No/N /7/2021

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

No.16, C-1, Miller Tank Bed Area, Vasanthnagar, Bengaluru-560 052.

Dated: 11.02.2022

Present:

Sri H.M. Manjunatha	**:**	**Officiating Chairperson**
Sri M.D. Ravi	**:**	**Member**

OP No.03/2021

BETWEEN:

1. **Green Infra Wind Power Generation Limited**
   No.515 & 514, Tolstoy House,
   Tolstoy Marg New Delhi
   New Delhi-110 001.
   (Through authorized representative)

2. **M/s Karanja Industries Pvt. Ltd.**
   (RR No. HKHT-5)
   Sy. No. 106, Sindhabandagi,
   Humnabad Taluk,
   Biddar District.
   (Through authorized representative)

3. **M/s Karanja Industries Pvt. Ltd.**
   (RR No. KHT-6)
   Plot No. 1, Kolhar Industrial Area,
   Biddar District.
   (Through Authorized Signatory)

4. **M/s Ultratech Cement Ltd.**
   (RR No. MHT-42)
   Aditya Birla Group Company,
   Gingera Village,

Koppal Taluk & District-583228
(Through Authorized Signatory) **……..Petitioners**

(All the Petitioners are represented by
Senior Advoctae Shri. Sanjay Sen for Sri. Hemant Singh
for M/s Charter Law Chambers, New Delhi)

VERSUS

5. Gulbarga Electricity Supply Company
Company Limited,
Corporate Office
GESCOM, Station Road,
Kalaburagi
(Through Chairman) **… Respondent**

[Represented by Advocate Sri. Shahbaaz Husain
for Precinct Legal, Bengaluru.]

ORDER

1. The present Petition is filed under Section 9(2), 42, 57, 60, 86(1)(c), 86(1)(f) and 86(1)(k) of the Electricity Act, 2003 and seeking for the following reliefs to:

a) Declare that the Harapanahalli CGP of the Petitioner No.1 is a captive generating plant for FY 2018-19;

b) Quash the impugned letters dated 20.05.2020, 02.06.2020, 03.06.2020 and 04.07.2020, and the invoice dated 01.07.2020 [Annexure-14 (Colly)], issued by the Respondent;

c) Devise and formulate a mechanism for the purpose of ascertaining the captive status of the Petitioner's Harapanahalli Captive Generating Plant;

d) Declare that the Respondent has abused its dominant position, in terms stated in the present petition;

e) The Petitioners crave leave to claim compensation from the Respondent, through a separate petition, in the event this Commission grants prayer (d) in favour of the said Petitioners; and

f) Pass such other and further order or orders as this Commission deems fit and proper under the facts and circumstances of the present case.

2. The brief facts of the case urged by the Petitioner are as hereunder:

i. The Petitioner No.1 -Green Infra Wind Power Generation Limited (GIWPGL) is a company which owns and operates four wind based renewable power projects, including 36 MW of Harapanahalli power project which is identified as a captive generating plant in terms of a Government Order dated 04.03.2016. Power from the above-mentioned CGP was consumed by 14 captive users for their self-consumption during FY 2018-19.

ii. It is submitted that GESCOM has wrongfully imposed Cross-Subsidy Surcharge (CSS), Additional Surcharge (ASC) and Electricity Tax upon the captive users of the Harapanahalli CGP of the Petitioner No.1, for the FY 2018-19, vide letters dated 20.05.2020, 02.06.2020, 03.06.2020 and 04.07.2020, and invoice dated 01.07.2020, despite the fact that the said CGP, and its captive users, fulfilled the requirements of a

captive generating plant, as provided under Rule 3 of the Electricity Rules, 2005.

iii. The Respondent has considered wrong data for assessing as to whether the Petitioners have fulfilled the mandate of Rule 3 of the Electricity Rules, 2005. It is submitted that the Respondent has considered 23 captive users of the Petitioner No.1 in FY 2018-19, as evident from letter dated 20.05.2020 issued by the said Respondent, whereas the correct number of captive users was 14, having 18 load centers/consumption points. Further, Respondent has also considered an equity share-capital of 36.50% of the captive users in FY 2018-19, whereas the correct equity share-capital with voting rights held by the group captive consumers was 28.07%, during the said financial year. It is submitted that even after being repeatedly pointed out by the petitioner No. 1 that the data considered by the Respondent is not correct, and also after furnishing the correct data, the Respondent failed to carry out an assessment with respect to the correct data. In fact, there is no response by the Respondent to a series of letters written by the Petitioner No. 1, thereby reminding and furnishing the correct data. This evidences that the Respondent has acted with a malafide intent, and with the pre-conceived mindset to somehow declare the Petitioners as non-captive and not fulfilling the tests contained in the Rule 3, so that CSS, ASC and enhanced Electricity Tax can be imposed upon the captive users.

iv. The Petitioner No. 2 is M/s Karanja Industries Pvt. Ltd. (RR No. HKHT-5) the Petitioner No. 3 is M/s Karanja Industries Pvt. Ltd. (RR No. KHT-6), the Petitioner No. 4 is M/s Ultratech Cement Ltd. (RR No. MHT-42). The said Petitioner are companies registered in India under the provisions of the companies Act, 1956 (2013) and were the captive users of the Harapanahalli CGP for FY 2018-19.

v. The Respondent, Gulbarga Electricity Supply Company Limited ("GESCOM"), is a Government company and is a distribution licensee in terms of Section 14 read with Section 2(17) of the Act.

vi. The Respondent vide its letters dated 24.06.2016 (Annexure P-3) certified that the Harapanahalli CGP of the Petitioner No. 1 is not having any Power Purchase Agreement with the said Respondent. Further, the Respondent also concurred for wheeling of energy generated by the Petitioner No. 1 to the Petitioner No. 2 to 4 located in the Jurisdiction of the Respondent.

vii. On 25.06.2016 (annexure P-4), Bangalore Electricity Supply Company Limited (BESCOM), granted its concurrence for execution of wheeling and Banking Agreement for supply of captive power by the Harapanahalli CGP of the Petitioner No. 1 to its captive users falling within the distribution area of the above licensee.

viii. KPTCL vide its letter dated 18.07.2016 (Annexure P-5) accorded its approval for Wheeling and Banking Agreement so as to facilitate sourcing of captive power from the Harapanahalli CGP to the captive users of the said Petitioner.

ix. On 01.08.2016 (annexure P-6), KPTCL executed the Wheeling and Banking Agreement (WBA) with the Petitioner No. 1 and the concerned distribution licensees, including the Respondent, within whose jurisdiction the captive users of the said Petitioner were situated with respect to the Harapanahalli CGP. As per Article 10 of the Agreement/WBA, the term of the said Agreement is 120 months, or 10 years.

x. Respondent issued various Official Memorandums (OM) to the Petitioner No. 1 authorizing sourcing of captive Power to the captive users, in FY 2018-19.

xi. Petitioner No.1 vide its letter dated 04.02.2020 (annexure P-8) informed the respondent about the shareholding details of the 36MW Harapanahalli CGP as on 31st March, 2019, by providing a certificate issued by the Chartered Accountant, which reflected 28.07% of equity share-capital held by the captive users for FY 2018-19.

xii. The Respondent, vide its letter dated 20.05.2020(annexure P-9) wrongfully and arbitrarily, without providing any logical/legal reasoning decided to treat the captive consumption by the Petitioner No. 2 and 3 (M/s Karanja Industries Pvt. Ltd.) as non-captive for FY 2018-19, and accordingly raised the total demand of Rs. 1,10,61,700/- and Rs. 65,62,500/- respectively, towards CSS, ASC and Electricity Tax and required the aforesaid petitioners to make the payment of the said amount within 15 days from the date of issuance of the said letter.

xiii. The Petitioner No. 1 vide its aforesaid letter informed the Respondent that no data has been submitted for supporting any calculations indicating non-captive status of the said captive user i.e. Petitioner No. 2 and 3. Therefore, in the absence of documentary evidence, the Petitioner No. 2 and 3 refused to accede to the demand made in the aforesaid letter. Accordingly, the Petitioner No. 1 requested the Respondent to share the data or calculations on the basis of which the said Respondent arrived at the conclusion that the energy consumption of the Petitioner No. 2 and 3, in FY 2018-19, does not meet the criteria of captive consumption as per the provisions of the Electricity Rules, 2005. Petitioner Nos. 2 and 3 vide their letter dated 05.06.2020 (annexure P-11(colly.)), sought withdrawal of the letter dated 20.05.2020 (Annexure P-9) issued by the Respondent wrongfully levying CSS, ASC and Electricity Tax on the Petitioner No. 2 and 3. The Respondent vide its letter dated 04.07.2020 (annexure P-12) proceeded to issue disconnection notice against the Petitioner No. 3. vide the said letter, the Respondent informed the Petitioner No. 3 that in the event the payment of Rs.65,62,500/- is not made within a period of 7 days from the issuance of the disconnection notice, their connection would be disconnected. On 11.07.2020 (Annexure P-13), the Petitioner Nos. 2 and 3 again requested the respondent to withdraw its demand letter dated 20.05.2020 (Annexure P-9) on the basis of the fact that the Petitioner No. 1 provided the correct Shareholding details of its captive users vide its letter dated 25.05.2020

(Annexure P-10), and that the shareholding is as per the group captive norms.

xiv. The Respondent, vide invoice dated 01.07.2020, and letters dated 20.05.2020, 02.06.2020 and 03.06.2020 (annexure P-14 (colly.)), wrongfully and arbitrarily, without providing any logical/legal reasoning decided to treat the captive consumption by the Petitioner No. 4 i.e., M/s Ultra Tech Cement Limited as non-captive for FY 2018-19, and accordingly, raised the demand of Rs.1,96,93,427- towards CSS, ASC and Electricity Tax. Pursuant to the issuance of aforesaid letter by the Respondent, the Petitioner No. 1 vide its letter dated 05.06.2020 (annexure P-11(colly.)), informed the Respondent to make reference to the earlier letter dated 25.05.2020 (annexure P-10), whereby the petitioner No. 1 contended that no data has been submitted for supporting any calculations indicating non-captive status of the said captive user i.e. Petitioner No. 4. Therefore, in the absence of documentary evidence the Petitioner No. 4 refused to accede to the demand made in the aforesaid letter. Accordingly, the petitioner no. 1 requested the Respondent to share the data or calculations on the basis of which the said Respondent arrived at the conclusion that the energy consumption of the Petitioner No. 4 did not meet the criteria of captive consumption as per the provisions of the Electricity Rules, 2005 for the FY 2018-19.

xv. Petitioner No. 4 vide its letter dated 06.06.2020(annexure P-16) to the Respondent, reiterated that the understanding of the Respondent as

regards the shareholding of the captive users is misconceived and misplaced and as such, the Petitioner No. 4 refuted the claim of the Respondent, and further asked the said Respondent to withdraw the said demand.

xvi. Petitioner No. 4 vide its letters dated 15.06.2020 (annexure P-17), 18.06.2020(annexure P-18) and 29.06.2020(annexure P-19), requested the Respondent to withdraw its letter and confirm the same to the said Petitioner. Eventually, the Assistant Executive Engineer of the Respondent vide its letter dated 19.08.2020(annexure P-22) informed the Executive Engineer of the Respondent about the violation of the captive users as regards their shareholding. However, it was also mentioned in the above letter that the captive users have provided data to the Respondent claiming that the energy consumption pattern is not violated in any manner whatsoever.

xvii. Upon a perusal of the provisions of Section 2(8) of the Act read with Rule 3 of the Rules, it is evident that the Act and the Rules provide for the setting up of captive generating plants for the purpose of consumption. Under the Rules, the captive structure can be either through a captive generating plant established by a person having self-consumption of power, or through an association of persons, or through formation of a Special Purpose Vehicle (SPV). In the present case, the captive structure is through the SPV model.

xviii. The data provided by the Respondent to the Petitioner Nos. 2, 3, and 4, for payment of the aforesaid charges is wrongful and erroneous

owing to the fact that the said data is based on erroneous ownership / shareholding percentage. Further, there are severe discrepancies in the quantum of power sourced by the Petitioner No.1, as provided by the Respondent in its data.

xix. The Respondent completely ignored the data provided by the Petitioner No.1 vide its email dated 04.02.2020 (annexure P-8) and without considering the accurate data/ information as provided by the said Petitioner, the Respondent proceeded on the wrong premises to declare the CGP of the Petitioner No. 1 as non-captive. Further, the respondent also failed to provide the complete details and source from where it sources its data, on the basis of which the respondent proceeded to treat Petitioner no. 1 as non-captive.

xx. A part from the above, it is stated that as per Rule 3 of the Electricity Rules, 2005, the captive users have to hold minimum of 26% equity share capital with voting rights in the captive generating plant. Further, the said captive users constituting such 26% shareholding have to consume minimum 51% of the electricity generated by the captive generating plant, in proportion to their shareholding, within a variation of +10%.

xxi. It is clear from the above provision that the above said proportionate consumption has to be maintained only up to 51% of total energy generated by the captive users constitution minimum 26% of equity shareholding in the Harapanahalli CGP.

xxii. It is a settled principle of law that determination/verification of captive status can only be done by a State Commission. In this context, reference be made to the following judgments:

a. Appeal No. 270 of 2006 titled as Chhattisgarh State Power Distribution Co. Ltd. v. Shri J.P. Saboo, Urla Industries Association Ltd. & Ors. (refer Para 34 and 35); and

b. Appeal No. 116 of 2009 titled as Chhattisgarh State Power Distribution Co. Ltd. v. Hira Ferro Alloys Ltd. & Anr.

Hence, the Respondent exceeded its jurisdiction by straightaway issuing the impugned letters, and invoice, to the captive users thereby treating the Harapanahalli CGP as non-captive generating plant for FY 2018-19.

xxiii. As such, the present petition is filed under Sections 9(2), 42 (2) 4th proviso, 57, 60 and86 (1)(c), 86 (1)(f) and 86 (1)(k) of the Electricity Act, 2003, seeking quashing of the impugned communications / letters, and invoice. The Petitioners, through the present petition are also seeking declaration that the Respondent has abused its dominant position by wrongfully levying CSS, ASC and electricity tax with the sole intent to play with the market and coerce the captive users into compulsorily procuring power from the Respondent only and / or wrongfully collecting CSS, ASC and electricity tax. Accordingly, the Respondent is also liable to pay a compensation to the Petitioners against the above abuse of its dominant position in terms of Sections 57 and 60 of the Electricity Act, 2003.

xxiv. Petitioner submitted that some protocol needs to be established as to how the distribution licensees have to monitor the captive status of captive generating plant in the State. It is further submitted that the determination of liability on account of loss of captive status can only be determined by a State Commission by validating the data collected and certified by an Independent Authority, such as the Chief Electrical Inspector. As such, the data ought to be collected by the Chief Electrical Inspector in order to determine the CGP status of a particular power plant. The distribution licensees cannot at all be allowed to decide or adjudicate upon the captive status of a captive generating plant, and that if the said licensee is of the opinion that a particular power plant does not qualify as a captive generating plant, then the only option available for the licensee is to approach the State Commission for deciding the said captive status.

xxv. The above protocol was not followed by the Respondent in the present case, and the said Respondent took upon itself the adjudicatory / regulatory powers and wrongfully treated the Harapanahalli CGP of the Petitioner No. 1 as non-captive generating plant for FY 2018-19.

xxvi. It is submitted that the State Commission has the necessary jurisdiction to adjudicate the present petition. In this context, reference may be made to Section 86 (1) (f) of the Act under which a generating company, including a CGP, can file a petition for adjudication of disputes against a licensee (Respondent). Since, the levy of CSS, ASC

and Electricity Tax on the captive users is essentially on account of the illegal ground of the Respondent that the Harapanahalli CGP does not qualify as a captive generating plant for FY 2018-19, the present petition raises a dispute between the Petitioner No.1 and the said Respondent. Further, under Sections 57 read with Section 60 of the Act, the Commission has the necessary jurisdiction to decide upon the abuse of dominant position by a licensee and to provide adequate compensation.

xxvii. In view of the above, the petitioner prayed for allowing the prayer as stated above

3. In the meanwhile, the Petitioner had filed an interim application before the Hon'ble ATE with a request for granting interim relief in the matter. The Hon'ble ATE in its Order dated 01.02.2021 in DFR No. 32/2021 and IA No. 156 and 157/2021 had opined that DISCOMs not to take coercive steps of disconnection till the next date of hearing, however all other such legal dues, if any, have to be paid by the appellant. Further, the matter was taken up by the Hon'ble ATE on 10.02.2021 and the Hon'ble ATE continued the interim order till the next date of hearing on 15.03.2021. The Hon'ble ATE vide its Order dated 15.03.2021 disposed of the case since the case was listed for hearing before the Commission on 16.03.2021.

4. The Commission vide its interim Order dated 16.03.2021 directed the petitioner to deposit 25% of the demand of Rs. 196.93 Lakhs claimed by

GESCOM vide its letter/notice dated 19.01.2021 to M/s Ultra Tech Cement Ltd. (R.R.No.-MHT-42) for violating the energy consumption pattern of group captive consumers with respect to share holding pattern for FY2018-19.

5. Thus, in accordance with the Commission's Order dated 16.03.2021, the Petitioners filed a memo dated 23.03.2021 with documents reflecting the payment made to the Respondent. M/s Ultra Tech Cement Ltd. (R.R.No.-MHT-42) and Karanja Industries Pvt. Ltd. (HKHT-5 and KHT-6), submitted Rs. 49,23,357.00, Rs. 27,65,425.00 and Rs. 16,40,625.00 respectively.

6. Upon issuance of the notice, the Respondent appeared through their Counsel and submitted the detailed statement of objections dated 01.06.2021 and the gist of the points urged by the Respondent are as follows:

   i. The Respondent had issued letter dated 20.05.2020 to the Petitioners nos. 2-4 seeking payment of the Cross Subsidy Surcharge and Electricity tax for the reason that the Petitioner's allocation of energy was not in proportion to its equity as required under Rule 3 of the Electricity Rules, 2005. The Petitioners have filed the instant petition challenging the said letter and the resultant demands of the Respondent.

   ii. The Petitioners No. 2& 3 have collectively alleged that the impugned letter of this Respondent at Annexure P-9 of the Petition, has unjustly and without any substance deprived petitioner No.2 to 3 of the

captive user status and that they have been consequentially charged an amount of Rs.110.61 lakhs and Rs.65.62 lakhs, towards CSS, ASC and electricity tax. Similarly, the Petitioners have also alleged that the Respondent has issued letter at Annexure P-14, against Petitioner No.4 and has charged Rs.196.93 Lakhs towards CSS, ASC and Electricity Tax. Such contentions of the Petitioners are hereby denied as false and the Petitioner is put to strict proof of the same.

iii. The Respondent submits that the Petitioners No.2 to 4 have transgressed Rule 3 of Electricity Rules, 2005 by consuming energy that is not in proportion to their equity within the captive group and such variance exceeds the permissible 10% limit.

iv. The Respondent submits that the Electricity Rules, 2005, stipulate the requirement of captive generating plant (CGP) and also provide for conditions that shall always be adhered to be the Captive generating plant in order to maintain its status.

v. The three main requirements for a plant to be classified as CGP and the same are listed below:

- A minimum of 26% of the ownership of the entity owning the CGP should be held by its captive users;
- A minimum of 51% of the aggregate electricity generated by CGP should be utilized by the captive users on an annual basis;
- The usage of electricity by captive users shall be proportionate to their shareholding and shall be within a variation not exceeding 10%.

vi. The instant Petition pertains to compliance of the third condition (hereinafter referred to as the "Rule of Proportionality") listed above by the Petitioners in order to be classified as the captive users. For better understanding, the said condition is explained by way of an example as under:

- If A is a generating unit and B is a captive user of the generating unit, then B shall consume energy from the captive plant in proportion to the shares held by it within the captive group. In this example, if the captive group holds 30% equity and B holds 3% equity, then the equity of B in proportion to the captive group would be 10%. (10% of 30 is equal to 3). In this case, B is eligible to consume only 10% of the total captive energy in accordance with the aforestated condition. B is allowed a variation of 10%, which means, B can consume anywhere between 9% to 11%, to comply with Rule 3 of the ER."

vii. The respondent verified the shareholding pattern of Petitioner no. 1 in order to ensure that all the requirements of CGP are met with. Upon verification, it was seen that Petitioner No. 2 to 4 have been drawing power purportedly as captive energy in transgression of the rule that requires the captive users to draw power in proportion to their equity. Accordingly, on 20.05.2020, the Respondent addressed letters to the Petitioners No. 2 to 4, wherein, the transgression of the said rule was highlighted and in consequence, the charges towards CSS and Electricity Tax were claimed.

viii. The Petitioner has alleged that the aforesaid letters of the Respondent, do not substantiate the transgression of rules and merely claim charges towards CSS and Electricity Tax. Such allegations are denied as false. The Respondent in its letter has made it clear that Petitioner No. 2 to 4 are not considered captive users for want of adherence to the afore-stated rule of proportionality. Further, in the annexure to the said letter the Respondent highlighted the shareholding pattern and the disproportionate consumption of energy by Petitioner No. 2 to 4. In the said letter the respondent has highlighted that:

- Petitioner No. 2 holds 2.05% of the equity in Petitioner No. 1 and consumes 7.01% of the energy. It is further seen that the Captive group holds a total of 35.60% of the total equity. Therefore, it can be safely deduced that the Petitioner No.2 holds 5.76% of equity within the captive group and shall thus consume energy within 5.18% to 6.33% of the total energy in order to comply with the applicable rule. However, as stated supra, the Petitioner No.2 has consumed 7.01% which is in excess of the higher limit of 6.33% and thus is liable to be considered as non-captive.
- Petitioner No.3 holds 1.02% of the equity in Petitioner No.1 and consumes 3.93% of the energy. It is further seen that the Captive group holds a total of 35.60% of the total equity. Petitioner No. 3 holds 2.87% of the equity within the captive group and shall thus consume energy between 2.58% to 3.15% of the total energy in

order to comply with the applicable rule. However, as stated supra, the Petitioner No.2 has consumed 3.93% which is in excess of the higher limit of 3.15% and thus is liable to be considered as non-captive.

Thus, the respondent has proceeded in accordance with law in issuing the impugned letters.

ix. The Petitioner avers that the consideration of equity of the captive group within the Petitioner No.1 by the Respondent is erroneous and states that the correct equity of the captive group stands at 28.07%. The Petitioner has addressed several letters to the Respondent disputing the shareholding pattern of Petitioner No.1. Subsequently thereto, a meeting was held between the Respondent and the Petitioner No.1 on the issue of shareholding pattern and in the said meeting the Petitioner No.1 undertook to provide exact shareholding pattern as per the MCA records for FY 2018-2019.

x. The Respondent on 22.02.2021 addressed a letter to Petitioner No. 1 stating that shareholding pattern as per MCA record has not been submitted and once again a request was placed in this regard. Thereafter, on 10.03.2021, the Petitioner wrote to Respondent by enclosing a list of shareholders of Petitioner No.1. In the said list, signed by the director of Petitioner No.1, it has been stated that the captive group holds 27.74% equity in Petitioner No.1. It has been further stated

that Petitioner No.2 & 3, collectively hold 2.03% of equity and petitioner No.4 hold 2.25% of the equity.

xi. The said list advanced by the Petitioner No.1 is only verified by its director and the same cannot be considered to be authentic as per the records of MCA. In any event, even considering the list advanced by the Petitioner No.1, it is seen that the Petitioner No.2 to 4 have disproportionately consumed energy and are thus liable to be treated as non-captive. Thus, from the calculation sheet of the respondent, the following can be concluded:

- Petitioner No. 2 & 3 holds 2.03% of the equity in Petitioner No.1 and consumes 10.94% of the energy. It is further seen that the Captive group holds a total of 27.74% of the total equity. Therefore, it can be safely deduced that the Petitioner No. 2 & 3 hold 7.32% of equity within the captive group and shall thus consume energy between 6.59% to 8.05% of the total energy in order to comply with the applicable rule. However, as stated supra, the Petitioners No.2 & 3 have consumed 10.94% which is in excess of the higher limit of 8.05% and thus are liable to be considered as non-captive.
- Petitioner No.4 holds 2.25% of the equity in Petitioner No.1 and consumes 12% of the energy. It is further seen that the Captive group holds a total of 27.74% of the total equity. Therefore, it can be safely deduced that the Petitioner No.4 holds 8.11% of equity within the captive group and shall thus consume energy

between 7.30% to 8.92% of the total energy in order to comply with the applicable rule. However, as stated supra, the Petitioner No.4 has consumed 12% which is in excess of the higher limit of 8.92% and thus is liable to be considered as non-captive.

Thus, it becomes indisputable that the Petitioner nos. 2-4's consumption of energy is not in proportion to their equity as required under Rule 3 of Electricity Rules, 2005.

xii. The Petitioner has produced a CA certificate at Annexure P-8, purporting to be the evidence of shareholding pattern of Petitioner No.1 as on 31.03.2019. The said CA certificate states that the group captive units to be holding 28.07% of the total equity and further states that Petitioner No. 2 & 3 hold 3.07% of equity and Petitioner No.4 holds 3.41% of equity. This is in stark contrast to the list of shareholders furnished by the director of Petitioner No.1 (Annexure R-2), wherein the group captive units are shown to be holding 27.73% equity. The Petitioner at Annexure P-23 has reiterated the shareholding pattern of the CA and has stated that group captive units hold 28.07%of the total equity. Such data furnished by the Petitioner No.1 runs contrary to the annual return form (Form No. MGT-7) filed by the Petitioner No.1 with MCA for FY 2018-19. Since, a bare perusal of the form under the head "shareholding pattern" shows that the group captive units hold 27.71% of the total equity and not 28.07% as claimed by the Petitioner.

xiii. Therefore, the instant petition is marked with misrepresentation and suppression of facts and for want of accurate data pertaining to the

issue at hand, the instant petition is liable to be dismissed. In any event, even going by the data furnished by the Petitioner to the Respondent, it has been established at Annexure R-2, that the Petitioners No.2 to 4 have consumed energy which is not in proportion to their equity.

xiv. In view of the above facts and by considering the data furnished by the Petitioner itself, it has become clear that the consumption of energy by the Petitioner No. 2 to 4 is not in proportion to their equity and such variance exceeds the permissible 10%. Thus, the Petition is liable to be dismissed.

7. The Petitioner in its rejoinder to the replies filed by the respondent denied and disputed all the averments, contentions and allegations raised by the Respondent. The petitioner submitted that the Respondent in its statement of objections has raised the following broad arguments:

- Allocation and consumption of energy by the captive users from the CGP of Petitioner No.1 was not within the proportion laid down under Rule 3 of the Electricity Rules, 2005;
- There is a discrepancy between the equity shareholding claimed in the petition, as compared to the equity shareholding furnished with the Registrar of Companies, Ministry of Corporate Affairs, in terms of the form MGT-7.

The petitioner in its rejoinder submitted that according to Section 2(8) of the Electricity Act, 2003, it is evident that a captive generating plant means a power plant set up by any person to generate electricity for his

own use. Further, a captive user sourcing its power from the captive generating plant is exempted from payment of cross subsidy surcharge and additional surcharge. With respect to additional surcharge, it is stated that the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal Nos. 311 of 2018 and 315 of 2018 titled as M/s. JSW Steel Ltd. & Ors. V. MERC and Anr., has held that additional surcharge is not leviable when power is sourced by captive user(s) from a captive generating plant as there is no concept of 'sale' in such a transaction.

Further, from the reading of the Rule 3 of the Electricity Rules, 2005, the following principles can be ascertained:

- The captive user(s) have to hold a 'minimum' of 26% of equity shareholding along with voting rights in the CGP; and
- The captive user(s) have to collectively consume a 'minimum' of 51% of the aggregate electricity generated by the CGP.

It is relevant to state that the test of proportionate consumption is not applicable to a captive structure based on the SPV model, as is the issue in the present case. It is submitted that the SPV model under the aforesaid Rules is provided under Rule 3(1)(b), which does not provide for any adherence to the proportionality principle, as provided under the second proviso of the Rule 3(1)(a). Respondent cannot at all seek to apply the proviso, which is an exception to Rule (1)(a), to Rule 3(1) (b). It is further submitted that the Hon'ble ATE in the Kadodara judgment, being Appeal No. 171, 172, 10 of 2008 and Appeal No. 117 of 2009 had

held that an SPV is equivalent to an 'association of persons', and further held that the test of proportionality will have to be fulfilled by the SPV.

The aforesaid view of the Hon'ble ATE in the Kadodara judgment has been reviewed by the Hon'ble Tribunal in Appeal No. 131 of 2020, titled as Tamil Nadu Power Producers Association v. TNERC and Others, wherein vide judgment dated 07.06.2021, the following has been held:

"12.16 From the principles drawn from the above judgments, we observe that TNERC vide the impugned order particularly in para 6.4.4 has endeavoured to add an intention to Rule 3(1)(b) which was otherwise absent from its construction. By holding that the second proviso to Rule 3(1)(a) is applicable to Rule 3(1)(b) thereby equating a SPV with an AOP, the impugned order has committed an error in interpreting the said Rule in the manner in which it has been enacted by the Parliament. We also concur with the principles laid down in the cases of Kailash Nath (supra) and Sanjay Kumar (Supra) that a proviso is an exception and it cannot travel beyond the provision to which it is a proviso. We therefore, find that the same are applicable in the facts of the present Appeal. It is settled law that the function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. Applying this clear jurisprudence, TNERC could not have applied the second proviso to Rule 3(1)(a) to Rule 3(1)(b). Hence, the requirement of consuming minimum of 51% electricity generated on an annual basis and the requirement of the captive users holding 26% of the ownership of the plant in aggregate, and such consumption being in proportion to the shares of ownership of the power plant can only be applicable to power plants set-up by an AOP but cannot be applied to power plants set-up by SPV.

……

12.19 In line with the approach adopted by us in the above judgment, wherein the previous judgment of this Tribunal holding that DPC is part of Non-Tariff Income, was declared by us as 'per incuriam', we proceed to apply the same principle in the present appeal. We opine that the decision of this Tribunal in Kadodara judgment (supra) is given without taking into consideration the provisions of Rule 3 of the Rules to the extent that Second Proviso to Rule 3(1)(a) being an exception under law could not have been applied to Rule 3(1)(b). The said decision was also given in ignorance of the judgments referred by the Appellant, namely B.N. Elias. (1936) I.L.R. 63 Cal. 538; CIT v.

LaxmidasDevidas (1937) 39 BOM LR 910; and Dwaraknath Harishchandra Pitale, [1937] 5 ITR 716 (Bom), RamanlalBhailal Patel v. State of Gujarat, (2008) 5 SCC 449, CIT v. Buldana Distt. Main Cloth Importer Group, (1961) 1 SCR 181 and Mohd. Noorulla v. CIT, (1961) 3 SCR 515 which establish that an 'association of persons' is a recognized tax entity and not an incorporated entity. We cannot permit unreasonable hardship to be caused to a captive generating plant, set up by a special purpose vehicle, by applying the above judgment of this Tribunal in ignorance of vital facets governing the framework of Rule 3 and also important judicial decisions as noted above. In the light of this, we have no hesitation to hold that the decision of the Tribunal in Kadodara judgment (supra) to the extent it equates a SPV and an AOP is 'per incuriam'. Consequently, the decisions referred to by the Respondents for the aforesaid issue do not lend any assistance. Therefore, the directions contained under 6.4.4, 6.4.5 and 7.6.4 of the impugned order are set aside." (Underline Supplied)

In view of the aforesaid, it is pertinent to note that the Respondent cannot at all aver that any of the captive users of the Petitioner No. 1 are not consuming power in proportion to their shareholding, within a variation not exceeding 10%. After the aforesaid judgment passed by the Hon'ble ATE in Appeal No. 131 of 2020, it has been clarified that the principle of proportionate consumption is not applicable upon Petitioner No.1 and its captive users. Accordingly, the Respondent cannot seek imposition of CSS on account of the alleged violation of the proportionate principle.

Hence, in light of the aforesaid judgment, the only requirement to the fulfilled by the captive users in SPV Model, as in the present case, is that the said users collectively own a minimum of 26% equity shareholding with voting rights, and the said users collectively consume 51% of the

electricity generated by the CGP, with no requirement of proportionate consumption whatsoever.

In addition, it has further been held in the above judgment that there is no requirement of payment of CSS by any defaulting captive users, if the rest of the captive users in a CGP fulfil the aforesaid minimum requirements of 26% shareholding and 51% of consumption in terms of Rule 3 of the Rules. In other words, even if one or two captive users duly fulfil the requirements under Rule 3, then also CSS and Surcharge cannot be imposed on such defaulting captive users.

> *"14.6 We have considered the submissions of the parties and agree with the arguments advanced on behalf of the Appellant on the present issue. In the scheme of Rule 3 of the Rules and in light of the decisions referred in Appeal No. 252 of 2014 and Appeal No. 316 of 2013, we have already settled this aspect that the requirement of 26% shareholding and 51% captive consumption are the minimum requirements to be fulfilled by a set of captive users, and once the same is done, the rest of the captive users not fulfilling the above conditions will have no impact to the overall captive structure. As such, we have no hesitation in holding that as per the aforesaid judgments, there cannot be any liability to make payment of CSS by defaulting captive users if the rest of the captive users fulfil the minimum requirements of 26% shareholding and 51% of consumption.*
>
> *14.7 Hence, we hold that the directions passed in Paras 6.6.3 and 7.8.2 have been done so in disregard of Rule 3 of the Rules and our judgments in the aforesaid appeals. Thus, these directions cannot be sustained under law and are hereby set-aside. We also hold that there is no requirement of payment of CSS by any defaulting captive users, if the rest of the captive users in a CGP fulfil the minimum requirements of 26% shareholding and 51% of consumption in terms of Rule 3 of the Rules."*

The aforesaid issue has been dealt by the Hon'ble ATE in Appeal No. 02 of 2018 and 179 of 2018, titled as M/s Prism Cement Limited v. MPERC and Others.

"9.6 It is clear from the Act, and Rules as also from the above cited Judgment of Hon'ble Supreme Court that to qualify as 'captive generating plant' under Section 2(8) read with Section 9 of the Act and Rule 3 of the Rules, a power plant has to fulfil two conditions;

a) firstly, 26% of the ownership of the plant must be held by the captive user(s); and
b) secondly, 51% of the electricity generated in such plant, determined on annual basis, is to be consumed for captive use by the captive user.

Upon fulfilment of the aforesaid conditions determined on an annual basis, the power plant qualifies as a captive generating plant. It is also clear that the Rules provide for determination of the status of the CGP on an annual basis at the end of the financial year. Rule 3 itself recognizes that the status of a power plant is dynamic i.e. a power plant can be a CGP in a particular year but can lose such status in any
subsequent year if the twin-conditions are not satisfied and thereafter again qualify as a CGP if the twin-conditions under Rule 3 are satisfied in any particular year.

9.11 So far as the Captive User is consuming more that 51% of the aggregate generation from the Unit-1, Rule 3 does not provide for any restriction as to where the captive generating plant can supply the balance 49% of its generated electricity, and such conditions cannot be read/inserted into the Rules, where no such condition exists." (Underline Supplied)

Reference be further made to the Kadodara judgement (Supra) of the Hon'ble ATE, wherein it was held as follows:

"15. If a company which is a special purpose vehicle is one person then all that is necessary is that this company should consume 51% of the generation. However, if it is treated as association of persons apart from a condition of consuming minimum 51% of its generation the three shareholders will also have to consume 51% of the generation in proportion to their ownership in the power plant." (Underline Supplied)

In view of the principles laid down herein above, the Respondent cannot base its case on the fact that there cannot be excess consumption, beyond 51% within a variation of 10%, by the captive users.

In the present case, the Petitioner has provided, by way of a certificate issued by the Chartered Accountant, that it had equity shareholding of 28.07% by the captive user(s) for FY 2018-19. The said equity shareholding is with respect to the Harapanhalli captive power plant / unit of the Petitioner No.1, while in the Registrar of Companies (ROC), Ministry of Corporate Affairs (MCA), the petitioner No.1 provided the equity shareholding of the Petitioner No. 1 company as a whole, which includes the above Harapanhalli project. As such, the contention of the Respondent that there is some kind of discrepancy in the equity shareholding of the Petitioner No. 1 is completely erroneous. Further the consumption of such captive user(s) was in proportion to their shareholding (i.e., within $\pm$10%) with respect to 51% of the electricity generated by the CGP. The Petitioner has submitted a chart detailing the consumption pattern of the captive users of the Petitioner no.1 in FY2018-19 with the Petition and from perusal of the data provided by the Petitioner, it is evident that the captive users of the Petitioner No. 1 have consumed in excess of 90% electricity generated from the CGP in proportion to their shareholding, within the variation of $\pm$10%. Thus, it is

again clarified that the Petitioner no. 1 adhered to the proportionality principle only because the same was mandated in the Kadodara judgement which has now been held to be *per incuriam* by the Hon'ble ATE in its judgment dated 07.06.2021 in Appeal No. 131 of 2020, titled as Tamil Nadu Power Producers Association v. TNERC and Others, to the extent of such proportionate consumption. Hence, even though the proportionality test is not applicable in the present captive model based on SPV, still the Petitioners have adhered to the said principle. Further, the captive user(s) are permitted to consume electricity more than 51% as there is no bar, and in fact, Rule 3 permits such excess consumption. Therefore, once the Petitioner fulfils the aforesaid minimum requirement, the respondent cannot at all oppose the consumption of electricity over and above 51%.

The Petitioner has also relied on the judgement dated 17.05.2016 of the Hon'ble ATE in Appeal No. 316 of 2013 in M/s Sai Wardha Power Co. Ltd. Vs. MERC and Ors. had held the following:

> *"15.2) This Appellate Tribunal vide judgment dated 22.09.2009 in Appeal No.171 of 2008, Appeal No. 172 of 2008, IA No. 233 of 2008, IA No. 234 of 2008, Appeal No.10 of 2008 and Appeal No. 117 of 2009 in the matter of Kadodara Power Pvt. Ltd. & Ors. Vs. Gujarat Electricity Regulatory Commission & Anr. while dealing with the situation whether the provisions of Rule 3 of Electricity Rules 2005 would apply to a CGP which is a SPV, after dealing with all the relevant provisions of CGP and requirement of Rule 3 with reference to SPV having dealt with minimum 51% of total consumption by a captive consumption of the CGP and 21% shareholding in the ownership of the CGP clearly held that the provisions of Rule 3 of Electricity Rules 2005 would fully apply to an SPV and both the requirements of minimum 51% consumption of total generation of electricity and shareholding minimum 26% in the ownership of the CGP are required to be fulfilled by any CGP in order*

to successfully claim the benefit of Rule 3 of Electricity Rules 2005." (Underline Supplied)

It is further submitted that the Respondent is an interested party, as any failure to fulfil the principles laid down in Rule 3 would enable the said Respondent to levy and collect cross subsidy surcharge, additional surcharge and enhanced electricity tax. Therefore, the Respondent has a vested interest in arbitrarily holding that a CGP has failed the tests contained under Rule 3, thereby getting entitled to claim the aforesaid charges, as has happened in the present case. In the above context as well, reference made to the following findings in the judgment of the Hon'ble ATE dated 07.06.2021 in Appeal No. 131 of 2020 in Tamil Nadu Power Producers Association v. TNERC and Others:

"10.16 We are impressed by the submission of learned Senior Counsel appearing on behalf of the Appellant, that in the present case, vesting the power and function to verify captive status upon the Respondent No. 2 would in fact be permitting the said Respondent to act as a judge in its own cause, which in turn would lead to dilution of the principle of fair play and transparency. We place reliance in the decisions of Uma Nath Pandey and Ors (supra) and J Mohapatra and Co. &Anr. (supra). We have also been taken to the decisions rendered by this Tribunal in the case of J.P. Saboo (supra) and Hira Ferro Alloys (supra) to construe that verification of captive status is to be done by the concerned Commission.

10.17 We have also considered the contention of the Respondents that the issue of appointment of Respondent No. 2 as a verification authority has already been decided by the Hon'ble Madras High Court. We have also gone through the relevant paragraphs of the order dated 09.10.2018 passed by the said High Court. We note that placing reliance on paragraph No. 10 (v), the Respondents have contended that Respondent No. 2 herein was permitted to make verification of captive status of CGPs, captive users and the said direction has attained finality. However, it is important to note that at Paragraph No. 10 (i) the Hon'ble High Court has specifically left open the issue of jurisdiction and power of Respondent No. 2 to verify and

determine CGP status. We have no doubt that the direction contained under Para 10 (v) was not a final direction but was an interim arrangement. TNERC in terms of the direction in Para 10 (i) was mandated to adjudicate this issue in an independent and an efficient manner. We are not impressed by the submissions of the Respondent that there are approximately 7000-10,000 captive users in the State of Tamil Nadu and a majority of them have evaded their liability in terms of payment of CSS and ASC. We note that this submission is not a relevant issue in the present Appeal nor was considered in the impugned order by TNERC. The impugned order only relates to formulation of procedure for verification of status of CGPs and captive users in the State of Tamil Nadu and the Respondents before us
cannot be permitted to improve upon their case. In the present Appeal we are not to decide the liability when certain entities do not furnish data, rather the present Appeal is about deciding as to how verification and documentation needs to be done. As such, we are of the view that once decision on the procedure of verification and documentation is made, then if certain entities do not comply with our directions, the Respondent No. 2 would be free to initiate appropriate proceedings before TNERC against such entities.

10.18 Thus, we are unable to accept the contentions of the Respondents on this issue and set aside the directions of TNERC contained in paragraphs 6.1.4 to 6.1.6 and 7.9.6 to 7.9.10 in the impugned order. <u>However, we hold that Respondent No. 2 can be appointed for undertaking an exercise of collecting and verifying data for the purpose of verification of captive generating plant status in the State of Tamil Nadu, without the powers to itself take any coercive action against any CGP/Captive User(s). It is clarified that any action to be initiated against the CGP/Captive User(s) regarding its captive status or for recovery of CSS, as per law, needs to be done through appropriate proceeding initiated before the Respondent No.1 Commission</u>." (Underline Supplied)

Hence, as per the aforesaid judgment, there is no jurisdiction available with the Respondent to unilaterally impose any CSS or other charges or take any coercive action pursuant to any alleged violation of the tests contained under Rule 3, without final adjudication by the appropriate State Regulatory Commission. As such, the power to verify the captive status of a CGP/ captive user is vested solely with the Commission, and

that the Respondent illegally attempting to assume jurisdiction, where it has none qua verification of captive status of the CGPs / Captive Users.

8. We have heard the learned counsel for the parties. From the pleadings and the written/oral submissions made by the parties, the following issues arise for our consideration:

Issue No. (1): Whether the Petitioner No. 1 Green Infra Wind Power Generation Limited (Green Infra) proves that it is a captive generating plant and the other Petitioners as its captive users as per the Rule 3 of the Electricity Rules 2005 for FY2018-19?

Issue No. (2): Whether the Respondent has followed proper procedure for verification of the captive status of the Petitioners as contemplated under Section 2(8) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005?

Issue No. (3): What Order?

9. Since issues No. 1 and 2 are related to the provisions of the Electricity Act, 2003 & Rules, 2005 regarding the captive status, they are considered for answering together:

a) **Issue No. 1: Whether the Petitioner No. 1 Green Infra Wind Power Generation Limited (Green Infra) proves that it is a captive generating plant and the other Petitioners as its captive users as per the Rule 3 of the Electricity Rules 2005 for FY2017-18?**

b) **Issue No. 2: Whether the Respondent has followed proper procedure for verification of the captive status of the Petitioners as contemplated under Section 2(8) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005?**

i. It is necessary to understand the definitions and Rules governing the captive status under the Electricity Act, 2003 and Electricity Rules, 2005 before proceeding to analyze the issues. Section 2(8) of the Electricity Act 2003 defines a captive generating plant. Section 9 defines the rights and duties of captive generating plants. Rule 3 of the Electricity Rules, 2005 specifies the conditions to be fulfilled with respect to share-holding pattern and consumption pattern in order to be qualified as captive generator/users. Thus, any generating plant has to be established in accordance with Section 2(8) of the Electricity Act, 2003 and has to fulfil conditions under Rule 3 of the Electricity Rules, 2005 with respect to share-holding pattern and consumption pattern in order to be qualified as a captive generator/users. Section 2(8) and Section 9 of the Electricity Act, 2003 are enunciated below:

"Section 2(8) "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association;

…….

Section 9. (Captive generation):

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

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

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

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

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central

Transmission Utility or the State Transmission Utility, as the case may be:

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

ii. A generating company established under Section 2(8) has to comply with provisions under Rule 3 of the Electricity Rules, 2005 with respect to holding of equity shares and consumption of electricity by its shareholders to qualify as a captive plant. Rule 3 of the Electricity Rules, 2005 is as follows:

"3. Requirements of Captive Generating Plant.-

(1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless-

(a) in case of a power plant -

(i) not less than twenty-six percent of the ownership is held by the captive user(s), and

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

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under

paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society: Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

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

Explanation:-

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

(2) the equity shares to be held by the captive user(s) in the generating station shall not be less than twenty-six per cent of

the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

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

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

Explanation.- (1) For the purpose of this rule.-

a. "Annual Basis" shall be determined based on a financial year;

b. "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;

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

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

Thus, for any generating unit/plant (established under Section 2(8) of the Electricity Act, 2003) to qualify as a 'captive generating unit/plant' for any financial year, it has to satisfy the following conditions as specified under the Electricity Rules, 2005 with regards to consumption and share-holding pattern on an annual basis:

(i) not less than twenty-six percent of the ownership is held by the captive user(s), and

(ii) not less than fifty-one percent of the aggregate electricity generated in such plant, determined on an annual basis, consume electricity in proportion to their shares in ownership of the power plant within a variation not exceeding ten per cent.

iii. Thus in view of the above discussion, it is to be analyzed whether ESCOMs have correctly assessed the captive status of the generating plant of Petitioner No. 1 and its consumers in accordance with the Rule 3 of the Electricity Rules, 2005. Before answering the above issue, it needs to be clarified whether the ESCOMs have the authority to assess the captive status of the generating plant of Petitioner No. 1 and its consumers. It may be noted that Section 42 of the Electricity Act, 2003, provides the conditions for grant of Open Access by the ESCOMs. Section 42 of the Electricity Act, 2003 is enumerated below:

> *"Section 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 1[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:

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

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

Provided also that the State Commission shall, not later than five years from the date 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."

iv. Thus, Section 42 of the Electricity Act, 2003 exempts a captive generating plant from payment of CSS for carrying the electricity to the destination of

his own use. In order to qualify for getting exemption from paying cross-subsidy surcharge under Section 42 of the EA, 2003, a generating company has to qualify as a captive generating company under Rule 3 of Electricity Rules, 2005 to claim the benefits in terms of reduced CSS extended under Section 42 of the Electricity Act, 2003.

Further, the Hon'ble ATE in its Order dated May 18, 2010 in Appeal No. 116 of 2009 and IA No. 218 and 219 of 2009 in the matter of Chhattisgarh State Power Distribution Co. Ltd. V/s. Hira Ferro Alloys Ltd. and Others on whether a State Commission can determine the captive status of generators/consumers had held that a State Commission has the jurisdiction to determine the status of captive generating plant which in turn will determine whether or not surcharge is payable. The relevant part of the judgement is reproduced below:

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

determination of tariff and charges payable by the consumers in the State.

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

v. Further, with regards to monitoring of Group captive consumers by the ESCOMs, the Hon'ble ATE in its Order dated 7th June, 2021 in Appeal No. 131 of 2020 & IA Nos. 425, 426, 1210 & 1215 of 2020 in the matter of Tamil Nadu Power Producers Association Versus Tamil Nadu Electricity Regulatory Commission and Others had stated as follows:

"*10.15 We have no doubt that Section 97 of the Act permits the appropriate Commission to delegate such of its powers and functions except the power to adjudicate disputes under Sections 79 & 86 and power to make Regulations under Sections 178 or 181. However, we cannot lose sight of the fact that it is a settled principle that any action undertaken by a quasi-judicial body, which includes delegation of power by the Commission to any authority, should not wither away the underlying foundation of transparency, unbiasedness and fair play.*

Vesting critical functions like verification of status of CGPs, captive users in the State of Tamil Nadu by the Commission upon an authority which can be a direct beneficiary of such process, cannot be said to be free and fair on the face of it. In fact, during the course of arguments, Learned Senior Counsel appearing on behalf of the Appellant, for academic purposes, also apprised us of the fact that certain captive users have been denied open access under Section 9 of the Act without any material cause. We do not wish to dwell upon the said submission, since it is not an issue in the impugned order and the said person always has a remedy under law for such grievance.

10.16 We are impressed by the submission of learned Senior Counsel appearing on behalf of the Appellant, that in the present case, vesting the power and function to verify captive status upon the Respondent No. 2 would in fact be permitting the said Respondent to act as a judge in its own cause, which in turn would lead to dilution of the principle of fair play and transparency. We place reliance in the decisions of Uma Nath Pandey and Ors (supra) and J Mohapatra and Co. & Anr. (supra). We have also been taken to the decisions rendered by this Tribunal in the case of J.P. Saboo (supra) and Hira Ferro

Alloys (supra) to construe that verification of captive status is to be done by the concerned Commission.

10.17 We have also considered the contention of the Respondents that the issue of appointment of Respondent No. 2 as a verification authority has already been decided by the Hon'ble Madras High Court. We have also gone through the relevant paragraphs of the order dated 09.10.2018 passed by the said High Court. We note that placing reliance on paragraph No. 10 (v), the Respondents have contended that Respondent No. 2 herein was permitted to make verification of captive status of CGPs, captive users and the said direction has attained finality. However, it is important to note that at Paragraph No. 10 (i) the Hon'ble High Court has specifically left open the issue of jurisdiction and power of Respondent No. 2 to verify and determine CGP status. We have no doubt that the direction contained under Para 10 (v) was not a final direction but was an interim arrangement. TNERC in terms of the direction in Para 10 (i) was mandated to adjudicate this issue in an independent and an efficient manner. We are not impressed by the submissions of the Respondent that there are approximately 7000-10,000 captive users in the State of Tamil Nadu and a majority of them have evaded their liability in terms of payment of CSS and ASC. We note that this submission

is not a relevant issue in the present Appeal nor was considered in the impugned order by TNERC. The impugned order only relates to formulation of procedure for verification of status of CGPs and captive users in the State of Tamil Nadu and the Respondents before us cannot be permitted to improve upon their case. In the present Appeal we are not to decide the liability when certain entities do not furnish data, rather the present Appeal is about deciding as to how verification and documentation needs to be done. As such, we are of the view that once decision on the procedure of verification and documentation is made, then if certain entities do not comply with our directions, the Respondent No. 2 would be free to initiate appropriate proceedings before TNERC against such entities.

10.18 Thus, we are unable to accept the contentions of the Respondents on this issue and set aside the directions of TNERC contained in paragraphs 6.1.4 to 6.1.6 and 7.9.6 to 7.9.10 in the impugned order. However, we hold that Respondent No. 2 can be appointed for undertaking an exercise of collecting and verifying data for the purpose of verification of captive generating plant status in the State of Tamil Nadu, without the powers to itself take any coercive action against any CGP/Captive User(s). It is clarified that any action to be

initiated against the CGP/Captive User(s) regarding its captive status or for recovery of CSS, as per law, needs to be done through appropriate proceeding initiated before the Respondent No.1 Commission."

vi. Thus, it can be construed from the above judgement of the Hon'ble ATE that the ESCOMs can be appointed by the Commission under the power conferred under Section 97 of the EA, 2003 for undertaking an exercise of collecting and verifying data for the purpose of verification of captive status of a generating plant in the State. However, initiating any action against any CGP/Captive User(s) regarding its captive status or for recovery of CSS, as per law, needs to be done through appropriate proceeding initiated before the Commission.

vii. Accordingly, it is opined that the ESCOMs have to collect and verify the data of generating plants claiming captive status and submit it to the Commission for verification and can issue provisional demand notices to the generators/consumers flouting the captive status. Any action against any CGP/Captive User(s) for recovery of CSS, additional Surcharge, enhanced electricity tax, etc., as per law, needs to be done through appropriate proceeding initiated before the Commission.

viii. Now, again coming back as to whether the ESCOMs have correctly assessed the captive status of the generating plant of Petitioner No. 1 and

its consumers in accordance with the Rule 3 of the Electricity Rules, 2005, it is to be assessed whether Petitioner No. 1 Green Infra Wind Power Generation Limited satisfies the conditions of Captive power plant as defined under Section 2(8) of the Electricity Act, 2003. The Commission in OP 14 of 2019 (Green Infra Wind Power Generation Limited and Ors. Versus Bengaluru Electricity Supply Company Limited) and OP 01 of 2020 (Green Infra Wind Power Generation Limited and Ors. Versus Mangalore Electricity Supply Company Limited) had analysed the share-holding pattern of the Petitioner No. 1 at the time of commissioning of the Project. Now for determining the exact shareholding pattern to be considered for ascertaining the captive/group captive status of the consumers for FY2018-19, the Commission has relied on the Judgement of the Hon'ble ATE dated 7th June, 2021 in Appeal No. 131 of 2020 & IA Nos. 425, 426, 1210 & 1215 of 2020 in the matter of Tamil Nadu Power Producers Association Versus Tamil Nadu Electricity Regulatory Commission and Others which states that the verification of the tests contemplated under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) can only be done annually, i.e. with respect to the shareholding existing at the end of the financial year. The relevant portion of the Judgement of the Hon'ble ATE is enunciated below:

> *"11.19 The short question which arises next is, when verification under Rule 3(1)(a)(ii) has to be done along with the verification mandated under Rule 3(1)(a)(i), then*

whether this process has to be undertaken annually i.e. at the end of Financial Year or not?

11.20 To answer this question, we see the decision in Appeal No. 02 and 179 of 2018 titled as "Prism Cement Limited v. MPERC &Ors.," wherein this Tribunal had the occasion of considering the said issue, as to whether the twin requirements under Rule 3 have to be determined at the end of the financial year together or only the requirement under Rule 3(1)(a)(ii) can be so determined with the exception of Rule 3(1)(a)(i) which can be verified at any given point of time. At para 9.6 of the said judgment, the following has been held by us:

> *"9.6 It is clear from the Act, and Rules as also from the above cited Judgment of Hon'ble Supreme Court that to qualify as 'captive generating plant' under Section 2(8) read with Section 9 of the Act and Rule 3 of the Rules, a power plant has to fulfil two conditions; a) firstly, 26% of the ownership of the plant must be held by the captive user(s); and b) secondly, 51% of the electricity generated in such plant, determined on annual basis, is to be consumed for captive use by the captive user. Upon fulfilment of the aforesaid conditions*

determined on an annual basis, the power plant qualifies as a captive generating plant. ***It is also clear that the Rules provide for determination of the status of the CGP on an annual basis at the end of the financial year.*** *Rule 3 itself recognizes that the status of a power plant is dynamic i.e. a power plant can be a CGP in a particular year but can lose such status in any subsequent year if the twin- conditions are not satisfied and thereafter again qualify as a CGP if the twin-conditions under Rule 3 are satisfied in any particular year."* ***[Bold & underline supplied]***

11.21 This Tribunal has taken a decision in the aforesaid case of Prism Cement Limited (Supra). In terms of this decision, we see that the verification of the tests contemplated under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) can only be done annually, i.e. with respect to the shareholding existing at the end of the financial year. We have to give mandate to the legislative intent as well as the law settled by us on the said issue.

11.22 We accordingly hold that verification of minimum shareholding and minimum consumption on proportionate basis for CGPs and Captive Users has to be done strictly in

terms of Rule 3 of the Rules, without any deviation and the said Rule envisages verification under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) to be at the end of financial year only."

ix. Thus, relying upon the abovementioned judgement of the Hon'ble ATE, we have considered the CA certified share-holding pattern of the Petitioner as on 31.03.2019 for determining the captive status of the Petitioners.

x. According to the CA certified share-holding pattern dated 31.03.2019, out of 35,18,000 number of total equity shares issued, 28.07% of total equity shares i.e., 9,87,600 equity shares were held by 14 consumers. Thus, the percentage shares held by the consumers of Petitioner is more than 26% as mandated under Rule 3 of the Electricity Rules, 2005. In the abovementioned certificate, it is also certified that Karanja Industries Private Limited (Petitioner No. 2 and 3) and Ultra Tech Cement Works (Petitioner No. 4) holds 1,08,000 (3.07%) and 1,20,000 (3.41%) of the total equity shares issued, respectively. Accordingly, Karanja Industries Private Limited and Ultra Tech Cement Works holds 10.94% and 12.15% equity shares out of the total 9,87,600 equity shares held by 14 consumers.

xi. The Commission notes that even though the respondent in its annexures submitted to the Commission has considered 23 consumption points, the respondent has failed to submit the data pertaining to the energy consumed by the alleged 23 consumption

points. Accordingly, the Commission has considered the data submitted by the petitioner (under annexure P-23) elucidating the share-holding pattern and the consumption pattern of its 14 consumers having 18 consumption points. The Commission notes that as per the submissions of the respondent (Annexure R-2), the 36 MW wind power project of the Petitioner no.1 at Harapanahalli has generated 9,06,30,386 units during FY2018-19 and the total energy wheeled by 14 consumers of Petitioner No. 1 considering the data submitted by the Petitioner (under Annexure 23) is 7,82,29,930 units which is 86.32% of the total energy generated. Thus, it can easily be construed that the consumers have consumed more than 51% of the total energy generated by the 36 MW wind power project of the Petitioner no.1 at Harapanahalli during FY2018-19.

xii. As regards consumption of energy in proportion to the share-holding pattern by the consumers, the Commission notes that the Hon'ble ATE in its Order in Appeal No. 171 of 2008, Appeal No. 172 of 2008 & IA Nos. 233/08 and 234/08, Appeal No. 10 of 2008 and Appeal No. 117 of 2009 in the matter of Kadodara Power Pvt. Ltd. and Others Versus Gujarat Electricity Regulatory Commission and Another, dated 22nd September, 2009 had held that 51% of total generation only has to satisfy the rule of proportionality in consumption and ownership. The rest 49% of the generation could be sold to anyone including grid, Distribution Company and the CGP owners themselves. The relevant part of the said judgement is extracted below:

"How proportionality of consumption has to be assessed:

17) The Electricity Rules 2005 have set down that not less than 51% of the aggregate electricity generated by a CGP, determined on an annual basis is consumed for captive use. However, in case there are more than one owner then there is a further rule of proportionality in consumption. In case the power plant is set up by a cooperative society the condition of use of 51% can be satisfied collectively by the members of the cooperative society. However, if it is an 'association of persons' then the captive users are required to hold not less than 26% of the ownership of the plant and such captive users are required to consume not less than 51% of electricity generated determined on an annual basis in proportion to the share of the ownership of the power plant within a variation not exceeding + 10%. For example, if a CGP produces 10,000 kWh of electricity, 5100 kWh need to be consumed by the owners of CGP.

In case there are three owners holding equal share, each one must consume 1/3rd of the 5100 kWh within a variation of + 10% i.e. between 1530 kWh to 1870 kWh. It will not be proper to assess the proportionality of the consumption on 100% of the generation.

…….

The 51% of total generation only has to satisfy the rule of proportionality in consumption and ownership. The rest 49% of the generation could be sold to anyone including grid, Distribution Company and the CGP owners themselves. Further such calculation has to be done on an annual basis i.e. for a financial year."

xiii. Further, as regards satisfying the proportionality criteria by the captive power users, it may be noted that the Hon'ble ATE in its Order dated 7th June, 2021 in Appeal No. 131 of 2020 & IA Nos. 425, 426, 1210 & 1215 of 2020 in the matter of Tamil Nadu Power Producers Association Versus Tamil Nadu Electricity Regulatory Commission and Others has held the following:

"12.16 From the principles drawn from the above judgments, we observe that TNERC vide the impugned order particularly in para 6.4.4 has endeavoured to add an intention to Rule 3(1)(b) which was otherwise absent from its construction. By holding that the second proviso to Rule 3(1)(a) is applicable to Rule 3(1)(b) thereby equating a SPV with an AOP, the impugned order has committed an error in interpreting the said Rule in the manner in which it has been enacted by the Parliament. We also concur with the principles laid down in the cases of Kailash

Nath (supra) and Sanjay Kumar (Supra) that a proviso is an exception and it cannot travel beyond the provision to which it is a proviso. We therefore, find that the same are applicable in the facts of the present Appeal. It is settled law that the function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. Applying this clear jurisprudence, TNERC could not have applied the second proviso to Rule 3(1)(a) to Rule 3(1)(b). Hence, the requirement of consuming minimum of 51% electricity generated on an annual basis and the requirement of the captive users holding 26% of the ownership of the plant in aggregate, and such consumption being in proportion to the shares of ownership of the power plant can only be applicable to power plants set-up by an AOP but cannot be applied to power plants set-up by SPV."

xiv. Accordingly, it is construed that the requirement of consuming minimum of 51% electricity generated on an annual basis in proportion to the shares of ownership of the power plant can only be applicable to power plants set-up by an AOP but cannot be applied to power plants set-up by a Company formed as a SPV. The Commission notes that, in accordance to Form MGT-7 as submitted by the respondent (annexure R-3), 100% of turnover of the Petitioner No.1 is under the Business Activity Code D1 i.e.,

Electric power generation, transmission and distribution. Since Petitioner No. 1 has entered into a wheeling and banking agreement dated 01.08.2016 (annexure P-6) with KPTCL, BESCOM CESC and GESCOM for transmission and wheeling of energy to its consumers, it can easily be construed that Petitioner No.1 in accordance with the definition of Special Purpose Vehicle (SPV) as mentioned in explanation 'd' under Rule 3(2), is a SPV engaged in generation of electricity for its captive consumers.

xv. As regards prayer (2) made by the petitioner regarding quashing the impugned letters dated 20.05.2020, 02.06.2020, 03.06.2020 and 04.07.2020, and the invoice dated 01.07.2020 [Annexure-14 (Colly)], issued by the Respondent, the Commission notes that the Petitioner has submitted letters dated 20.05.2020, 02.06.2020, 03.06.2020, the invoice is dated 01.06.2020 instead of 01.07.2020 under Annexure-14 (Colly). Further, the invoice dated 01.06.2020 is bill for the month of May, 2020 which includes demand towards 'Short Claim violation of Energy pattern of Group Captive for FY19'. Thus, once the letters dated 20.05.2020, 02.06.2020 and 03.06.2020 are set aside, the demand made towards 'Short Claim violation of Energy pattern of Group Captive for FY19' raised by the respondent will get nullified. Further, the Petitioner has submitted letter dated 04.07.2020 as annexure P-12. Thus, for the reasons stated above, we set aside the impugned demands notices issued by the Respondent

to the consumers of Harapanahalli generating plant (Petitioner 2, 3 and 4) as prayed for in this petition.

xvi. For the reasons stated above, we hold issue No. 1 in affirmative and issue No. 2 in negative.

10. **Issue No. (3)What Order?**

For the above reasons, we pass the following:

O R D E R

The Petition is partly allowed holding that:

a. Harapanahalli power projects of Green Infra Wind Power Generation Limited, along with their consumers are captive generators/consumers for FY2018-19.

b. All the demand notices pertaining to the petitioners (2, 3 and 4) dated 20.05.2020, 02.06.2020, 03.06.2020, 04.07.2020 and 1.07.2020 (01.06.2020), issued by the Respondent are set aside;

c. Thus, the amount of Rs. 49,23,357.00, Rs. 27,65,425.00 and Rs. 16,40,625.00 as submitted by M/s Ultra Tech Cement Ltd. (R.R.No.-MHT-42) and Karanja Industries Pvt. Ltd. (HKHT-5 and KHT-6), respectively to the respondent in accordance with the Commission's Order dated 16.03.2021 towards cross-subsidy surcharge, Additional

Surcharge and the differential electricity tax shall be refunded within two months from the date of this Order.

d. All pending I.A's also doesn't survive for consideration, accordingly they stands disposed of.

e. All other reliefs sought for are rejected.

Sd/-
(H.M. MANJUNATHA)
Officiating Chairperson

Sd/-
(M.D. RAVI)
Member