as long as the co-generation is in excess of the*

renewable purchase obligation, there can be no additional purchase obligation placed on such entities.

***54**. In view of the facts and circumstances, as stated supra, we hold that, the Appellants herein, being co-generation plants, are not under a legal obligation to purchase power from renewable sources of energy in order to meet their Renewable Purchase obligation in the interest of justice and equity."*

26. After going through the above judgment of the co-ordinate Bench, we are of the opinion that we totally concur with the opinion of the co-ordinate Bench. There is no reason to differ from the view expressed by the co-ordinate Bench with regard to co-generation plant vis-a-vis RPO. Accordingly, the Appeal Nos. 322 of 2016 and 333 of 2016 are allowed and the impugned order dated 25.08.2016 passed by Karnataka Electricity Regulatory Commission is hereby set aside. All the pending IAs shall stand disposed of. No order as to costs.

27. Pronounced in the open court on this the 9th April, 2019.

(S. D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd