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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SANJIV KHANNA; J., M.M. SUNDRESH; J.
CIVIL APPEAL NOS. 8527-8529 OF 2009; OCTOBER 09, 2023

M/S. DAKSHIN GUJARAT VIJ COMPANY LIMITED
versus
M/S. GAYATRI SHAKTI PAPER AND BOARD LIMITED AND ANOTHER, ETC.

Electricity Rules, 2005; Rule 3(1)(a) Second Proviso - In cases where a Captive Generating Plant (CGP) has more than one user and fluctuating shareholding or any change in ownership, shareholding, or consumption occurs, the principle of "Weighted Average" should be applied to determine the proportional electricity consumption of each user. *(Para 47)*

WITH CIVIL APPEAL NOS. 1-2 OF 2010 CIVIL APPEAL NOS. 1693-1698 OF 2010 CIVIL APPEAL NO. 12282 OF 2016 CIVIL APPEAL NO. 1142 OF 2022 CIVIL APPEAL NO. 1141 OF 2022 CIVIL APPEAL NOS. 4611-4624 OF 2022 CIVIL APPEAL NOS. 4532-4556 OF 2022 CIVIL APPEAL NO. 4571 OF 2022 CIVIL APPEAL DIARY NO. 10378 OF 2022 CIVIL APPEAL NO. 3662 OF 2022 CIVIL APPEAL NO. 4233 OF 2022 AND CIVIL APPEAL NO. 8738 OF 2022

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J U D G M E N T

SANJIV KHANNA, J.

This judgment interprets relevant provisions of the Electricity Act, 2003[1] and Rule 3 of the Electricity Rules, 2005[2], for being classified as a Captive Generating Plant[3] and a captive user.

[1] For short, "Act".
[2] For short, "Rules".
[3] For short, "CGP".

2. We will be elucidating the legal position as per the statute, our intent being to first lay down the principles of law and then apply the principles to the facts and circumstances of each case.

3. To decide the legal question, we will refer to two judgments of the Appellate Tribunal for Electricity[4]. These are, ***Kadodara Power Pvt. Ltd. and Others*** v. ***Gujarat Electricity Regulatory Commission and Another***[5], dated 22.09.2009, which decision was held to be *per incuriam* on several findings in ***Tamil Nadu Power Producers Association*** v. ***Tamil Nadu Electricity Regulatory Commission***[6], dated 07.06.2021. A third decision of the APTEL in ***Sai Wardha Power Generation Limited and Others*** v. ***Maharashtra Electricity Regulatory Commission***[7] dated 26.11.2021, substantially agrees with the view in ***Tamil Nadu Power***[8]. We shall refer to the reasons given in the decisions and the explanation and grounds for our conclusion and legal finding.

4. We begin by first reproducing the relevant provisions of the Act[9]:

"**2. Definition. —** In this Act, unless the context otherwise requires,—

xx xx xx

(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 cooperative society or association of persons for generating electricity primarily for use of members of such cooperative society or association;

xx xx xx

(49) "person" shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person;

xx xx xx

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 plan to any licensee 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."

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[4] For short, "APTEL".
[5] 2009 SCC OnLine APTEL 119; for short, "Kadodara Power".
[6] 2021 SCC OnLine APTEL 19; for short, "Tamil Nadu Power".
[7] 2021 SCC OnLine APTEL 78; for short, "Sai Wardha".
[8] Supra note 6.
[9] As amended up to 31.08.2023.

5. We would also like to reproduce Rule 3 of the Rules[10], interpretation of which is pivotal for the decision:

"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 per cent of the ownership is held by the captive user(s); and

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

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

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

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

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

(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twentysix 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 per cent of the equity shares in the company (being the twenty-six per cent proportionate to Unit A of 50 MW) and not less than fifty-one per cent of the electricity generated in Unit 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.

(3) The captive status of such generating plants, where captive generating plant and its captive user(s) are located in more than one state, shall be verified by the Central Electricity Authority as per the procedure issued by the Authority with the approval of the Central Government.

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:

[10] As amended up to 01.09.2023.

Provided that the consumption of electricity by the captive user may be either directly or through Energy Storage System:

Provided further that the consumption by a subsidiary company as defined in clause (87) of Section 2 of the Companies Act, 2013 (18 of 2013) or the holding company as defined in clause (46) of Section 2 of the Companies Act, 2013 (18 of 2013), of a company which is a captive user, shall also be admissible as captive consumption by the captive user;

(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."

6. Section 2(8) of the Act defines a "*captive generating plant*" as a power plant set up by any person to generate electricity primarily for his own use. A power plant set up by co-operative society or associations of persons for generating electricity primarily for use of the members of the co-operative society or association is also a CGP.

7. Section 2(8) emphasises on the words, "*primarily for his own use*" and "*primarily for use of the members of the co-operative society or association of persons*". Secondly, while specifically referring to a co-operative society and association of persons, the clause does not refer to a company. Section 2(49) defines the word, "*person*", to include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person.

8. On a conjoint reading of Section 2(8) and Section 2(49) of the Act, a CGP can be an individual, body corporate, association or body of individuals, whether incorporated or not, "*primarily for his own use*" and "*primarily for use of the members of the co-operative society or association of persons*". An association of body corporates is permitted to set up a CGP.

9. Section 9 of the Act, a specific provision relating to captive generation, applies notwithstanding anything contained in any other provision of the Act. It states that any person may construct, maintain or operate a CGP and dedicated transmission lines. The second *proviso* to Section 9(1) states that no licence is required under the Act for supply of electricity generated from a CGP to any licensee in accordance with the provisions of the Act, rules and regulations made thereunder. However, supply to any consumer is subject to regulations made under Section 42(2) of the Act. The first *proviso* to Section 9 states that the supply of electricity from the CGP through the grid shall be regulated in the same manner as the generating station of a generating company.

10. Section 9(2) of the Act states that a person who has constructed a CGP and maintains and operates the CGP, shall have right to open access for the purpose of carrying electricity from his CGP to the destination of his use. The first *proviso* to Section 9(2) states that such open access shall be subject to the 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. Any dispute regarding availability of transmission facility is to be adjudicated by the appropriate commission.

11. Therefore, in terms of Section 9(2) of the Act, a person who has constructed a CGP, and maintains and operates such plant,[11] subject to availability constraints, can ask the distribution licensee to open access for the purpose of carrying electricity from his CGP to the destination of his use. This right under Section 9(2) to open access to the transmission facilities, must be contrasted with the right referred to in Section 9(1), which states that any person may construct, maintain or operate a CGP and use dedicated transmission lines for self-use.

12. The third aspect to be noticed with reference to Section 9(1) is that the second *proviso* permits a person who has constructed, maintains or operates a CGP, to supply electricity generated from a CGP to any licensee. However, as stated above, this supply is subject to the provisions of the Act, and rules and regulations made thereunder. Thus, the supply to any consumer, other than a captive user, is subject to regulations made under Section 42(2) of the Act. Equally, the first *proviso* permits supply of electricity from the CGP through the grid, in which case the supply is to be regulated in the same manner as in generating station of a generating company.

13. Section 9 read with the relevant provisions of the Act, therefore, postulates three situations. First, when the person who constructs, maintains or operates a CGP for their own use and supplies electricity to himself through dedicated transmission lines. Secondly, when the person who constructs, maintains or operates a CGP to supply electricity by exercising their right to open access for the purpose of carrying electricity from their CGP to the destination of their use. Thirdly, when the electricity generated from the CGP is supplied through the grid for any licensee or consumer. While no license is required for the supply of electricity to a licensee or consumer, the supply is subject to the regulations made under Section 42(2) of the Act.

14. Section 42(1) of the Act states that a distribution licensee has the duty to develop and maintain an efficient, coordinated, and economical distribution system in the area of his supply.[12] A distribution licensee also owes duty to supply electricity in accordance with the provisions of the Act. Section 42(2) states that open access shall be introduced by a State Commission in such phases, and subject to such conditions, including cross subsidies and other operational constraints. [13] The sub-section permits the State Commission to specify the extent of open access in successive phases and determine charges for wheeling, which charges have to be determined having regard to all relevant factors, including cross subsidies and other operational constraints.[14] The first *proviso* states that open access shall be allowed on payment of surcharge in addition to charges for wheeling as determined by the State Commission.[15] Such surcharge, in terms of the

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[11] As explained and elucidated below the word 'and' in Section 9(2) of the Act, when read harmoniously with Section 9(1) and on purposive interpretation would include a subsequent owner who maintains and operates a CGP. Captive generation as per Section 9 is not restricted to a person who constructs, maintains and operates a CGP. The provision does not bar or prohibit transfer of ownership rights by the person who has constructed or had originally set up the CGP.

[12] "**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."

[13] "42(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross-subsidies, and other operational constraints:"

[14] *Supra* note 11.

[15] "**Section 42. (Duties of distribution licensee and open access)**: --- xx xx xx
Provided that [12][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:"

second *proviso*, is to be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distributing licensee.[16] The third *proviso* provides that cross subsidy and surcharge shall be progressively reduced in the manner as may be specified by the State Commission.[17] What is important for our consideration is the fourth *proviso* which states that surcharge will not be leviable in case open access is provided to a person who has established a CGP for carrying electricity to the destination of his use. The fourth *proviso* reads:

"42. Duties of distribution licensee and open access. —

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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:"

In our opinion, the fourth *proviso* deals with the second situation elaborated by us above, that is, when the person who has established a CGP, invokes his right to open access for the purpose of carrying electricity from the CGP to the destination of his own use in terms of Section 9(2) of the Act. In such cases, no surcharge is leviable even if the right to open access is invoked. However, wheeling charges have to be paid to the distribution licensee for the use of his distribution system to supply electricity to the destination of his own use.

15. The aforesaid interpretation of Section 9 and Section 42 of the Act, respectfully follows the view expressed by this Court in ***Chhattisgarh State Power Distribution Company Limited*** v. ***Chhattisgarh State Electricity Regulatory Commission and Anr.***[18] and ***Maharashtra State Electricity Distribution Company Limited*** v. ***JSW Steel Limited and Ors.***[19]

16. In ***Maharashtra State Electricity***[20], the specific question answered was whether captive consumers are liable to pay additional surcharge leviable under the Act. The answer in the negative, holds that levy of additional surcharge would be contrary to Section 42(2) of the Act read with the definition of "*consumer*" *vide* Section 2(15) of the Act[21], which means a person who is supplied with electricity by the licensee or the government or any other person engaged in the business of supplying electricity to the public and includes a person whose premises for the time being are connected for the purpose of receiving electricity with the works of a licensee, government, or such other person, as the case may be. Apart from the language of the sections, this Court highlighted that the captive consumers incur huge expenditure or invest substantial amounts for the purpose of construction, maintenance and operation of the CGP and sometimes on the dedicated transmission lines. Thus, captive consumers form a separate class different *viz*

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[16] "**Section 42. (Duties of distribution licensee and open access)**: --- xx xx xx
Provided further that such surcharge shall be utilised to meet the requirements of current level of crosssubsidy within the area of supply of the distribution licensee:"

[17] "**Section 42. (Duties of distribution licensee and open access)**: --- xx xx xx
"Provided also that such surcharge and cross-subsidies shall be progressively reduced in the manner as may be specified by the State Commission:"

[18] (2022) SCC Online SC 604; for short, "Chhattisgarh State Power".

[19] (2022) 2 SCC 742; for short, "Maharashtra State Electricity".

[20] **.** *Supra* note 19.

[21] **Definition**.—In this Act, unless the context otherwise requires,— xx xx xx
(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;"

the, "*consumers*", defined under Section 2(15).[22] They are not be subjected and liable to pay the additional surcharge.

17. In ***Chhattisgarh State Power***[23], reference was made to the National Electricity Policy, 2005,[24] notified by the Government of India in exercise of its powers under Section 3 of the Act on 12.02.2005. Clauses 5.2.24 to 5.2.26 of the Policy dealing with captive generation and use are relevant, and read:

"Captive Generation

5.2.24 The liberal provision in the Electricity Act, 2003 with respect to setting up of captive power plant has been made with a view to not only securing reliable, quality and cost effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry.

5.2.25 The provision relating to captive power plants to be set up by group of consumers is primarily aimed at enabling small and medium industries or other consumers that may not individually be in a position to set up plant of optimal size in a cost effective manner. It needs to be noted that efficient expansion of small and medium industries across the country would lead to creation of enormous employment opportunities.

5.2.26 A large number of captive and standby generating stations in India have surplus capacity that could be supplied to the grid continuously or during certain time periods. These plants offer a sizeable and potentially competitive capacity that could be harnessed for meeting demand for power. Under the Act, captive generators have access to licensees and would get access to consumers who are allowed open access. Grid inter-connections for captive generators shall be facilitated as per section 30 of the Act. This should be done on priority basis to enable captive generation to become available as distributed generation along the grid. Towards this end, nonconventional energy sources including co-generation could also play a role. Appropriate commercial arrangements would need to be instituted between licensees and the captive generators for harnessing of spare capacity energy from captive power plants. The appropriate Regulatory Commission shall exercise regulatory oversight on such commercial arrangements between captive generators and licensees and determine tariffs when a licensee is the off-taker of power from captive plant."

18. This Court in ***Chhattisgarh State Power***[25] observes that the provisions of the Act which deal with captive generation and use have been made not only with the view to secure reliable, quality and cost-effective power, but also to felicitate creation of employment opportunities through speedy and efficient growth of industry. The policy states that provisions relating to the CGP, which can be set up by a group of consumers, are primarily made for enabling small and medium industries and other consumers, who may not be individually be in a position to set up a power plant of optimum size, in a cost-effective manner. Efficient expansion and growth of small and medium industries across the country leads to creation of employment opportunities. Lastly, the captive and standby generating stations in India can supply electricity continuously or during certain time periods. The policy which is issued under Section 3 of the Act, contains the statutory flavour. In case of ambiguity, an interpretation which advances the object and purpose of the Act as underlined and stated in the policy has to be preferred.

19. At this stage, we must distinguish an earlier decision of this Court in ***SESA Sterilite Limited*** v. ***Orissa Electricity Regulatory Commission and Others***.[26] In this case the

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[22] *Supra* note 21.
[23] *Supra* note 18.
[24] For short, "Policy".
[25] *Supra* note 18.
[26] (2014) 8 SCC 444; for short, "SESA Sterlite".

appellant industry had set up a unit in Special Economic Zone[27], and was the developer of the SEZ. The appellant-industry had entered into a power purchase agreement with a third party. The contention raised by the appellant industry was that it was not drawing or utilising any electricity from the distribution licensee and, therefore, is not a consumer of the distribution licensee, and accordingly not liable to pay the crosssubsidy surcharge. This was not a case of a captive user. The contention of the appellant-industry was rejected by this Court referring to the rationale behind cross-subsidy surcharge. Bulk consumers who avail of open access are burdened with relatively high rates, as this subsidises supply of electricity to marginalised and vulnerable sections of the society. Thus, the exit of consumers has an adverse effect on finances of the existing distribution licensee. Cross subsidy surcharge intends to compensate the existing distribution licensee in a two-fold manner: first, to compensate on the requirements of current levels of cross-subsidy, and secondly, to compensate for the fixed cost incurred by the distribution licensee as a part of its obligation to supply electricity to a consumer on demand, sometimes referred to as the stranded cost. Cross subsidy and surcharge are meant to compensate the distribution licensee on both counts. Thus, this decision does not deal with and decide the legal issue in question before us which relates to the definition of the CGP and use of electricity by the captive users.

20. In addition to the reasons given in ***Chhattisgarh State Power***[28] and ***Maharashtra State Electricity***[29]***,*** we will also like to refer to Section 38 of the Act[30], which prescribes

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[27] For short, "SEZ".
[28] *Supra* note 18.
[29] *Supra* note 19
[30] "**38. Central Transmission Utility and functions**.—(1) The Central Government may notify an Government company as the Central Transmission Utility:
Provided that the Central Transmission Utility shall not engage in the business of generation of electricity or trading in electricity:
Provided further that the Central Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity of such Central Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 (1 of 1956) to function as a transmission licensee, through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.
(2) The functions of the Central Transmission Utility shall be—
(a) to undertake transmission of electricity through inter-State transmission system;
(b) to discharge all functions of planning and co-ordination relating to inter-State transmission system with—
(i) State Transmission Utilities;
(ii) Central Government;
(iii) State Governments;
(iv) generating companies;
(v) Regional Power Committees;
(vi) Authority;
(vii) licensees;
(viii) any other person notified by the Central Government in this behalf;
(c) to ensure development of an efficient, co-ordinated and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centres;
(d) 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 subsection (2) of Section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the Central Commission:
Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:
Provided further that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the Central Commission:
Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Central Commission:

that the Central Government may notify any Government company as the Central Transmission Utility[31]. The CTU cannot engage in business of generating and trading of electricity. Its functions under Section 38(2) includes the planning and coordination relating to inter-State transmission system and the development of efficient, coordinated and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centre and to provide non-discriminatory open access to its transmission system for use by a licensee or generating company on payment of transmission charges and by any consumer as and when open access is provided by the State Commission under Section 42(2), on payment of transmission charges or surcharge thereon. The fourth *proviso* to Section 38(2) reads:

"**38. Central Transmission Utility and functions. —**

xx xx xx

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."

Thus, the Act prohibits levy of surcharge, cross or additional surcharge, even when open access is provided to a person who has established a CGP for carrying the electricity to the destination of their own use.

21. This brings us to the core issue which relates to interpretation of Rule 3 of the Rules. Three issues arise for our specific consideration in view of the conflicting judgments of the APTEL. These are:

I. Eligibility criteria for a CGP/captive user under Rule 3(1)(a) of the Rules.

II. Interpretation of the second *proviso* under Rule 3(1)(a) of the Rules and in particular the words "*association of persons"*.

III. Whether a company set up as a Special Purpose Vehicle[32] for generating electricity is an, "*association of persons*", in terms of the second *proviso* to Rule 3(1)(a) of the Rules.

Issue I Eligibility criteria for a CGP/captive user specified under Rule 3(1)(a) of the Rules.

22. Rule 3(1)(a) of the Rules was interpreted by this Court in ***Chhattisgarh State Power***[33]. In the said case, M/s. Shri Bajrang Power and Ispat Ltd.[34] had established a CGP. SBPIL had submitted a petition to provide open access for wheeling of power through the transmission system of ***Chhattisgarh State Power***[35], for the captive use by SBPIL's sister concern, Shri Bajrang Metallics and Power Limited[36]. SBMPL held 27.6% equity shares in SBPIL. However, the judgement also states that SBMPL directly held 26.67% shares in the CGP.[37] The petition was resisted by CSPDCL on the ground that the

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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."

[31] For short, "CTU".

[32] For short, "SPV".

[33] *Supra* note 18.

[34] For short, "SBIPL".

[35] For short, CSPDCL.

[36] For short, "SBMPL".

[37] The judgment states that, *"It was contended by the appellant that SBPIL holds more than 72% of the shares of the company. However, its consumption would be limited only to 14.16% (13.22 MU), whereas the consumption of SBMPL holding 26.67% shares, would be 57.87%(54 MU). It was submitted that this was not proportionate to the ownership of the power plant*". Proviso to Explanation 1 to Rule 3 states that consumption by a holding or subsidiary of a company, which is a captive user, shall also be admissible as captive consumption.

consumption of electricity by SBPIL and SBMPL independently/individually was not in proportion to their respective ownership of the CGP. SBPIL, while holding 72% shares in the CGP, was to consume 14.16% of the electricity generated, whereas, SBMPL, which was holding 26.67% shares in the CGP, was to consume 57.87% of the electricity generated.

23. This Court did not agree with the plea and contention of the distribution licensee. The plant was held to be a CGP and SBMPL a captive user. The requirement under Rule 3(1)(a) of the Rules is twofold. First, the captive user should not hold less than 26% of the ownership in the CGP. Secondly, the captive user should consume not less than 51% of the aggregate electricity generated by such CGP. The second *proviso* to Rule 3(1)(a)(ii) of the Rules states that in case of an association of persons, the captive user(s) shall not hold less than 26% of ownership of the plant in aggregate and the captive user(s) shall not consume less than 51% of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the CGP within a variation not exceeding ±10%. The decision holds that an association of corporate bodies can establish a power plant. SBMPL held 27.6% equity shares in SBPIL and thus satisfied the ownership requirement of 26%. The second requirement with regard to consumption of electricity was satisfied as SBMPL and SBPIL, together, would be consuming more than 51% of the power generated.[38]

24. The ratio in the ***Chhattisgarh State Power***[39] requires clarification and elaboration. We have provided such clarification and elaboration in **Issues I and II,** on our interpretation of the rule of proportionality in terms of the second *proviso* to Rule 3(1)(a) of the Rules.

25. To qualify as a CGP under Section 9, read with Section 2(8) of the Act, the requirements of paragraphs (i) and (ii) to Rule 3(1)(a) of the Rules have to be satisfied. We have already referred to the definition of a CGP under Section 2(8) of the Act which uses the words, "*primarily for his own use*". This expression has been given statutory grail *vide* Rule 3 of the Rules. Rule 3 as repeatedly noticed incorporates two separate requirements. The first requirement is that the captive user(s) should have not less than 26% of the ownership in the CGP. Lower limit or minimum of 26% ownership is prescribed. Upper limit of ownership is not prescribed. The second requirement relates to the minimum electricity consumption. 51% of aggregated or more of the generated electricity should be consumed by the user(s) who meets the ownership requirement.

26. The presence of the words, "*not less than*", in paragraphs (i) and (ii) to Rule 3(1)(a) of the Rules reflects and shows that the stipulations with regard to 26% ownership and 51% consumption is the minimal or lowest threshold. Maximum is not prescribed. A captive user who owns 100% of the CGP and consumes 51% or more electricity generated from such plant would satisfy the parameters prescribed. Equally, a captive user who owns 26% of the CGP and consumes 51% or more of the electricity generated would qualify as a captive user. However, this can result in abuse or gaming where there are multiple owners with different shareholdings. In case of an association of persons, a situation which is covered by the first explanation. This aspect, when there are multiple owners, in a case of association of persons, is examined under **Issue II**.

27. Proviso to clause (b) to Explanation 1 to Rule 3 states that consumption by a subsidiary, or holding company as defined in the Companies Act, 2013, when one of them

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[38] See footnote 37.
[39] *Supra* note 18.

is a captive user, shall be also admissible as captive consumption by the captive user. Clause (b) to Explanation 1 to Rule 3 states that captive user is the end user of the electricity. Captive user is the actual consumer who uses electricity for his own use.

28. The first *proviso* to Rule 3(1)(a) of the Rules applies in case of a CGP set up by a registered cooperative society. In such cases, the requirements under paragraphs (i) and (ii) to Rule 3(1)(a) are treated as satisfied collectively by the members of the cooperative society. Therefore, if the members of the cooperative society consume more than 51% of the electricity generated collectively, the power plant is to be treated as a CGP and the members of the cooperative society as captive users. The cooperative society may supply 49% or less of the aggregate electricity generated to third parties. Any third party, who is not a member of the cooperative society, will be a non-captive user and a consumer, who will be liable to pay a cross-subsidy and an additional surcharge, as applicable. The members of the cooperative society when they collectively satisfy the consumption requirement will not be liable to pay cross-subsidy or additional surcharge, irrespective of whether they use dedicated transmission lines or exercise their right to open access using the distribution network of the distribution licensee. They will be liable to pay wheeling charges to the distribution licensee in case they use their distribution network.

29. The second *proviso* to Rule 3(1)(a) of the Rules applies in cases where the captive user(s) is an, "*association of persons*". We will elaborate on the eligibility requirements for, "*association of persons*", while interpreting the second *proviso* to Rule 3(1)(a) in

Issue II.

30. Two secondary, but nevertheless important questions arise for our consideration.

31. First, a contention was raised before us that since Section 2(8) of the Act uses the expression, "*power plant set up by any person*", the captive user under Rule 3(1)(a) of the Rules must be the person who had participated in setting up the plant. It is submitted that, "*set up*", does not include the acquisition of shares/ownership after the power plant has already been set up. Therefore, transfer of captive status through transfer of ownership is prohibited under the Act.

32. We should not accept this plea for several reasons. The expression, "*set up*" used in clause Section 2(8) of the Act should not to be read in a pedantic manner as referring to initial set up. We should recognise the practical reality and not ignore the impractical asinine consequences of this interpretation. Section 2(8) of the Act should not be read as impliedly incorporating a prohibition to transfer of ownership once the CGP has been set up. This bar is not specifically stated and mentioned, though the legislature could have stated this in simple words. Rather, in Section 9(1) the words used are, "*construct, maintain or operate a captive generating plant*". Thus, construction, maintenance or operation of a CGP under Section 9(1) of the Act can be read disjunctively. This emanates from the use of the word, "*or*", with reference to "*construct, maintain or operate*" in Section 9(1). This would be rational and reasonable interpretation in consonance with the legislative intent. It is not necessary that the person who maintains and operates the CGP must have also constructed the CGP. Construction, maintenance or operation can be by different persons. This is brought out in Rule 3 of the Rules which specifies the eligibility criteria for captive users. Rule 3 refers to the percentage of ownership of the captive user in the CGP, and use/consumption by the captive user in the financial year.

33. Clause (c) to Explanation 1 to Rule 3 states that ownership in relation to the generating station or power plant set up by a company or body corporate means the equity

capital with voting rights. In other cases, ownership means proprietary interest and control over the generating station or power plant.

34. Section 9(2) the words used are "*every person, who has constructed a captive generating plant and maintains and operates such plant*". The expression, "*every person*" can refer to a person who maintains and operates a CGP while not having constructed the CGP, which meaning and interpretation gains affirmation from the language of Section 9(1) which states that a, "*a person may construct, maintain or operate a captive generating plant*". In case of ambiguity, it is useful to apply the purpose and object rule of interpretation. A practical interpretation is preferable, so as not to over-ride the legislative intent. It is legitimate for the court to assume that the legislature knows the reality and supports and enacts practicable laws which encourages and promotes business activities.

35. The expression, "*person*", as defined under Section 2(49) of the Act, includes, *inter alia*, body corporates and association or body of individuals, whether incorporated or not. Transfer of ownership in case of companies and association of persons is a normal occurrence and incidence of business.

36. This issue was examined in ***Kadodara Power***[40] and it has been observed:

"Can the ownership of the CGP be transferred after its set up?:

xx xx xx

21. It is submitted that the words "set up" here are important and that the person who has set up the plant alone can own captive generating plant and not the person(s) who is transferee from the original owner(s).

This proposition has not been accepted by the Commission in the impugned order. Nor does this proposition appeal to us. The Act nowhere prescribes that once set up by a person(s) a captive generating plant cannot be transferred to another owner. Nor does the Act say that on transfer of ownership the captive generating plant will lose its character of being captive despite fulfillment of all other conditions requiring it to be so. Section 9 of the Act which permits captive generation begins with the following words: *notwithstanding anything contained in this Act, the person may construct, maintain or operate a captive generating plant and dedicated transmission lines".* Obviously the owner of a captive generating plant need not be one who constructs. Set up defined in section 2(8) has been made equal to *"construct, maintain or operate"* by the use of these words in section 9. As we view it a captive generating plant does not lose its character by transfer of the ownership or any part of the ownership provided the generating plant produces power primarily for the use of its owner(s). The Regulation quoted above lays down further restrictions on the user of the power generated by a CGP. If all the provisions of the Act and Regulations governing captive generation and consumption from the CGP are specified a plant will be a CGP notwithstanding the fact that the plant at present is not owned by the person who originally set up the plant."

We agree with the said interpretation and logic. A CGP does not lose its captive status due to transfer of its ownership or any part of its ownership, provided that the transferee, that is, a new captive user, complies with eligibility criteria specified under Rule 3 of the Rules.

37. This Court in ***Global Energy Ltd. and Another*** v. ***Central Electricity Regulatory Commission***[41], while holding that Regulation 6-A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and Other Related Matters), Regulations, 2004 was *intra vires* the Act and the Constitution of India, had reasoned:

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[40] *Supra* 5.
[41] (2009) 15 SCC 570.

"**38.** When a disqualification is provided, it is to operate at the threshold in respect of the players in the field of trading in electricity. When, however, a regulatory statute is sought to be enforced, the power of the authority to impose restrictions and conditions must be construed having regard to the purpose and object it seeks to achieve. Dealing in any manner with generation, distribution and supply and trading in electrical energy is vital for the economy of the country. The private players who are permitted or who are granted licence in this behalf may have to satisfy the conditions imposed. No doubt, such conditions must be reasonable. Concededly, the doctrine of proportionality may have to be invoked."

Dealing with the generation of electricity being vital for the economy of the country, a narrow interpretation will ignore realities, leading to irrational results. Section 2(8) and Section 9(2) are required to be read harmoniously with Section 9(1) of the Act. A purposive interpretation would include a subsequent owner of the CGP, who is an owner as per clause (c) to Explanation 1 to Rule 3 of the Rules.

38. In ***Tamil Nadu Power***[42], the APTEL had held that the minimum ownership and consumption criteria for captive users are required to be satisfied only on the last day of the financial year, that is, 31st March. This, the APTEL in ***Tamil Nadu Power***[43] observes, will account for any change in shareholding of the CGP, and consequent captive status, throughout the financial year. It is observed:

"**292.** It is critical for us to note the practical difficulties staring down at the face of the captive users and CGPs in the event the concept of weighted average is applied. We agree with the submissions of the Appellant that the nature of shareholding in a captive structure is fluid and dynamic. That, existing captive users within the said captive structure can choose to give-up its ownership along with consumption of captive power at any point of time if it considers no usage for the same. In such a scenario, if no new captive user(s) is added then the shareholding along with consumption is accordingly adjusted. A CGP cannot foresee the future and predict as to how many of its shareholders may give up their ownership along with consumption of captive power, neither can it be predicted, if any new/ how many captive user(s) will be inducted within the structure. In such a scenario, if in terms of Rule 3 of the Rules verification of minimum shareholding along with minimum consumption is not done annually, at the end of the financial year but done considering ownership at different periods during the year, then same would create unforeseen difficulties for a CGP to maintain its captive structure. As such, we opine that the verification mandated under the Rule 3 has to be done annually, by considering the shareholding existing at the end of the financial year. This is also evident from a perusal of Format-5 formulated by TNERC as a part of the impugned order, which also specifically contemplates verification to be done as per the shareholding existing at the end of the financial year. Similar view has already been taken by us in Appeal No. 02 and 179 of 2018 titled as "*Prism Cement Limited v. MPERC & Ors*" (supra).

xx xx xx

294. In light of our findings, we also observe that suppose there are ten (10) captive users who avail open access for captive use under Section 9 of the Act at the start of the financial year, and in the event three (3) of such captive users stops sourcing captive power after six months, and instead three new captive users are introduced within the captive structure by subscribing equity shareholding with voting rights immediately thereafter, then when the verification of captive status will be done annually on the basis of the shareholding existing at the end of such financial year, in that case the total number of captive users throughout the financial year would be treated as thirteen (7+3+3) and not 10. This is because the shareholding of the three captive users who stopped sourcing captive power, cannot have a zero/nil shareholding, as they sourced captive power for the first six months. While verifying the condition under Rule 3(1)(a)(i) and (ii) of the

[42] Supra note 6
[43] Supra note 6.

Rules, the consumption of captive power has to be done by captive users holding a minimum of 26% shareholding. Therefore, in the event shareholding of a captive user is considered as zero/nil after a few months into the financial year, then such user cannot be permitted to take benefit of availing captive power thereby seeking exemption from payment of CSS. In any event, the applicability of CSS will also depend upon the observations made by us in Appeal No. 38 of 2013 titled as '*M/s. Steel Furnace Association of India v. PSERC & Anr.*'"

39. We do not agree. The minimum threshold of ownership, which is 26%, is to be met and satisfied throughout the year and not at the end of the financial year alone. The reasoning in ***Tamil Nadu Power***[44] ignores that there is a connect between paragraph (i) and (ii) of Rule 3(1)(a) of the Rules. Paragraph (ii) which refers to minimum electricity that is required to be consumed by captive users is with reference to the minimum ownership specified in paragraph (i) of the said Rule. Thus, the minimum ownership requirement is required to be maintained continuously, throughout the financial year, that is, from 1st April of a year to 31st March of the next year, along with the minimum electricity consumption requirement. This is also the mandate of Explanation (2) to Rule 3(1)(b) of the Rules, which casts obligation on the captive users to ensure compliance of clauses (a) and (b) to sub-rule (1) to Rule 3 of the Rules.

40. The issue of computation of consumption of electricity and change of shareholding of captive users, when a CGP has more than one captive user and the application of the proportionality principle in terms of *second proviso* to Rule 3(1)(a) has been dealt by us in **Issue II**.

Issue II Application of the second proviso to Rule 3(1)(a) of the Rules.

41. The second *proviso* provides an additional eligibility requirement where the captive users are "an *association of persons*". At the outset, we must record that the *proviso* is ambiguous and confusing. It states that in case of association of persons being the captive user(s), the captive user(s) shall hold not less than 26% of the ownership of the plant in aggregate and such captive user(s) shall not consume less than 51% of the electricity generated on an annual basis. To this extent, it is an exact replica of paragraphs (i) and (ii) of Rule 3(1)(a). Thereafter, the suffix in the last portion, states that the proportion of the shares held by the captive user(s) must be in proportion to the consumption of electricity generated within a variation not exceeding 10 percent.

42. In ***Kadodara Power***[45]**,** referring to proportionality requirement, it is held:

"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 Commission, however, appears to have calculated

[44] Supra note 6.
[45] *Supra* 5.

the proportion of use to 100% of the total consumption which may be more than 51% of generation…."

We agree with the said reasoning in ***Kadodara Power***[46] But we would like to elaborate on the said reasoning by referring to the clarifications and the illustrations provided by Mr. M.G. Ramachandran, learned Senior Advocate appearing on behalf of the appellant – Dakshin Gujarat Vij Company Limited.

43. The last portion of the second *proviso* to Rule 3(1)(a) of the Rules, that is, the proportionality principle, specifies an unitary qualifying ratio. The unitary qualifying ratio is the consumption requirement divided by the shareholding requirement, that is, 51% divided by 26%. This means that the owner of every 1% shareholding of the CGP should have minimum consumption of 1.96% of the electricity generated by the CGP, with a variation of ±10% being permissible.

Therefore, the unitary qualifying ratio has to be within a range of 1.764% to 2.156%. In other words, we do not take into consideration 100% of the electricity generated. Instead, we apply the shareholding requirement, which should not be less than 26% in aggregate, to the electricity consumed, which should not be less than 51%, and thereby compute whether the ownership criteria and the proportionate consumption criteria is satisfied. Benefit of variation by 10% either way is to be a given.

44. For clarity, the illustrations provided Mr. M.G. Ramachandran, Senior Advocate, are reproduced below:

Total Generation			100%	Unitary Qualifying Ratio is Consumption Requirement divided by Shareholding Requirement (with a variation of 10%) i.e. 51% divided by 26% which equals to 1.96% consumption by a captive user for every 1% shareholding	
Consumption Requirement (Not less than)			51%		
Shareholding Requirement (Not less than)			26%		
Shareholder	Actual Consumption	Actual Shareholding	Unitary Ratio Achieved	Remarks	Result
Illustration 1					
A	20	10.2	1.96	A, B, C, D, and E (all) consume not less than 1.96% for 1% shareholding and therefore all qualify as captive users. All collectively own more than 26% shareholding.	A to E qualify as captive users
B	20	10.2	1.96		
C	20	10.2	1.96		
D	20	10.2	1.96		
E	20	10.2	1.96		
Others	0	49	0		
Illustration 2					
A	15	7	2.14	A, B, C, D, and E (all) consume more than 1.96% for 1% shareholding and therefore all qualify as captive users. All collectively own 26% shareholding.	A to E qualify as captive users
B	15	6	2.5		
C	15	5	3		
D	15	4	3.75		
E	15	4	3.75		
Others	25	74	-		
Illustration 3					
A	30	10	3	A, B and C qualify the captive consumption qua their shareholding in the ratio of not less than 1.96% of 1% shareholding. The ratio of D is not above 1.96, yet it qualifies on account of its ratio being within the permissible limit of 10% variation. E does not qualify as unitary consumption is 1.67%	A to D qualify as captive users. E is not a captive user.
B	30	10	3		
C	20	10	2		
D	5.75	3	1.92		

[46] *Supra* note 5.

E	5	3	1.67	only, i.e. less than 1.96% per 1% shareholding and the same does not fall within 10% variation. Excluding E, the shareholding held by A, B, C and D is 33% i.e. not less than 26%. Hence A, B, C and D qualify as Captive users. The disqualification of E will not affect A, B, D and D as they cumulatively consume more than 51% and hold 33% i.e. not less than 26%.	
Others	9.25	64	-		
Illustration 4					
A	25	6	4.17	A, B, C and D qualify the captive consumption qua their shareholding in the ratio of not less than 1.96% for 1% shareholding. E does not qualify as unitary consumption is 1% only, i.e. less than 1.96% per 1% shareholding. Excluding E, the shareholding held by A, B, C and D however is only 21%. Since cumulatively A, B, C, and D do not hold not less than 26%, by virtue of Rule 3(2) of Electricity Rules, 2005, they cannot claim captive user status.	No one qualifies as captive user
B	20	5	4		
C	15	5	3		
D	10	5	2		
E	5	5	1		
Others	25	74	-		
Illustration 5					
A	30	1	30	Neither of A or B qualify as captive user even though they collectively satisfy the requirements of minimum shareholding of not less than 26% and minimum consumption of not less than 51%. B does not qualify as unitary consumption is less than 1.95% and not within the 10% variation. A or B independently do not satisfy the shareholding and consumption requirements. By virtue of Rule 3(2) of Electricity Rules, 2005, they cannot claim captive user status	No one qualifies as captive user
B	21	25	0.84		
Others	49	74	-		

Once the above standard is met and satisfied, the person satisfying the requirement will be treated as a member of the group captive users.

45. The aforesaid interpretation checks, "*gaming*", by owners, which would amount to misuse and abuse of the Rule 3(1)(a) of the Rules. Instances of gaming are where a 1% or an insignificant shareholder of the CGP disproportionately uses the electricity generated, in which case he should not be treated as a group captive user and, therefore, should be denied the benefits that are given under the Act to the captive users. Gaming or misuse should be checked to protect interests of the Distribution Licensee.

46. This brings us to the question of applicability of the second *proviso* of Rule 3(1)(a) in cases where there is a change in ownership or shareholding of the CGP. An issue arises with respect to calculation of proportional consumption of electricity under the *second* proviso to Rule 3(1)(a) of the Rules when an existing captive user exits/transfers their shareholding/ownership to a new captive user. It may happen in multiple situations. The APTEL in ***Tamil Nadu Power***[47] had postulated that such issue would be resolved if the minimum consumption and shareholding requirements are verified only at the end of the

[47] *Supra* 6.

financial year. However, we have held that the minimum consumption and shareholding requirement are required to be maintained continuously and not just at the end of the year. It is only with respect to determining the ownership proportionate to consumption of electricity that requires our attention, with respect to the second *proviso* to Rule 3(1)(a) of the Rules.

47. In case of change of ownership, shareholding, or consumption, the principle of weighted average should be applied to ensure compliance of the proportional electricity consumption requirement stipulated under the second *proviso* to Rule 3(1)(a). For instance, if a captive consumer exits or drops out in the middle of the year, transferring its shareholding to another or new captive user, it would be fair to hold that the captive user who has become a shareholder in the middle of the year, is required to consume proportionately to the electricity generated. In a given case, existing captive users taking advantage of the variation, may enhance their consumption. The concept of weighted average shareholding comes in aid to calculate the relevant average shareholding of the captive user in the year and the proportionate electricity required to be consumed by him. To borrow from the illustrations provided by learned Senior Advocate Mr. Basava Prabhu Patil, appearing on behalf of Tata Power Company Limited, this comes in aid in instances where the shareholding of a captive user in a CGP fluctuates, provided that the minimum ownership requirement of 26% in aggregate is not being breached. Further, a shareholder may hold 30% of shares of the CGP for 3 months, 40% of shares for 4 months, and 50% of the shares for the balance 12 months. The weighted average shareholding method is applied by taking average shareholding held by particular shareholder for the year for the purpose of calculating proportionate electricity required to be consumed by it in terms of the second *proviso* of Rule 3(1)(a).

48. We agree with the reasoning and logic, that weighted shareholding and proportionate consumption of electricity is the fair, equitable and the correct method to determine whether the essential requirements of the second *proviso* to Rule 3(1)(a) are satisfied.

Issue III Whether a company set up as a Special Purpose Vehicle[48] for generating electricity is an 'association of persons' which must meet the proportionality requirement specified in the second proviso to Rule 3(1)(a) of the Rules.

49. This brings us to the last issue and question – whether a company set up as a SPV, in view of clause Rule 3(1)(b) of the Rules, is absolved from meeting the eligibility criteria specified in paragraphs (i) and (ii) of Rule 3(1)(a) of the Rules read with second *proviso* to Rule 3(1)(a) of the Rules. This argument was raised and accepted in ***Tamil Nadu Power***[49] on the following grounds:

"**255.** We have analysed the submissions of the parties on the issue of treatment of an SPV as an AOP. As seen before, Rule 3 of the Rules deals with the requirements to be fulfilled to qualify as a captive. In the said rule, SPV as a CGP is given under Rule 3 (1)(b). Further, it is also seen that Rule 3(1)(a)(i) has two provisos contemplating the manner in which the requirements to qualify as a CGP is to be fulfilled by a registered Cooperative society and an AOP. It is also seen that the said two provisos do not relate to Rule 3(1)(b) which deals with a SPV.

256. We agree with the submission put forward by the Appellant that second proviso to Rule 3(1)(a) is a stand-alone provision and as such does not relate to Rule 3 (1)(b). The Parliament in its wisdom has created an intelligible differentia under Rule 3, between a SPV and an AOP. It is clear from a reading of Rule 3 that second proviso to Rule 3(1)(a) which exclusively deals with an

[48] For short, "SPV".
[49] *Supra* 6.

AOP, lays down that the captive user (s) shall hold not less than 26% ownership of the plant in aggregate and shall not consume less than 51% of the electricity generated, determined on an annual basis, in proportion to their ownership of the power plant.

257. On the other hand, Rule 3(1)(b) exclusively deals with a SPV, and it only provides that the conditions mentioned in Rule 3(1)(a)(i) and (ii) are applicable to a SPV, with the second proviso not mandated to be applied to it. Thus, we find force in the argument of the Appellant that second Proviso to Rule 3(1)(a) is a stand-alone provision.

258. The above argument of the Appellant is further strengthened on the principles enunciated by the Hon'ble Supreme Court with regard to interpretation of statutes by Courts. The Hon'ble Supreme Court has time and again held that Courts cannot rewrite or recast legislation, they should not act as law makers where there is no ambiguity in the language in a piece of legislation then such legislation ought to be literally interpreted without any deviation. The Hon'ble Supreme Court has also held that provisos are exceptions to the general rule. In this regard, we refer to the following judgments:

xx xx xx

259. 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.

50. ***Kadodara Power***[50] takes the opposite view, and the APTEL has reasoned:

"Is a company formed as a special purpose vehicle an association of person?

15. The question has arisen because the word

'association of persons' is not defined anywhere in the Act or in the Rules. The proviso to Rule 3 (I)(a)(ii) makes two special conditions for cooperative societies and association of persons. If the CGP is held by a person it is sufficient that the person consumes not less than 51% of the aggregate electricity generated in such plant. In case the plant is owned by a registered cooperative society then all the members together have to collectively consume 51% of the aggregate electricity generated. In case the CGP is owned by an association of persons the captive users together shall hold not less than 26% of the ownership of the plant in aggregate and shall consume not less than 51% of the electricity generated in proportion to their shares of the ownership of the plant within a variation not exceeding + 10%. A special purpose vehicle is a legal entity owning, operating and maintaining a generating station with no other business or activity to be engaged in by the legal entity. Now if three companies need to set up the power plant primarily for their own use they can come together and form another legal entity which may itself be a company registered under the Companies Act. This company may set up a power plant. In that case the company formed by three different companies would become a special purpose vehicle.

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[50] *Supra* 5.

If a company which is a special purpose vehicle is one person then all that is necessary is that this company should consume 51% of the generation. However, if it is treated as association of persons apart from a condition of consuming minimum 51% of its generation the three share holders will also have to consume 51% of the generation in proportion to their ownership in the power plant. It is contended on behalf of some of the appellants before us who are special purpose vehicles that they are not an association of persons and accordingly it is only necessary for them to consume 51% of their generation collectively without adhering to the Rule of proportionality of consumption to their share. This does not appear to us to be the correct view. Section 2(8) of the Act, as extracted above, says that a captive generating plant may be set up by any person and includes the power plant set up by any cooperative society or association of persons. Mr. M. G. Ramachandran contends that going by this definition if the special purpose vehicle is not an association of persons it cannot set up a captive generating plant because the definition does not mention any person other than a cooperative society and association of person. There is small flaw in the argument of Mr. M. G. Ramachandran in as much as the definition of captive generating plant is inclusive. In other words, the captive generating plant may be set up by any person including a cooperative society or association of persons. In other words, the person to set up a generating plant may be somebody who does not fulfill the description of either a cooperative society or association of persons. Nonetheless, reading the entire Rule 3 as a whole it does appear to us that a CGP owned by a special purpose vehicle has to be treated as an association of person and liable to consume 51% of his generation in proportion to the ownership of the plant. Every legal entity is the person. Therefore, the special purpose vehicle which has to be a legal entity shall be a person in itself. Any generating company or a captive generating company is also a person. The Rules specially deals with cooperative society. In an association of persons it has to be a 'person' because without being a person it cannot set up a captive generating plant. Therefore it will be wrong to say that since the special purpose vehicle is a 'person' in itself it cannot be covered by a definition of 'association of persons' and has to be covered by the main provision which requires the owner to consume 51% or more of the generation of the plant. In our view the definition is somewhat strange in as much as the term 'person' is said to include an 'association of persons'. One therefore cannot say that a CGP owner can be either a 'person' or an 'association of persons' a special purpose vehicle thus can be a 'person' as well as an 'association of persons'. A cooperative society is an 'association of persons' in the sense that some persons come together to form a cooperative society. However, the moment an association or society is formed according to the legal provisions it becomes a person in itself. A special provision has been made permitting a cooperative society from consuming 51% collectively. The first proviso 3 (1)(a)(ii) itself suggests that a special privilege has been conferred on a cooperative society. Other persons who are also legal entities formed by several persons coming together have not been given such special privilege. Who can such association of persons be? Of the various legal entities comprehended as persons owning a CGP the special purpose vehicle does seem to fit the description of 'association of persons'. We fail to comprehend who other than a special purpose vehicle can be an 'association of persons'. None of the lawyers arguing before us gave example of 'association of persons' other than a special purpose vehicle. Therefore, we have no hesitation to hold that special purpose vehicle is an association of persons.

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

51. We agree with the reasoning giving in ***Kadodara Power***[51] Rule 3(1)(b) of the Rules does not negate or undo the eligibility requirements specified in paragraphs (i) and (ii) to Rule 3(1)(a) of the Rules, which in case of an association of persons mandates the satisfaction of the proportionality requirement under the second *proviso* to Rules 3(1)(a). Rule 3(1)(b) refers to a situation where a company set up as a SPV has multiple units generating electricity. It stipulates that the company formed as a SPV can identify one or more of such generating units for its captive use. All the generating units need not be identified for captive use. The units which are not identified for captive use need not satisfy the conditions mentioned in paragraphs (i) and (ii) of Rule 3(1)(a) of the Rules. Electricity generated by these unidentified units need not be accounted and considered. The explanation clarifies the situation as it states that the requirement of consumption of electricity by captive users shall be determined with reference to the generating unit or units identified for captive use. The unit or units identified for captive use, in other words, must satisfy the requirements of paragraphs (i) and (ii) of Rule 3(1)(a) of the Rules read with the second *proviso*. This is also clear from Rule 3(2), which states that the equity shares held by the captive user in the generating station, which is identified for captive use, should not be less than 26% of the proportionate equity of the company relating to the generating unit or units identified as a CGP. The illustration to Section 3(1)(b) that is lucid, for the sake of convenience is again reproduced:

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

Thus, Rule 3(1)(b) of the Rules liberalises, gives flexibility and an option when a generating station owned by company, incorporated as a SPV, has multiple generating units. Rule 3(1)(b) does not undo or override the eligibility criteria specified under Rule 3(1)(a) read with second *proviso*.

52. It was submitted before us that since a SPV was an incorporated company, it could not be equated with an association of persons, which is usually understood to mean a recognised taxable entity and not as an incorporated entity. Reliance was placed on the interpretation by this Court in ***Ramanlal Bhailal Patel and Others*** v. ***State of Gujarat***[52], to contend that whenever an inclusive definition is provided for a term, an extended statutory interpretation of such term may be adopted. Section 2(49) of the Act uses the word "*includes*", in the expression, "'*person' shall include*" to define a "*person*" with respect to the Act. Thus such extended statutory interpretation for the term, "*association of persons*", it is submitted is importable from statutes like the Income Tax Act, 1961. We do not agree with the said contention.

53. This Court in ***Ramanlal Bhailal Patel***[53], while interpreting the meaning of an, "*association of persons*", has held that an association of persons is one where two or more persons join in a common purpose and common action to achieve some common benefit. Further, such common purpose, action or benefit may vary based on the particular context of a statute. The relevant paragraph reads:

"**28.** The terms "association of persons" and "body of individuals" (which are interchangeable) have a legal connotation and refer to an entity having rights and duties. They are not to be

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[51] *Supra* 5.
[52] (2008) 5 SCC 449; for short, "Ramanlal Bhailal Patel".
[53] *Supra* note 52.

understood literally. For example, if half a dozen people are travelling in a car or a boat, or standing in a bus-stop, they may be a group of persons or a "body of individuals" in the literal sense. But they are not an association of persons/body of individuals in the legal sense. When a calamity occurs or a disaster strikes, and a band of volunteers or doctors meet at the site and associate or cooperate with each other for providing relief to victims, and not doing anything for their own benefit, they may literally be an association of persons, but they are not "an association of persons/body of individuals" in the legal sense. A mere combination of persons or coming together of persons without anything more, without any intention to have a joint venture or carry on some common activity with a common understanding and purpose will not convert two or more persons into a body of individuals/association of persons. An "association of persons/body of individuals" is one in which two or more persons join in a common purpose and common action to achieve some common benefit. Where there is a combination of individuals by volition of the parties, engaged together in some joint enterprise or venture, it is known as "association of persons/body of individuals". The common object will have some relevance to determine whether a group or set of persons is an association of persons or body of individuals with reference to a particular statute. For example, when the said terms "association of persons" or "body of individuals" occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profit or gain (vide CIT v. Indira Balkrishna, Mohd. Noorulla v. CIT, N.V. Shanmugam and Co. v. CIT and Meera and Co. v. CIT). But the object need not always be to carry on commercial or business activity. For example, when the word "person" occurs in a statute relating to agriculture or ceiling on landholding, the term "association of persons/body of individuals" may refer to a combination of individuals who join together to acquire and own land as co-owners and carry on agricultural operations as a joint enterprise."

54. Further, in ***Ramanlal Bhailal Patel***[54], while elaborating on the notion of an association of persons, the Court held that co-owners of a property do not automatically become an association of persons. Where such co-owners lack a common purpose and pursue co-ownership not by their own volition, each of such coowners would constitute a different person instead of being referred to as single person, as an association of persons/body of individuals. The reasoning is reproduced:

"**29.** Normally, where a group of persons have not become co-owners by their own volition with a common purpose, they cannot be considered as a "person". When the children of the owner of a property succeed to his property by testamentary succession or inherit by operation of law, they become co-owners, but the coownership is not by volition of parties nor do they have any common purpose. Each can act in regard to his/her share, on his/her own, without any right or obligation towards the other owners. The legal heirs though coowners, do not automatically become an "association of persons/body of individuals". When different persons buy undivided shares in a plot of land and engage a common developer to construct an apartment building, with individual ownership in regard to respective apartment and joint ownership of common areas, the co-owners of the plot of land, do not become an "association of persons/body of individuals", in the absence of a deeming provision in a statute or an agreement. Similarly, when two or more persons merely purchase a property, under a common sale deed, without any agreement to have a common or joint venture, they will not become an "association of persons/body of individuals". Mere purchase under a common deed without anything more, will not convert a co-ownership into a joint enterprise. Thus when there are ten co-owners of a property, they are ten persons and not a "body of individuals" to be treated as a "single person". But if the co-owners proceed further and enter into an arrangement or agreement to have a joint enterprise or venture to produce a common result for their benefit, then the co-owners may answer the definition of a "person"."

55. Thus, the connotation of the expression, "*association of persons*", may vary in different statutes based on the particular context in which an association of persons is

[54] *Supra* note 52.

used in that statute. It needs to be examined whether such association of persons is pursuing a common action to achieve a benefit under the said statute.

56. In the context of the Act and Rules, companies or body corporates may come together and set up another company as a SPV, with a common purpose to achieve the common benefit of becoming captive user(s) under the Act and Rules, thereby enjoy the advantages provided to captive users such as waiver of paying cross subsidy or additional surcharge, as applicable.

57. Further, explanation 1(d) to Rule 3 of the Rules, defines a SPV to mean a legal entity owning, operating, and maintaining a generating station with no other business or activity to be engaged in by the legal entity. Thus, SPVs have a single purpose as envisaged under the Rules, that is, owning, operating and maintaining a generating station. A SPV cannot consume the electricity generated by the CGP by itself, that is, it cannot be a captive user since its only purpose is to own, operate and maintain a generating station. Thus, the purpose and objective of companies or body corporates in setting up an SPV, which cannot enjoy the benefits provided to captive users itself, would be for such body corporates, companies, or other persons to enjoy the common benefit of becoming captive users.

58. Our reasoning is in consonance with section 2(8) of the Act, which defines a CGP, and as noticed above categorises CGPs into two categories:

i) Single User CGP – the first part of Section 2(8) refers to a power plant set up by any person to generate electricity primarily for his own use; and ii) Group User CGP – the second part of Section 2(8) states that the power plant set up by any person to generate electricity primarily for their own use includes a power plant set up by any cooperative society or association of persons for generating electricity primarily for the use of members of such cooperative society or association. No other category of CGP is recognised under Section 2(8) of the Act.

59. The term "*person*", as defined in Section 2(49) of the Act, covers a wide category of users, including, any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person.

60. The term, "*association of persons*", has not been specifically defined in the Act. Conversely, the expression, "*association or body of individuals, whether incorporated or not*", used in the definition of "*person*" under Section 2(49) of the Act widens the scope of a "*person*" to include both juridical and non-juridical persons.

61. To reiterate, Section 2(8) of the Act recognises two categories of CGPs, that is, single captive users and group captive users. For group captive users, only two categories of users are recognised, that is, a cooperative society and association of persons. The first *proviso* to Rule 3(1)(a) of the Rules creates an exception for cooperative societies. It requires members of the cooperative society to only collectively satisfy the minimum ownership and electricity consumption requirements specified under paragraphs (i) and (ii) of Rule 3(1)(a) of Rules. The second *proviso* to Rule 3(1)(a), which refers to association of persons, requires such captive users to satisfy the minimum ownership and electricity consumption requirements specified under paragraphs (i) and (ii) of Rule 3(1)(a) of Rules. Additionally, it also requires such captive users to consume electricity generated by the CGP, which shall not be less than 51%, in proportion to their individual shares in the ownership of the CGP, which shall not be less than 26%. Thus, under the Rules, all group captive users which are not registered cooperative societies are required to comply with the test of proportionality specified in the second *proviso* to Rule 3(1)(a).

62. This Court in ***S. Sundaram Pillai and Others*** v. ***V.R. Pattabiraman and Others***[55] has held that a *proviso* serves four different purposes, as stated below:

"**43.** We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:

(1) qualifying or excepting certain provisions from the main enactment:

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable:

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

Accordingly, the second *proviso* to Rule 3(1)(a) of the Rules is not case specific. It is to be treated as corollary to the interpretation embedded under Section 2(8) of the Act, that is, "*primarily for its own use*". In order make the enactment under Section 2(8) of the Act workable in any instance where group captive users are not registered cooperative societies, the rule of proportionality under the second *proviso* to Rule 3(1)(a) of the Rules should be read as a mandatory condition.

63. This Court in ***Monnet Ispat & Energy Ltd. And Others*** v. ***Union of India and Others***[56] held that the minimum electricity consumption requirement under paragraph (ii) to Rule 3(1)(a) of the Rules conforms with the requirement under Section 2(8) of the Act, that electricity generated by the CGP should be "*primarily for its own use*". Thus it held that Rule 3(1)(a) of the Rules cannot be said to be against the purposes of the Act. This Court in ***Monnet Ispat***[57] observes:

"**14.** In the light of what has been discussed by this Court in Global Energy Ltd. (supra) when we examine definition of Generating Plant in section 2(8) of the Act it emphasizes setting up primarily for his own use or in case of cooperative society for use by its members. When we consider Rule 3(1)(a)(ii) of the Rules of 2005, it is clear that it provides not less than 51% of aggregate electricity generated in such plant determined on annual basis is consumed for captive use. The rule conforms to the requirement of section 2(8) that primarily electricity should be generated by captive generating plant for his own use/members as the case may be. The provisions of Rule 3(1)(a)(ii) of the Rules of 2005 cannot be said to be against purposes of the Act. Rather it promotes rationale of the provision and essential qualifications laid down in the Act itself…"

Similarly, the second *proviso* to Rule 3(1)(a) of the Rules is in furtherance of Section 2(8) of the Act.

64. An association of companies or body corporates thus are required to comply with Rule 3(1)(a) read with the second *proviso* to Rule 3(1)(a). Equally, an association of companies, body corporates, or other persons that set up a SPV which owns, maintains, and operates a CGP is required to comply with Rule 3(1)(a) read with the second *proviso* to Rule 3(1)(a). A SPV in this regard may be company, but it also is also an association of persons in terms of the second *proviso* to Rule 3(1)(a).

65. We cannot, in any manner, read Rule 3(1)(b) as overriding or prevailing over Rule 3(1)(a) of the Rules. To accept this argument would, in fact, be accepting that "gaming",

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[55] (1985) 1 SCC 591.
[56] C.A. No. 18506-18507 of 2017; for short, "Monnet Ispat".
[57] *Supra* note 56.

as described above, is permissible if a company is formed as a SPV for the purpose of generating and supplying electricity to its shareholders or other body corporates. For instance, a generating company established as an independent power producer being a shareholder of 98% shares in a plant can camouflage as a CGP by giving 2% shares to group captive users and allowing them to consume 98% of the electricity generated. The independent power producer may consume only 2% of the electricity generated despite holding 98% of the shares in the plant. This would be clearly contrary to Section 2(8), which uses the expression, "*primarily for its own use*". To accept this submission would also be contrary to the object and purpose behind giving benefit to captive users who spend their money and invest in setting up a CGP. While interpreting a provision which is ambiguous or debatable, the court or the adjudicator must keep in mind the intent of the legislature and read the words in a manner that the object and purpose is promoted, rather than accepting an interpretation which would result in misuse or abuse.

66. In view of the aforesaid reasoning, we hold that SPVs which own, operate and maintain CGPs are an "*association of persons*" in terms of the second *proviso* to Rule 3(1)(a) of the Rules. Companies, body corporates and other persons, who are shareholders and captive users of a CGP set up by a SPV, are required to comply with Rule 3(1)(a) of the Rules read with the second *proviso* of the Rules.

67. We accordingly answer the three issues.