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(2018) 08 CHH CK 0044

In the Chhattisgarh High Court

Case No : Civil Writ Petition No. 1262 of 2013, 91 of 2014, 102 of 2016, 372 of 2015, 769 of 2016, 777, 1313, 1391, 1813 of 2014, 1368, 1408, 1818 of 2013, 1793, 2112 of 2017, 2135, 2133 of 2015

Vandana Global Ltd. APPELLANT

Vs

State Of Chhattisgarh RESPONDENT

Date of Decision : 31-08-2018

Acts Referred:

Electricity Act, 2003 — Section 2, 2(15), 2(16), 2 (3) (8), (15), (16), (17), (19), (47), (70), (72), (73), 10, 10(2), 15, 13, 38(2)(d)(ii), 39, 39(2)(d)(ii), 40©(ii), 42, 42(2)
Electricity Rules, 2005 — Rule 3, 3(1)(a)(ii)
Constitution of India, 1950 — Article 265

Citation : (2018) 08 CHH CK 0044

Hon'ble Judges : PRASHANT KUMAR MISHRA, J;RAM PRASANNA SHARMA, J

Bench : Division Bench

Advocate : Sanjay Sen, Prashant Singh, Vaibhav Shukla, Hemant Singh, Ankita Bafna, Malay Shrivastava, Ankit Singhal, Amita Bais, Shobhit Koshta, Ashish Bernard

Final Decision : Dismissed

Judgement

Kumar Mishra, J.

1. The present batch of writ petitions have been preferred for issuance of appropriate writ declaring the following Regulations notified by the

respondent â?" Chhattisgarh State Electricity Regulatory Commission (henceforth 'the Regulatory Commission') as ultra vires to the Electricity Act,

2003 (henceforth 'the 2003 Act') and the Constitution of India.

(i) Regulation 11(6)(b)(ii) of the Chhattisgarh State Electricity Regulatory Commission (Intra State Open Access in Chhattisgarh) Regulations, 2005

(henceforth 'the 2005 Regulations'), introduced by amendment dated 20-7-2007.

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(ii) Regulation 33(6)(b)(ii) of the Chhattisgarh State Electricity Regulatory Commission (Intra State Open Access in Chhattisgarh) Regulations, 2011

(henceforth 'the 2011 Regulations').

(iii) The petitioners have also prayed for quashment of the demand-cum-disconnection notices issued against them on different dates by the

respondent â?" Chhattisgarh State Power Distribution Company Limited (henceforth 'the Distribution Company') levying cross subsidy surcharge for

the year 2008-09 to 2011-12.

2. The background facts on the basis of which the petitioners have claimed declaration of the Regulations as ultra vires are that all the petitioners

except Nalwa Steel & Power Limited have established Captive Power Plant (henceforth 'CPP') within their factory premises for manufacturing of

Steel, Sponge Iron, Ferro Alloy commodities, etc. and are, thus, generating company. The power generated from the CPP is used at various units

within the premises or outside for carrying out the manufacturing activity and, thus, the CPP is claimed to be a part of the companies overall activity.

Due to slump in the steel industry petitioners could not use the entire electricity generated at the CPP, therefore, the surplus power was exported or

sold to outside power consumers. When the petitioners could not fulfill the requirement of consuming more than 51% of the electricity generated for

their own use, they cease to be CPP in accordance with Rule 3 of the Electricity Rules, 2005 (henceforth 'the 2005 Rules') for the financial years

2008-09 to 2011-12.

3. The period during which the petitioners loose their captive status, the respondent Distribution Company has levied and demanded cross subsidy

charge on the strength of the impugned Regulations, on the amount of power generated by the petitioners, as according to the Distribution Company,

once the captive status is lost then cross subsidy charge is payable even if the lines of the licencee i.e. Distribution Company are not used. Thus, the

respondent Regulatory Commission is seeking to impose cross subsidy charge even in cases where open access has not been availed by the

petitioners.

4. Petitioner in WPC No.372 of 2015, Nalwa Steel & Power Limited has prayed for the same relief, like other petitioners, however, this petitioner

would claim that it is a part of diversified Jindal Group and has established the

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CPP of 286 MW and is, therefore, a generating company. Petitioner

Nalwa Steel is supplied power by Jindal Steel & Power Limited without using the transmission network of the Distribution Company. Thus, the supply

has been made through a dedicated transmission line set up by the petitioner at its own costs and, as such, JSPL also lost its captive status, as it could

not consume more than 51% power generated through its CPP for its own use during the relevant period.

5. The petitioners have also pleaded that they are not the consumers of the Distribution licencee nor there is any supply agreement nor a consumer

meter or number and have never opted for or have been granted open access in terms of the applicable Regulations and have not used the

transmission or distribution system owned by the State transmission and distribution licensees, therefore, the petitioners have not been charged with

payment of either any transmission or wheeling charges.

6. It is contended by Shri Sanjay Sen, Sr. Advocate, Shri Prashant Singh, Sr.Advocate, Shri Vaibhav Shukla, Shri Hemant Singh, Ms. Ankita Bafna,

Shri Malay Shrivastava, Shri Ankit Singhal, Ms. Amita Bais, Shri Shobhit Koshta and Shri Ashish Bernard, learned counsel appearing for the

respective petitioners, that the impugned Regulations introducing levy of cross subsidy surcharge on a category of persons who are neither

'consumers' nor availing 'open access' in terms provided under the 2003 Act and the applicable Regulations, therefore, the impugned Regulations are in

violation of Section 39(2)(d)(ii), 40(c)(ii) and the first and second proviso to Section 42 (2) of the 2003 Act. Such rule/regulation is intrinsically

connected with definition of 'consumer' and 'open access', therefore, the Regulatory Commission has exceeded its powers by framing the impugned

Regulations because the petitioners are not the consumers and have never availed the open access. It is also putforth that the impugned Regulations

creates a category of 'deemed consumer' or 'deemed open access', however, there is no legal sanction for creating such deeming legal fiction. It is

further argued that the impugned amendment Regulation of 2007 being notified only on 20-7-2007 it cannot be applied retrospectively for the reason

that some of the petitioners have availed power supply in the financial year 2006-07 i.e. ending on 31-3-2007.

7. Learned counsels for the petitioners would further contend that to fall within

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the definition of â??consumerâ?? as provided under Section 2 (15) of

the 2003 Act the person is to be supplied electricity for his use by a licensee or by the Government or by any other person engaged in the business of

supply of electricity to the public under the Act or any other law and further that the premises of such person is connected for the purpose of receiving

electricity with the works of a licensee, the Government or such other person, therefore, the petitioners having not fulfilling the necessary requisites as

they are not supplied electricity by the licensee or Government or any other person nor the petitioner companies are connected with the works of

licensee, Government or such other person, they are not liable to pay CSS.

8. According to the petitioners, since they are generating electricity for captive use or are otherwise a generating company when they are selling

electricity to any other person, at the same time, they cannot be termed as â?? consumerâ??. Taking recourse to the provisions contained in Sections

10 to 15 of the 2003 Act, it is next contended that as a generating company they are not supplying electricity to members of public and are otherwise

exempted from grant of licence under Section 13 of the 2003 Act, therefore, a generating company does not fall in the category that supplies

electricity to the public. As a corollary, the words â??any other person engaged in the business of supplying electricity to the publicâ?? as provided

under Section 2 (15) of the 2003 Act would only mean persons as mentioned in Section 13 who are exempted from grant of license and can undertake

supply of electricity to the public.

9. It is lastly contended that a delegated legislation cannot have retrospective effect. Conceding that the grant of retrospective applicability of the

impugned Regulation has not been adequately dealt with in the grounds of the petitions, it is putforth that it is settled principle of law that a pure

question of law can be raised even if the same is not pleaded in the petition.

10. Shri Raj Kumar Mehta, Ms. Suparna Shrivastava, Shri Abhivav Kandekar, Ms. Himanshi Andley and Shri Anumeh Shrivastava, learned counsel

appearing for the respondent Regulatory Commission and the Distribution Company, respectively would submit, at the outset, that the issue raised in

this batch of writ petitions is no longer res integra as the Supreme Court in Sesa Sterlite Limited v Orissa Electricity Regulatory Commission and

Others1 has already set at rest the issue of levy of cross subsidy charge (CSS)

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payable by the consumer of electricity to distribution licensee of the

area. Elaborating the submission, it is argued that the Regulation would impose cross subsidy surcharge on such consumers who receive supply of

electricity from a person other than the area distribution licensee, however, it is not leviable where a captive generating plant is carrying electricity

generated by it to the destination of its own use. For the relevant period all the petitioners have lost their captive status, therefore, the distribution

company was within its authority to raise the subject bills against the petitioners for payment of cross subsidy surcharge on the electricity consumed by

them in the relevant years in terms of the impugned Regulations.

11. According to the learned counsels, cross subsidy has an in-built element of tariff determined for a distribution licensee who is supplying power to

various classes of consumers including the consumers falling in the â??subsidized categoryâ??. Whenever the consumer of the subsidizing category

i.e. the industrial consumers avail supply from a source other than the distribution licensee in the area, it loses element of cross subsidy and the

element of cross subsidy is recovered from the person who is availing supply from another source. The recovery of cross subsidy is known as cross

subsidy surcharge payable by the subsidizing category i.e. industrial consumers to the distribution lincensee.

12. It is argued that the generating company supplying electricity directly to a consumer without the instrumentality of a distribution licensee is subject

to payment of cross subsidy surcharge for not availing the supply net work of the distribution licensee. Levy of cross subsidy surcharge is for

balancing the cost of supply as between the subsidizing consumers and subsidized consumers of the licensee, therefore, the said levy is used for off-

setting against the tariff recovered from the subsidized category below the cost of supply and, thus, it is not a tax, hence provisions of Article 265 of

the Constitution of India are not attracted.

13. Referring to the relevant definitions under Section 2 and the provisions contained under Sections 39 & 42, it is argued that levy of cross subsidy

surcharge on the petitioners is mandated under the parent Act, therefore, the subject Regulation is intra vires of the 2003 Act.

14. Learned counsels appearing for the respondents would then refer Rule 3 of the 2005 Rules and the order passed by the Supreme Court in Monnet

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Ispat & Energy Ltd. Etc. v Union of India, Etc.2 wherein the validity of the said Rules has been upheld. It is, thereafter, submitted that the petitioners

having failed to utilise more than 51% of the power generated by it for its own use, they lose their captive status and in such eventuality the petitioner

can only be a consumer and not otherwise. The moment petitioners become consumer in the area of distribution licensee, they become liable and the

distribution licensee becomes entitled to levy cross subsidy surcharge. Learned counsel would vehemently submit that availing of open access is not

necessary for levy of cross subsidy surcharge.

15. Shri P.K. Bhaduri, learned Govt. Advocate appearing for the State, has also referred to the judgment rendered by the Supreme Court in Sesa

(supra) and Monnet Ispat & Energy Ltd. (supra) to defend the validity of the impugned Regulations.

16. In order to dwell on the issue concerning the validity of subject Regulations, certain definitions/expressions in the 2003 Act would need reference,

therefore, Section 2 (3) (8), (15), (16), (17), (19), (47), (70), (72) & (73) reproduced hereunder :

2. Definitions.â?"In this Act, unless the context otherwise requires,--

(3) ""area of supply"" means the area within which a distribution licensee is authorised by his licence to supply electricity;

(8) ""Captive generating plant"" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant

set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or

association;

(15) ""consumer"" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in

the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises

are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the

case may be;

(16) ""dedicated transmission lines"" means any electric supply-line for point to point transmission which are required for the purpose of connecting

electric lines or electric plants of a captive generat-ing plant referred to in section

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9 or generating sta-tion referred to in section 10 to any transmission

lines or sub-stations or generating stations, or the load centre, as the case may be;

(17) ""distribution licensee"" means a licensee autho-rised to operate and maintain a distribution system for supplying electricity to the consumers in his

area of supply;

(19) ""distribution system"" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating

station connection and the point of connection to the installation of the consumers;

(47) ""open access"" means the non-discriminatory provision for the use of transmission lines or distri-bution system or associated facilities with such

lines or system by any licensee or consumer or a person engaged in generation in accordance with the regu-lations specified by the Appropriate

Commission;

(70) ""supply"", in relation to electricity, means the sale of electricity to a licensee or consumer;

(72) ""transmission lines"" means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee)

transmitting electricity from a generating station to another generating station or a sub-station, together with any step- up and step-down transformers,

switch- gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be

required to accommodate such transformers, switchgear and other works;

(73) ""transmission licensee"" means a licensee authorised to establish or operate transmission lines;

17. Certain other provisions of the 2003 Act also need reference, the same are i.e. Sections 38 (2) (d) (ii) & fourth proviso; 39 (2) (d); and 42 which

are reproduced hereunder :

38. Central Transmission Utility and functions.-

(2) The functions of the Central Transmission Utility shall beâ?

(d) to provide non-discriminatory open access to its transmission system for use by--

ii. any consumer as and when such open access is Provided by the State

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Commission under sub-section (2) of section 42, on payment of the

transmission charges and a surcharge thereon, as may be specified by the Central Commission:

Provided also that such surcharge shall not be leviable in case open access is Provided to a person who has established a captive generating plant for

carrying the electricity to the destination of his own use.

39. State Transmission Utility and functions.-

2. The functions of the State Transmission Utility shall beâ?

(d) to provide non-discriminatory open access to its transmission system for use byâ?

i. any licensee or generating company on payment of the transmission charges; or

ii. any consumer as and when such open access is Provided by the State Commission under sub-section (2) of section 42, on payment of the

transmission charges and a surcharge thereon, as may be specified by the State Commission:

42. Duties of distribution licensee and open access.-

1. It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of

supply and to supply electricity in accordance with the provisions contained in this Act.

2. The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other

operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive

phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational

constraints:

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

Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the

distribution licensee:

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

Provided also that such surcharge shall not be leviable in case open access is Provided to a person who has established a captive generating plant for

carrying the electricity to the destination of his own use:

Provided also that the State Government shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by

regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time

exceeds one megawatt.

3. Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the

business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than

such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations

made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-

discriminatory open access.

4. Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution

licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the

State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

5. Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for

redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

6. Any consumer, who is aggrieved by non-redressal of his grievances under sub-sec. (5), may make a representation for the redressal of his

grievance to an authority to be known as Ombudsman to be appointed or disignated by the State Commission.

7. The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

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8. The provisions of sub-sections (5), (6) and (7) shall be without prejudice to right which the consumer may have apart from the rights, conferred

upon him by those sub-sections.

18. Before proceeding to take up the issue concerning challenge to the impugned Regulations we shall briefly refer to a previous challenge thrown by

some industries having captive generating plant to Rule 3 of the 2005 Rules. The said Rule deals with the requirement of captive generating plant

providing that no power plant shall qualify as a 'captive generating plant' unless the electricity generated in such plant consumes more than 51% of the

aggregate electricity for its captive use. Vires of the said provisions was assailed before this Court in Monnet Ispat & Energy Limited v. Union of

India and Others3 which came to be dismissed by the Division Bench of this Court on 30-1-2013. In the said matter challenge to the subject

Regulations was also made, however, that issue was left open to be agitated again, if the need so arises. The Division Bench decision in Monnet Ispat

& Energy Limited (supra) was assailed before the Supreme Court in Monnet Ispat & Energy Ltd. Etc. v Union of India, Etc. Civil Appeal No.18506-

18507 of 2017, which came to be dismissed by the Supreme Court on 13-11-2017 holding the Rule 3 (1)(a)(ii) to be intra vires.

19. Consequently, the petitioners having failed to use more than 51% of the aggregated electricity generated by them for their captive use, they cease

to have the status of captive power plant.

20. We shall now dwell upon the issue concerning challenge to the impugned Regulations i.e. Regulation 11 (6) (b) (ii) of the 2005 Regulations; 2005

Regulations was amended w.e.f. 20-7-2007; and Regulation 33 (6) (b) (ii) of the 2011 Regulations, which are reproduced herein under for ready

reference :

Regulation 11 (6) (b) (ii) of the 2005 Regulation :

11. Charges of Open Access

6. Surcharge â?

(b) The principle and procedure for determining cross-subsidy surcharge shall be as under:

(ii) Such surcharge shall be based on the current level of cross subsidy of the tariff category / tariff slab and / or voltage level to which such open

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access customers, belong or are connected to, as the case may be. It is to be calculated based on the difference between the applicable tariff rate to

the consumer category concerned if the electricity is supplied by the distribution licensee and the cost to the licensee for such supply.

Provided that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant, in

respect of his captive generation, for carrying the electricity to a destination of his own use.

Clauses 14, 15 & 16 of 2007 Regulation (amended) w.e.f. 20-7-2007

14. The heading 'surcharge' in sub-clause (6) of clause 11 of the principal Regulations shall be substituted by â??Cross subsidy surcharge.â??

15. In sub-clause (6) (b) of clause 11 of the principal Regulations after (i) the following shall be added:-

â??(ii) Cross subsidy surcharge shall also be payable by such consumer who receive supply of electricity from a person other than the distribution

licensee in whose area of supply is located, irrespective of whether he avails such supply through transmission/distribution network of the

Board/licensee or not.â??

16. Sub-clause (6)(b)(ii) of the principal Regulations shall be renumbered as sub-clause

(6) (b) (iii) and the sentence of the clause beginning â??it is to beâ?? shall be substituted by the following:

â??It is to be calculated based on the average cost method by taking the difference between the average tariff for such supply voltage for the

consumer of subsidizing category and the average cost of supply for the licensee.â??

Regulation 33 (6) (b) (ii) of the 2011 Regulation :

33. Open access charges

6. Cross subsidy Surcharge â?

(b) The principle and procedure for determining cross-subsidy surcharge shall be as under:

(ii) Cross subsidy surcharge shall also be payable by such consumer who receive supply of electricity from a person other than the distribution licensee

in whose area supply is located, irrespective of whether it avails such supply through transmission/ distribu-tion network of the licensee or not.

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21. The Regulations, quoted above, clearly shows that it has imposed cross subsidy surcharge on such consumers who receive supply of electricity

from a person other than the area distribution licensee in whose area supply is located, irrespective of whether it avails such supply through

transmission/ distribution network of the licensee or not. Such surcharge is, however, not leviable where a captive generating plant is carrying

electricity generated by it to the destination of his own use. It is to bear in mind that while fixing the tariff, the tariff recovered from the subsidizing

category i.e. to whom electricity is supplied at a rate lower than the cost of supply is used by the distribution licensee for off-setting the tariff

recovered from the ordinary consumer below the cost of supply. This additional tariff on the subsidizing category is referred as subsidy and whenever

such generating plant which supplies electricity for its own use, but at the same time has lost its captive status is levied cross subsidy surcharge

because while consuming its own generated electricity, it does not pay cross subsidy as it has not availed supply from the distribution licensee of the

area. In such situation, the distribution licensee having lost the cross subsidy, it recovers the same from such consumer who avail supply from another

source. The cross subsidy surcharge thus becomes a levy on the subsidizing consumer which would have paid it to the distribution licensee in the form

of cross subsidy had it continued to receive supply from the distribution licensee and not from another source.

22. Under the 2003 Act the 'open access' is defined to mean the non-discriminatory provision for the use of transmission lines or distribution system or

associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations

specified by the Appropriate Commission. Under Section 39 the State Transmission Utility is enjoined to provide non-discriminatory open access to its

transmission system for use by (i) any licensee or generating company on payment of the transmission charges; or (ii) any consumer as and when

such open access is Provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge

thereon, as may be specified by the State Commission.

23. Under Section 42 (2) of the 2003 Act, the State Commission has been obligated to introduce open access in such phases and subject to such

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conditions as may be specified within one year of the appointed date. The first proviso to Section 42 (2) permits open access on payment of a

surcharge in addition to the charges for wheeling whereas the second proviso states that such surcharge is to be utilised to meet the requirement of

current level of cross subsidy within the area of the distribution licensee and is to be progressively reduced in the manner as may be specified by the

State Commission. Thus, a consumer who has been availing supply of power from the area distribution licensee may avail supply of power from

another source on payment of surcharge to the area distribution licensee so as to enable the licensee to utilise the same for meeting the current levels

of cross subsidy.

24. It is also to be seen that cross subsidy and surcharge have been made an integral part of electricity supply under the above mentioned provisions.

It is for this reason, supply availed from a source other than the area distribution licensee through the means of open access is necessarily to be

subjected to payment of cross subsidy surcharge.

25. Petitioners have contended that since they are not availing power supply from the distribution licensee they are not the consumers and further

since they have not availed open access, provisions contained in Section 42 (2) of the 2003 Act would not apply, therefore, they are not liable to pay

cross subsidy surcharge and, as such, the Regulation fall foul of the provisions contained in the 2003 Act.

26. Section 2 (15) of the 2003 Act defines the word 'consumer' to mean any person who is supplied with electricity for his own use by a licensee or

the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being

in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee,

the Government or such other person, as the case may be. Similarly, under Section 10 (2) generating company may supply electricity (i) to a licensee

directly; and/or (ii) to a consumer as per Regulations framed under Section 42 (2), which includes a provision for payment of cross subsidy surcharge.

Thus, whether supply can be availed by a consumer through the distribution licensee or by a generating company; only two modes are permissible and

supply through any other mode is not contemplated under the Act. The Act

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nowhere contemplates supply of electricity by a generating company to

any consumer through own transmission and distribution system or without availing the licence from appropriate Commission except the captive power

plants.

27. Under Section 2(16) a captive generator is permitted to construct its own dedicated transmission line for point to point transmission from its captive

generating plant to the destination of its use. Thus, each of the petitioners have connected their captive generating plants to their industrial loads by

constructing dedicated lines. It is also to be seen that Section 42 (2) exempts a captive generator from payment of cross-subsidy surcharge when open

access is availed for carrying electricity to the destination of his own use through dedicated line, however, when the petitioners have lost their captive

status for the subject period they were no longer entitled to get exemption as provided under the fourth proviso to Section 42 (2). The moment

challenge to Rule 3 of the 2005 Rules was negatived by this High Court and the Hon'ble Supreme Court, the petitioners cease to be a captive user,

therefore, the connected load or the 'own use' ceases to be a captive consumption. The 2003 Act would contemplate only two types of consumption of

electricity, first by consumer as defined under Section 2 (15) and other is own use, therefore, when the consumption ceases to be captive consumption

then it remains consumption by a consumer and not otherwise. Whenever electricity is consumed by a person, it cannot be to any third category than

the consumer and own use. During the relevant period the petitioners have used their connected load as a consumer availing supply from a generating

company and not by a captive generator as they have lost their status by virtue of operation of law and precisely for this reason they are not entitled

for exemption from payment of cross subsidy. The moment the petitioners become a consumer, the area distribution licensee becomes entitled to levy

cross subsidy surcharge from such generator which has supplied electricity to its connected load because the supply is not received through

distribution licensee and by operation of legal fiction it is deemed to be by way of open access as there is no third mode of supply.

28. In Sesa (supra) the petitioner was not drawing or utilising any electricity from the distribution licensee, yet the Odisha State Commission directed

Sesa to pay cross subsidy surcharge holding Sesa to be a consumer. The

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Supreme Court referred the nature of dispute between the parties in para 21

thus :

21. From the aforesaid narration of events as well as arguments of the counsel for the parties, it has become manifest that the primary dispute relates

to CSS which the appellant is called upon to pay to WESCO. As per the appellant no such CSS is payable and the PPA which was submitted by the

appellant to the State Commission for approval, should have been accorded due approval by the State Commission.

29. Thereafter dealt with the issue of open access and cross subsidy surcharge at paras 25 to 30 :

25. While open access in transmission implies freedom to the licensee to procure power from any source of his choice, open access in distribution with

which we are concerned here, means freedom to the consumer to get supply from any source of his choice. The provision of open access to

consumers, ensures right of the consumer to get supply from a person other than the distribution licensee of his area of supply by using the distribution

system of such distribution licensee. Unlike in transmission, open access in distribution has not been allowed from the outset primarily because of

considerations of cross-subsidies. The law provides that open access in distribution would be allowed by the State Commissions in phases. For this

purpose, the State Commissions are required to specify the phases and conditions of introduction of open access.

26. However open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of

current level of cross-subsidy and the fixed cost arising out of the licenseeâ??s obligation to supply. Consequent to the enactment of the Electricity

(Amendment) Act, 2003, it has been mandated that the State Commission shall within five years necessarily allow open access to consumers having

demand exceeding one megawatt.

3) Cross-Subsidy Surcharge (CSS)â?"Its rationale

27. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of

surcharge by the State Commissions. There are two aspects to the concept of surcharge â?" one, the cross-subsidy surcharge i.e. the surcharge

meant to take care of the requirements of current levels of cross-subsidy, and

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the other, the additional surcharge to meet the fixed cost of the

distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access,

who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on

two counts â?" one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such

licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge

is meant to compensate the licensee for both these aspects.

28. Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the

legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to

encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price

of supply so as to ensure that the consumers do not go out of their fold to get supply from some other source.

29. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act

makes provision of surcharge for taking care of current level of cross-subsidy. Thus, the State Electricity Regulatory Commissions are authorised to

frame open access in distribution in phases with surcharge for:

4. (vi)(a) current level of cross-subsidy to be gradually phased out along with cross-subsidies; and (b) obligation to supply.â??

30. Therefore, in the aforesaid circumstances though CSS is payable by the consumer to the distribution licensee of the area in question when it

decides not to take supply from that company but to avail it from another distribution licensee. In a nutshell, CSS is a compensation to the distribution

licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff

applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers. What is important is that a

consumer situated in an area is bound to contribute to subsidising a low end consumer if he falls in the category of subsidising consumer. Once a

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cross-subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross-subsidy within

the area. A fortiori, even a licensee which purchases electricity for its own consumption either through a â??dedicated transmission lineâ? or through

â??open accessâ? would be liable to pay cross-subsidy surcharge under the Act. Thus, cross- subsidy surcharge, broadly speaking, is the charge

payable by a consumer who opt to avail power supply through open access from someone other than such distribution licensee in whose area it is

situated. Such surcharge is meant to compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer

by reason of the consumer taking supply from someone other than such distribution licensee.

30. The Supreme Court, thereafter, noted the facts of Sesa's case and its arguments to hold in paras 31 & 32 that Sesa was liable to pay cross subsidy

surcharge. Paras 31, 32 & 47 are as under :

(4) Application of the Cross-Subsidy Surcharge principle

31. In the present case, admittedly, the appellant (which happens to be the operator of an SEZ) is situate within the area of supply of WESCO. It is

seeking to procure its entire requirement of electricity from Sterlite [an independent power producer (IPP)] (which at the relevant time was a sister

concern under the same management) and thereby is seeking to denude WESCO of the cross-subsidy that WESCO would otherwise have got from it

if WESCO were to supply electricity to the appellant. In order to be liable to pay cross-subsidy surcharge to a distribution licensee, it is necessary that

such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated and it is not necessary that such

consumer should be connected only to such distribution licensee but it would suffice if it is a â??consumerâ?? within the aforesaid definition.

32. Having regard to the aforesaid scheme, in the normal course when the appellant has entered into PPA with Sterlite, another electricity generating

company, and is purchasing electricity from the said company it is liable to pay CSS to WESCO. Admittedly under the PPA, the appellant is

purchasing his electricity from the said generating station and it is consumed by the single integrated unit of the appellant. The appellant therefore,

qualifies to be a â??consumerâ? under Section 2(15) of the Electricity Act. It is

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also not in dispute that the unit of the appellant is in the area which is

covered by the licences granted to WESCO as distribution licensees.

47. Having regard to the aforesaid factual and legal aspects and keeping in mind the purpose for which CSS is payable, as explained in detail in the

earlier part of this judgment, we are of the view that on the facts of this case it is not possible for the appellant to avoid payment of CSS to WESCO.

We, therefore, do not find any merit in this appeal which is accordingly dismissed.

31. In the case at hand also, all the petitioners would indisputably fall within the area of supply of State distribution licensee. Since the petitioners, like

Sesa, were not availing power supply from the distribution licensee, but were obtaining supply from its own generating plant, which has already lost its

captive status, they become consumer under Section 2 (15) of the 2003 Act as held by the Supreme Court in Sesa's case at paras 31 & 32. Case at

hand is, thus, squarely covered by the decision of the Supreme Court rendered in Sesa (supra).

32. Turning back to the challenge thrown by the petitioners to the validity of the impugned Regulations, it is to be seen that the Regulations only sought

to reiterate provisions of the 2003 Act particularly Section 42 (2) thereof because the petitioners have lost their captive status.

33. It would be appropriate for us to again refer to the Sesa's judgment wherein the argument raised by the Sesa, with the aid of Section 42 of the

2003 Act was that cross subsidy surcharge is payable to the distribution licensee of the area of supply only when the distribution system of such

distribution licensee is used for supply of electricity and CSS can only be levied on open access customers i.e. a consumer who has availed of or

intends to avail of open access. Thereafter, the Hon'ble Supreme Court discussed the special features of the 2003 Act, the concept and rationale of

open access and cross subsidy surcharge and eventually held in the following words in para 29 :

â??29. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the

Act makes provision of surcharge for taking care of current level of cross subsidy. Thus, the State Electricity Regulatory Commissions are authorized

to frame open access in distribution in phases with surcharge for:

4 (vi) (a) current level of cross-subsidy to be gradually phased out along with

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cross-subsidies; and (b) obligation to supply.

34. The Supreme Court further held, in categorical terms in para 30 that CSS is payable by the consumer to the distribution licensee of the area in

question when it decides not to take supply from Distribution company but to avail it from another source. It was further held that a fortiorari, even a

licensee which purchases electricity for its own consumption either through a dedicated transmission line or through open access would be liable to

pay cross subsidy surcharge under the Act.

35. The above extracts from the Sesa judgment puts a full stop to the contention of the petitioners and closes all avenues for any further argument to

challenge the reasonableness of the CSS or that the subject Regulation violates the provisions of the 2003 Act.

36. The argument that CSS is a tax should not detain us for long for the reason that the Supreme Court in Indian Aluminum Co. and Others v State of

Kerala and Others4 held (paras 27 & 28) that surcharge stands for an additional or extra charge or payment. It is a super-added charge, a charge

over and above the usual or current dues and the term 'surcharge' in substance is an addition to the stipulated rate of tariff. The nomenclature,

therefore, does not alter the position. It was further held that the expression 'surcharge' in the context of taxation means an additional imposition which

results in enhancement of the tax and the nature of the additional imposition is the same as the tax on which it is imposed as surcharge. The nature of

such imposition is the same, viz., land revenue on which it is a surcharge"". It would thus be settled law that surcharge is additional duty or tax imposed

in addition to the original levy, on the same topic.

37. Petitioners have also contended that the Regulation has been made with retrospective effect because the CSS is levied on the electricity consumed

by the petitioners in the year 2006-07. Countering the submission respondents have argued that the Regulations were already in place in the year 2005,

which was amended in the year 2007 and thereafter Regulations were again framed in the year 2011. On a reading of 2005 Regulations, it would

appear that the power to levy CSS was available with the respondents even in the year 2005, therefore, even without the amended Regulations levy is

lawful and the argument is misconceived.

38. On the basis of above analysis of the provisions of the 2003 Act and the

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Regulations as also the pronouncements made by the Supreme Court in

Sesa (supra), we must reject the challenge to the constitutional validity of the Regulation 11 (6) (b) (ii) of the 2005 Regulations as amended in 2007

and the Regulation 33 (6) (b) (ii) of the 2011 Regulations. It is accordingly rejected.

39. In the result, all the writ petitions, sans substratum, are liable to be and are hereby dismissed, leaving the parties to bear their own cost(s).

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