

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JAIPUR BENCH JAIPUR

1. D.B. Civil Writ Petition No.2772/2012
Ambuja Cements Ltd. V/s Raj.Electricity Regulatory
Commission
2. D.B. Civil Writ Petition No.2850/2007
Raj.Textile Mills Asso. V/s Raj.Electricity Regulatory
Commission
3. D.B. Civil Writ Petition No.5128/2007
M/s Shree Cement Ltd. V/s State of Rajasthan & ors.
4. D.B. Civil Writ Petition No.5270/2007
M/s DCM Shriram . V/s State of Rajasthan & ors.
Consolidated Ltd.
5. D.B. Civil Writ Petition No.5151/2008
M/s Binani Cement Ltd. V/s Union of India & ors.
6. D.B. Civil Writ Petition No.11285/2008
M/s J.K.Lakshmi Cement V/s Raj.Electricity Regulatory
Ltd. Commission
7. D.B. Civil Writ Petition No.11288/2008
M/s Aditya Cement V/s Raj.Electricity Regulatory
Commission
8. D.B. Civil Writ Petition No.7616/2009
M/s Manglam Cement Ltd. V/s Raj.Electricity Regulatory
Commission
9. D.B. Civil Writ Petition No.7622/2009
M/s Lucid Colloids Ltd. V/s Raj.Electricity Regulatory
Commission
10. D.B. Civil Writ Petition No.9781/2009
M/s Shriram Rayons Kota V/s Raj.Electricity Regulatory
Commission
11. D.B. Civil Writ Petition No.9783/2009
Ambuja Cements Ltd. V/s Raj.Electricity Regulatory
Commission
12. D.B. Civil Writ Petition No.10219/2009
Grasim Industries Ltd. V/s Raj.Electricity Regulatory
Commission

Reportable

13. D.B. Civil Writ Petition No.11072/2009
Hindustan Copper Ltd. V/s Raj.Electricity Regulatory
Commission
14. D.B. Civil Writ Petition No.11073/2009
J.K.Tyre & Industries Ltd. V/s Raj.Electricity Regulatory
Commission
15. D.B. Civil Writ Petition No.14510/2009
Chambal Fertilisers and V/s Raj.Electricity Regulatory
Chemicals Ltd. Commission
16. D.B. Civil Writ Petition No.14575/2009
Grasim Industries Ltd. V/s Raj.Electricity Regulatory
Commission
17. D.B. Civil Writ Petition No.4589/2011
The Raj.Textile Mills Asso. V/s Raj.Electricity Regulatory
Commission
18. D.B. Civil Writ Petition No.6517/2011
M/s J.K.Lakshmi Cement V/s Raj.Electricity Regulatory
Ltd. Commission
19. D.B. Civil Writ Petition No.6518/2011
Hindustan Cooper Ltd. V/s Raj.Electricity Regulatory
Commission
20. D.B. Civil Writ Petition No.6519/2011
Ultra Tech Cement Ltd. V/s Raj.Electricity Regulatory
Commission
21. D.B. Civil Writ Petition No.6520/2011
Chambal Fertilisers and V/s Raj.Electricity Regulatory
Chemicals Ltd. Commission
22. D.B. Civil Writ Petition No.6521/2011
M/s Lucid Colloids Ltd. V/s Raj.Electricity Regulatory
Commission
23. D.B. Civil Writ Petition No.6877/2011
J.K.Tyre & Industries Ltd. V/s Raj.Electricity Regulatory
Commission
24. D.B. Civil Writ Petition No.7343/2011
Ultratech Cement Ltd. V/s Raj.Electricity Regulatory
Commission
25. D.B. Civil Writ Petition No.7344/2011
Ultra Tech Cement Ltd. V/s Raj.Electricity Regulatory
Commission

26. D.B. Civil Writ Petition No.10911/2011
M/s Hindustan Zinc Ltd. V/s Raj.Electricity Regulatory
Commission
27. D.B. Civil Writ Petition No.10912/2011
M/s Shriram Rayons Kota V/s Raj.Electricity Regulatory
Commission
28. D.B. Civil Writ Petition No.10913/2011
M/s Manglam Cement Ltd. V/s Raj.Electricity Regulatory
Commission

Date when the order was reserved :- 21.8.2012

Date of pronouncement of order :- 31.8.2012

PRESENT

Hon'ble the Chief Justice Mr.Arun Mishra
Hon'ble Mr.Justice Narendra Kumar Jain-I

Mr.P.N.Bhandari)
Mr.Kamlakar Sharma, Sr.Counsel with)
Ms.Alankrita Sharma)
Mr.Sudhir Gupta,Sr.Counsel with)-for the petitioners.
Mr.Sachin Mehta)

Mr.Virendra Lodha, Sr.Counsel with)
Mr.Ankit Jain)
Mr.Bipin Gupta)
Mr.Pradeep Kalwania)-for the respondents.

ORDER

BY THE COURT (Per Hon'ble Shri Arun Mishra, CJ)

Since common questions of law and facts are involved in all these writ applications, they were heard together and are being decided by this common order.

In one batch of writ applications, the petitioners have prayed that the order dated 7th March, 2007 passed by the

Rajasthan Electricity Regulatory Commission, Jaipur (hereinafter referred to as "the Regulatory Commission") whereby the Regulatory Commission has approved the draft of Rajasthan Electricity Regulatory Commission (Renewable Energy and Cogeneration Obligation) Regulations, 2006 with changes in Regulations 4 and 5 pertaining to renewable energy obligation (RE Obligation) and payment of renewable energy surcharge for short fall in obligation and the Notification dated 23.3.2007 by which the Regulatory Commission in exercise of the powers conferred by Section 86(1) (e) read with section 181 of the *Electricity Act, 2003 (Act 36 of 2003)* (hereinafter referred to as "the Act of 2003") has framed and notified the *Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) Regulations, 2007* (hereinafter referred to as "the Regulations of 2007") imposing obligation on the captive power plants and open access consumers to purchase minimum energy from renewable sources and to pay surcharge in case of short-fall in meeting out the RE obligation, be declared ultra vires the Sections 7, 9, 86(1)(a) and (e) and 181 of the Act of 2003, Articles 14, 19(1)(g) and 265 of the Constitution of India, National Electricity Policy, 2005 and Tariff Policy, 2006 and the Regulatory Commission be restrained from imposing any obligation on the Captive Generating Plants and open access consumers to purchase any energy from renewable sources and to pay surcharge on non-fulfilment of RE obligation.

In another batch of writ applications, the petitioners have also prayed that the Notification dated 23rd December, 2010 whereby in exercise of the power conferred under sections 61, 66, 86(1)(e) and 181 of the Act of 2003, the Regulatory Commission has framed the *Rajasthan Electricity Regulatory Commission (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010* (hereinafter referred to as "the Regulations of 2010") be declared null and void in so far as they relate to captive power plants and open access consumers based on such captive plants; it has been further prayed that the Regulatory Commission had no authority to issue direction to non-licensees like the petitioners for purchasing renewable energy and to levy charge or surcharge and to take any action for the alleged non compliance of order or direction under the provisions of the Act of 2003; the petitioners have also prayed that the Regulatory Commission be restrained from imposing any charge or surcharge or to take any action against the petitioners for non-compliance of its order or direction arising out of the impugned Regulations; it has been further prayed that Regulatory Commission be restrained from compelling the petitioners, who are generator of electricity, to become purchaser of renewable energy.

Facts in brief are that the petitioners are Companies registered under the Indian Companies Act, 1956; they are

engaged in the manufacture of cement, textile, chemical, clinker, guar gum powder, rayons, white cement, copper, tyre, tube, flaps, fertilizers, agri.-inputs, non-ferrous metals, lead, zinc etc. and for that purpose, they have established their own captive generation power plants; prior to 2003, the electricity supply in India was governed by three enactments namely, the *Indian Electricity Act, 1910*, the *Electricity (Supply) Act, 1948* and the *Electricity (Regulatory Commissions) Act, 1998*; with a view to encourage private sector participation in generation, transmission and distribution of electricity and in order to distancing the regulatory responsibility from the Government to Regulatory Commissions, the Parliament enacted the Electricity Act of 2003, which is a self-contained comprehensive legislation in the matter of electricity; section 82 of the Act of 2003 enjoins upon every State Government to constitute a Commission in the State and accordingly, the State of Rajasthan constituted the Regulatory Commission; the functions of the Regulatory Commission have been mentioned in Section 86 of the Act of 2003; beside other functions, the Regulatory Commission is required to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from generating companies or licensees or from other sources; the Regulatory Commission is also required to promote co-generation and generation of electricity from renewable

sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of distribution licensee; the 'Captive Generating Plant' has been defined in Section 2(8) of the Act of 2003, which 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; section 2(47) of the Act of 2003 defines 'open access' which means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission; section 9 allows any person to construct, maintain or operate a Captive Generating Plant and dedicated transmission lines.

It was further submitted that with a view to promote co-generation and generation of electricity from renewable energy sources as provided in Section 86(1)(e) of the Act of 2003, the Regulatory Commission has also specified the purchase obligation from other renewable energy sources in respect of distribution licensees. However, according to petitioners, though the Act of 2003, did not authorize the Regulatory

Commission to make similar provisions in respect of Captive Generating Plants or consumers availing energy through open access, it issued public notice in November, 2006 showing intention to frame the Rajasthan Electricity Regulatory (Renewable Energy and Co-generation Obligation) Regulations, 2006; the Regulatory Commission proposes RE and cogeneration obligations to consumers availing energy through open access and/or having captive generating plants yearwise to the extent of 4.88% in 2007-08, 6.25% in 2008-09, 7.45% in 2009-10, 8.50% in 2010-11 and 9.50% in 2011-12; the Regulatory Commission has mentioned in the public notice that if any person intends to make any suggestions on the said Regulations, he may do so by 15th December, 2006; petitioners have submitted their suggestions/objections to the Regulatory Commission; objections were also submitted by the Rajasthan Cement Manufacturers' Association (for short "the RCMA") and others; the Regulatory Commission thereafter approved the draft Regulations with some changes in Regulations 4 and 5 vide order dated 7th March, 2007, which is under challenge and thereafter, the Regulations of 2007 were notified by the Regulatory Commission vide notification dated 23.3.2007, which is also challenged by the petitioners contending that the Regulatory Commission had no authority or power to frame the Regulations of 2007 imposing obligation upon captive power plants and open access consumers to purchase energy from renewable

sources and to pay surcharge in case of short-fall in fulfilling the RE obligation and the Regulatory Commission had acted beyond the legislative powers delegated on it; the impugned Regulations are ultra vires the Sections 7,9, 86(1)(a) and (e) and 181 of the Act of 2003, Articles 14, 19(1)(g) and 265 of the Constitution of India, National Electricity Policy 2005 and the Tariff Policy, 2006; the Act of 2003 was enacted with the objective of encouraging private sector participation in generation, transmission and distribution of electricity and on 28th May, 2007, the conference of various Chief Ministers was held in New Delhi and the Ministry of Power Government of India has published the resolution adopted by the Chief Ministers' Conference on power and the petitioners have relied upon para 5 of the Resolution; Sub-section (4) of Section 86 of 2003 provides that in discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3 of the Act of 2003 and thus, the Regulatory Commission was bound by the Policies and could not have imposed any obligation contrary to the objectives of these Policies; the National Electricity Policy has been circulated and published in the Gazettee of India by the Ministry of Power on 12th February, 2005 and the petitioners have relied upon Paras 5.2.24 to 5.2.26 of the National Electricity Policy with regard to captive generation; since the Act of 2003 has been enacted with a view

to encourage participation of private sector in generation of electricity and with that objective, generation was de-licensed and captive generation was freely promoted, the impugned Regulations could be framed keeping in mind that purpose, but the same was ignored and by framing the Regulations of 2007, that purpose has been frustrated.

It was further submitted by the petitioners that the National Electricity Policy as well as Tariff Policy were framed to promote production of energy and utilization thereof to the maximum extent in respect of the captive generation plants and not to compulsorily force them to lower down their production of energy and purchase energy instead from the renewable energy source and thus, the Regulations of 2007 are contrary to the National Electricity Policy; considering the object of the Act of 2003, establishment of captive power plant has been totally liberalized and kept out of any licensing and regulatory regime; neither any license nor any approval from any authority is required to instal a captive power plant and thus, the Regulatory Commission had no jurisdiction to impose any obligation for compulsory purchase of electricity from a renewable energy source; the renewable energy source and captive generating plant are both alternative sources of energy which have to be promoted; one cannot be placed on higher or lower footing; the Regulatory Commission by imposing a compulsory obligation to purchase electricity from renewable

source and to pay surcharge in case of short fall in meeting out the RE obligation had acted beyond the object sought to be achieved under National Electricity Policy as well as Act of 2003.

It was further submitted that Section 86(1)(e) empowers the Regulatory Commission to determine the tariff for generation, supply, transmission and wheeling of electricity and the Regulations of 2007 cannot in any manner be regarded to be in the matter of determination of tariff; sub-clause (b) authorizes the Regulatory Commission to regulate electricity purchase and procurement process of distribution licensees; 'distribution licensee' has been defined under section 2(17), however, a captive generating plant cannot be said to be a distribution licensee; sub-clause (e) enables the Regulatory Commission to discharge the function of promoting cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person and under the said provision also, no compulsion can be imposed on captive generating plants to purchase electricity from renewable sources; the provision only enables removal of hurdles for the purpose of promotion in co-generation and generation of electricity from renewable sources and to take measures for providing connectivity with the grid so that the renewable energy sources may make sale of electricity to any person; the

distribution system is available only with the distribution licensee; separate regulations have been framed by the Regulatory Commission for providing open access to any person using or intending to use the transmission system or the distribution system of a distribution licensee viz. *The Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004* (for short "the Regulations of 2004"); unless open access is permitted a person cannot buy electricity from any source other than the distribution licensee nor can any other energy source, sell electricity to any person; under the Regulations of 2004 open access has been allowed for intrastate transmission under Regulation 26(2) to only the consumers mentioned therein; putting a compulsory obligation on a captive generating plant to buy its energy requirement from renewable energy sources cannot be considered in the realm of a promotional measure. The words 'specify, for purchase of electricity from such sources, a percentage of total consumption of electricity in the area of distribution licensee' contained in Section 86(1)(e) have to be read only in relation to the purchase by a distribution licensee and not any other person or consumer; it has not been specified that the word 'purchase' relates to whom; the word 'consumer' is also missing therein; such an obligation can necessarily be on licensee and the said obligation has to be read in respect of only a distribution licensee and not in respect of

captive generating plant as is evident from Para 6.4 of the Tariff Policy as notified by the government vide notification dated 6th January, 2006; reliance has also been placed on paras 6.3 and 6.4 of the Tariff Policy which provide for the purchase by the distribution licensee a fixed minimum percentage of its energy requirement from the non conventional energy sources including co-generation; similarly the policy for promoting generation of electricity through non-conventional sources issued by the Department of Energy imposes an obligation to purchase electricity from renewable energy source in respect of distribution companies and this indicates that the obligation could have been imposed only on the distribution licensee and not on a generator of electricity; the Regulatory Commission under section 86 of the Act of 2003 can regulate the sale of electricity to any person, however, it has got no power to regulate purchase by a person of electricity except in the case of a distribution licensee; the obligation could, therefore, be imposed only on a distribution licensee and not on a generator of electricity; Section 181 of the Act of 2003 also does not empower the Commission to make regulations for providing compulsory obligation on generating companies including captive generating plants; no doubt section 181(1) gives general power to frame regulations and sub-section (2) only specifies without prejudice to the generality of that power to make regulations providing for any of the matters mentioned in

sub section (2), none of the matters specifically mentioned under sub-section (2) viz. (a) to (zp) provide for framing of impugned Regulations and thus, imposition of obligation on captive generating plants to purchase electricity from the renewable energy source is neither consistent with the Act of 2003 nor can it be said to be for carrying out the purpose of the Act of 2003; general power under section 181(1) does not allow the Regulatory Commission to impose RE obligation; while framing the Regulations of 2007 imposing obligation on the captive power plants to purchase electricity from renewable energy source, the Regulatory Commission has acted in an illegal and arbitrary manner and thus, the impugned Regulations are violative of Articles 14 and 19(1)(g) of the Constitution of India.

According to the petitioners, the imposition of surcharge by the Regulatory Commission in case of short fall in meeting out the RE obligation as specified under the Regulations of 2007 buying energy from the renewable source is also without authority of law and contrary to Article 265 of the Constitution of India. Section 86(1)(g) of the Act of 2003 empowers the Regulatory Commission to levy fee for the purposes of the Act of 2003; the surcharge for not meeting-out the compulsory RE obligation cannot in any manner be regarded as a fee; fee can only be imposed for service rendered and there should be an element of 'quid pro quo' therein; the surcharge is in the form of

penalty or cess; this would be clear from the fact that the surcharge so collected is required to be credited to the State Transmission Utility (for short "the STU") in a fund to be utilized for creation of transmission system, infrastructure of renewable energy power plants; if the surcharge is considered as a penalty or tax or cess imposed for augmenting the revenue of the STU, no such tax or surcharge is envisaged under the Act of 2003; penalty in the form of surcharge cannot be imposed unless there is a direct provision enabling the Regulatory Commission to do so and since there is no such provision in the Act of 2003, penalty cannot be said to be within the authority of the Regulatory Commission and thus, imposition of surcharge is bad in law. Apart from this, there is no provision for fixing a rate at which energy shall be purchased by any person including a captive generating plant from a renewable energy source; section 62 empowers the Regulatory Commission to determine the tariff only in respect of matters mentioned in sub section (a) to (d); the Regulatory Commission has framed Regulations of 2004 whereby it has provided the rate at which the distribution licensee shall purchase energy from renewable energy sources, however, no such rate has been or could have been fixed in relation to captive power plants and thus, by imposing a compulsory obligation, the Regulatory Commission has put the captive power plants at a predicament.

It was further submitted by the petitioners that under the provisions of the Act of 2003, the Regulatory Commission is required to be consisted of not more than three members including the chairperson; the impugned Regulations as framed by the Regulatory Commission indicate that the quorum for it would be at least two; the Regulatory Commission had been constituted comprising of Sri Shanti Prasad as Chairman, Shri K.L.Prasad as Member and Shri Dharendra as Member; Chairman Shanti Prasad and Member Dharendra retired after publication of the draft regulations and the hearing was conducted by Shri K.L.Vyas as a single member and the Regulations of 2007 were framed by him; no order was issued appointing Shri K.L.Vyas as Chairperson and the impugned order dated 7.3.2007 and Regulations of 2007 have been passed by him; thus, in absence of proper quorum, framing of Regulations of 2007 and passing of impugned order dated 7.3.2007 are without jurisdiction. However, that point of quorum was not orally argued though taken in the submission.

Besides above, the petitioners have also questioned the validity of the Regulations of 2010 so far as they relate to captive plants and open access consumers on various grounds including that the Regulatory Commission had no power or authority whatsoever to frame such Regulations; under the Regulations of 2010 a new concept has been introduced regarding renewable energy certificates; from section 86(1)(b)

of the Act of 2003, it is clear that the Regulatory Commission can regulate only purchases by distribution licensees and thus, power purchases by others including Captive Power Plants cannot be regulated by the Regulatory Commission; whatever directions are given by the Regulatory Commission, they are applicable to licensees only, otherwise there would be no difference between the licensee and non licensee; though Regulatory Commission is required to promote the renewable energy, but it cannot act beyond jurisdiction and while framing the Regulations of 2010, it has acted in an illegal and arbitrary manner; incidentally 97% of the power in the State is being handled by the Discoms; they as licensees are already purchasing renewable energy as already prescribed by the Regulatory Commission; the owners of captive power plants generate 3% power in the State and under the Regulations in question, the captive power plants are required to purchase renewable power ranging from 4.88% to 9.50%, thus, the Regulatory Commission has acted in an unreasonable and arbitrary manner while framing the impugned Regulations; the captive power plant owners are generating power and not buying power and thus, the Regulatory Commission has committed error in directing the generator of energy to buy minimum renewable energy and in case of short fall to pay surcharge; no authority can force the generator of power to become a buyer of electricity; captive power plant consumers

are not within the regulatory jurisdiction of the Commission in respect of their consumption and they cannot be compelled to purchase electricity from renewable sources or any other sources.

It was submitted by the petitioners that the Act of 2003 has totally delicensed generation including captive generation and relying upon Sections 7 and 9 of the Act of 2003 it was submitted that any generating company can establish, operate and maintain a generating station without obtaining a license and a person may construct, maintain or operate a captive generating plant and dedicated transmission lines and Section 9 contains non-obstante clause which will have overriding effect on other provisions of the Act of 2003; referring to sections 12 and 14, it was submitted that there is no requirement for obtaining a license from the Regulatory Commission for generation etc. as the licensing is restricted to (a) transmission (b) distribution and (c) trading in electricity. When no license is required, how can the Regulatory Commission issue directions subsequently to captive power plant consumers and how can the licensees and non-licensees be treated alike and if such directions are allowed to stand, the very purpose of delicensing the generation would be frustrated.

Referring to Section 23 of the Act of 2003, it was submitted that directions can be issued by the Regulatory Commission to the licensees and in view of delicensing, no

directions can be issued by the Regulatory Commission to captive power plant and open access consumers. It is elementary that a licensing authority under any law can issue directions only to licensees. The Regulatory Commission has no jurisdiction over non-licensees like captive power plant and open access consumers, especially when Parliament has delicensed generation under the Act of 2003.

Referring to Section 86 (1)(e) of the Act of 2003, it was further submitted by the petitioners that procurement is to be from the distribution companies only as they alone purchase power and not the captive power plants consumers, who generate power but do not purchase power. Thus, the assumption of the Regulatory Commission that it can regulate purchase and procurement of electricity by others is wholly misplaced. The captive power plants consumers are generating power and not buying power and thus, directions to them to purchase renewable energy cannot be sustained as no authority can compel a generator of energy to become a purchaser of electricity. The Regulatory Commission cannot force the petitioners who are generators of power to switch over to the business of purchasing electricity and such action is violative of Article 19(1)(g) of the Constitution.

A reply to the writ applications was filed by the State of Rajasthan contending that the petitioners have misconstrued and misinterpreted the provisions of the Act of 2003; the

regulations of 2007 and 2010 are perfectly within the framework of law and cannot be said to be ultra vires the Constitution; the renewable energy obligation does not impose any liability on the petitioners in respect of their generation plant, instead the liability is on the end user to buy minimum percentage of renewable energy so that the generation from renewable energy can be promoted to achieve an object to reduce emission of such gases which are damaging ozone layer and by which the global warming all over the world is increasing and thus, the entire world is taking steps to protect the environment and with this object, the renewable energy is being promoted all over the world; there is no violation of the provisions of the Act of 2003 or National Electricity Policy or Tariff Policy, rather Regulatory Commission has acted within domain and authority and in consonance with the objects of the Act of 2003, National Electricity Policy, Tariff Policy.

The Regulatory Commission has also filed a reply to the writ applications contending that promotion of co-generation and generation of electricity from renewable source of energy is one of the avowed objectives of the Act of 2003 and suitable regulatory measures in that respect are included in the functions of the Regulatory Commission; while passing the impugned Regulations of 2007 and 2010, the Regulatory Commission has proceeded in right direction and prior to passing the impugned order and regulations, public notice was issued

and after considering the objections, the order and regulations of 2007 were passed and thus, the action was perfectly within law; RE obligation for captive power plant and open access users is applicable on the consumption of electricity in the area of distribution licensee drawn from sources other than distribution licensee; the impugned order and regulations cannot be said to be ultra vires the Constitution, rather the Regulatory Commission has acted within jurisdiction and in consonance with the National Electricity Policy, 2005 and Tariff Policy, 2006; under section 86(1)(e), the legislation has used the words that Commission can specify sale of electricity to any person from renewable sources and the commission may also specify purchase of electricity from such sources, a percentage of total consumption of electricity in the area of a distribution licensee; the word 'total consumption' has been used in the said section and the total consumption in area of a distribution licensee can be by three ways either supply through distribution licensee or supply from captive power plants by using lines and transmission lines of distribution licensee or from any other source by using transmission lines of distribution licensee; the area would always be of distribution licensee as the transmission lines and the system is of distribution licensee, the word 'total consumption' is very significant and the three types of consumption mentioned above cannot be discriminated by each other; the object behind imposing obligation is to promote

generation of electricity from renewable sources and thus it would have a long impact in protecting environment; at present, the coal is dominating the scenario and will continue to do so in future also; the thermal generation causes generation of green house gases (GHG), global warming affected by increased emission of GHG mainly carbon dioxide and consequence climate change have caused international concern; it has resulted into fundamental changes in approach towards development of energy sector in all the countries; the object of regulation is in the interest of public at large; even the Tariff Policy also strengthens the action of the Regulatory Commission asking any person to buy percentage of renewable energy; if the stand of the petitioners that obligation should be imposed on the consumers of the licensee only, then it would amount to discrimination and to remove such discrimination, obligation has been imposed on the captive power plant consumers as well as open access consumers. As regards the case of the petitioners that consumption through a distribution licensee contribute to 97% and consumption through captive power plant or open access is only 3% and therefore, the consumption of distribution licensee only should bear the costs of obligation, it was submitted that if such interpretation is accepted, it would result in causing discrimination and the word total consumption would loose its significance; 21 State Commissions have already implemented such Regulations and

the same are being complied with by the captive power plant and open access consumers. Hence, it was prayed that the writ applications be dismissed.

A reply has also been filed by the Indian Wind Energy Association, New Delhi contending that consumption from any source has to be total consumption, the case that there could be only one figure of total consumption and that would be of licensees would be fallacious as there can be two distribution licensees in the same area and there is no restriction and if two licensees are there then the consumption of each licensee would be different but at the same time it will include in total consumption; if consumption is different as being put up by the petitioners then it will discriminate between different type of consumption within the area, such discrimination is not permissible under the Act of 2003; if the case of the petitioners that the obligation should be imposed on the consumers of the licensees only, then it would be discriminatory act on the part of the Regulatory Commission and to remove such discrimination, the obligation has been rightly imposed on the captive power plant consumers as well as open access consumers; the object behind promotion of renewable energy is for clean and green environment and for promoting, if any harsh conditions are also imposed in public interest then it cannot be termed as arbitrary action or against the Constitution; the Association has more than 300 members engaged in promotion

and development of electricity from renewable resources of energy (wind) by establishing wind turbines across all over India; the electricity produced from renewable sources has the inherent advantage of being most environment, friendly, for which the Act of 2003 has been enacted and the policies framed under the Act of 2003 like the National Electricity Policy dated 12.2.2005 and Tariff Policy dated 6.1.2006 provide statutory framework to promote generation of electricity from renewable sources; thus, the action of the Regulatory Commission is in consonance with the Act of 2003, National Electricity Policy and the Tariff Policy; regulation is applicable for all distribution licensees including deemed distribution licensees, open access consumers and the captive consumers having power plants of installed capacity of more than 1 MW; the impugned Regulations have been framed and notified after following due process of law and providing opportunity of hearing to all including the petitioners; as provided under section 86(1) (e) of the Act of 2003, the Regulatory Commission has prescribed that the distribution licensees and captive/open access users shall purchase some percentage of their total consumption from renewable sources of energy out of their total consumption of electricity; the Regulations have been framed to give an impetus to production of electricity from renewable energy sources and thus, the Regulations have been framed in public interest as energy generated from renewable

sources is pollution free and the impugned Regulations are in consonance with the Act of 2003, National Electricity Policy and Tariff Policy; the Regulatory Commission has rightly insisted that captive power plants and open access consumers should compulsorily purchase renewable energy and such action is fully justified being within its domain; minimum percentage can be fixed under section 86(1)(e) which empowers the Regulatory Commission to fix the minimum percentage to be procured from RE sources of the total consumption of the electricity in the area of the distribution licensee which also covers the electricity consumption by the captive power plant and open access consumers also; the petitioners have misread and misconstrued section 86(1)(e) to their advantage only ignoring the legislative intent; the definition of "area of supply" in the Act of 2003 relates to territorial area of the distribution licensee and cannot be restricted to consumers of the distribution licensee; there cannot be any discrimination amongst normal consumers supplied electricity by distribution licensee and captive/open access consumers; the Regulatory Commission has considered the scope and nature of availability of RE sources of energy; protection of environment is the prime need of the hour; it is in ecology to boost interest of the production by utilizing renewable sources of energy; the State and Regulatory Commissions have a solemn responsibility to protect and improve for present and future environment

generation; Article 51A(g) casts a duty on the citizen of India to protect and improve the natural environment; the right to life under Article 21 imposes a positive obligation on the State and the authority constituted by it to protect the ecology and the environment and to conceive, anticipate and attack the causes of environmental degradation; the Regulatory Commission has framed the Regulations impugned with regard to the thrust and spirit of the aforesaid provisions in discharge of its functions under section 86(1)(e); hence, no interference is called for and the writ applications are liable to be dismissed.

It was submitted by Mr.Kamlakar Sharma, Senior Counsel appearing with Ms.Alankrita Sharma, Mr.Sudhir Gupta, Senior Counsel appearing with Mr.Sachin Mehta and Mr.P.N.Bhandari for the petitioners that the Regulatory Commission does not have jurisdiction under section 86(1)(e) read with section 181 of the Act of 2003 to frame the impugned Regulations in respect of industries running their own captive power plants and it has power only with respect to distribution licensee and thus, it was not open to the Regulatory Commission to impose obligation upon the petitioners having captive power plants to purchase energy from renewable sources and in the event of short fall to fulfil RE obligation to pay surcharge; the notification issued by the Regulatory Commission runs contrary to the scheme and provisions of the Act of 2003; one of the objectives of the Act of 2003 is that captive power plant should be free from

regulation and control by the Regulatory Commission and the same has been defeated by imposing obligation upon captive power plants to purchase energy from renewable source and to pay surcharge in case of short fall in fulfilling that obligation; under section 86(1)(e), obligation can be imposed only upon distribution licensee; regulation of electricity purchase by the Regulatory Commission is provided under section 86(1)(b) and Section 86(1)(e) does not confer any power on the Regulatory Commission to regulate electricity purchase and thus, Section 86(1)(b) and (e) are to be invoked by the Regulatory Commission for the purposes of issuing any notification regulating electricity purchase specifying percentage of power to be purchased; section 86(1)(b) deals with the distribution licensee and thus, there was no power with the Regulatory Commission to frame impugned Regulations in respect of captive power plants ; captive power plants have nothing to do with the total consumption of electricity in the area of the distribution licensee as provided in section 86(1)(e).

The learned counsel for the petitioners have also referred the definition of 'captive generating plant' contained in Section 2(8), 'distribution licensee' mentioned in Section 2(17), 'licensee' appearing in Section 2(39) and 'area of supply' contained in Section 2(3); they have also relied upon Section 86(4) of the Act of 2003 which provides that in discharge of its functions, the State Commission shall be guided by the National Electricity

Policy (NEP), National Electricity Plan and Tariff Policy published under section 3 of the Act of 2003; they have also relied upon Para 5.12 of the National Electricity Policy and Para 6.4 of the National Tariff Policy dealing with co-generation and non-conventional sources of energy generation; aforesaid policies are also for imposing obligation by the Regulatory Commission upon distribution companies.

The learned counsel while pointing out the scheme of the Act of 2003 also submitted that the Act of 2003 provides for de-licensing of captive generation and independent status of captive power plants and for that they have attracted the attention of the Court to Section 7 of the Act of 2003; Section 9 contains non-obstante clause and it has over riding effect and thus, captive power plants are free from any control of Regulatory Commission, as also emphasized in para 5.2.24 of the National Electricity Policy and para 6.3 of National Tariff Policy; independent and free status of captive generation/captive power plants cannot be tinkered or diluted by imposing RE or other obligation by the Regulatory Commission as done by it through impugned Regulations.

It was further submitted by the learned counsel appearing for the petitioners that Section 181 of the Act of 2003 also does not empower the Regulatory Commission to frame the impugned Regulations; Section 181(1), which gives general power to the Regulatory Commission to carry out the provisions of the Act of

2003, cannot be used to create liability upon captive power plants which is not provided under the Act of 2003; none of the matters enumerated in clauses (a) to (zp) of sub-section (2) of Section 181 provide for framing of any such Regulations in respect of Section 86 or captive power plants and thus, Regulations of 2007 framed by the Regulatory Commission through Notification dated 23.3.2007 imposing RE obligation on captive power plants and open access consumers are beyond the rule making power conferred upon the Regulatory Commission.

It was also submitted that one of the objectives of the Act of 2003 was to encourage growth of captive power plants and when captive power plants have been de-licensed under the Act of 2003, no order or regulation could authorize imposition of obligation on them to purchase energy from renewable source; there is shortage of power in the State and huge amount has been invested by the petitioners in the installation of captive power plants for generating energy. Thus, imposition of obligation upon captive power plants to purchase energy from renewable source runs contrary to the objectives of the Act of 2003.

It was further submitted by the learned counsel for the petitioners that imposition of surcharge on captive power plants is specifically prohibited by the Act of 2003 and for that, they have relied upon fifth proviso to section 39, fifth proviso to Section 40 and fourth proviso to Section 42 and thus, imposition

of surcharge is illegal and violative of the provisions contained in the Act of 2003.

In respect of Regulations of 2010 notified vide notification dated 23rd December, 2010, it was submitted by the learned counsel that the same are also bad in law for the aforesaid reasons; under section 12 licensing is restricted to transmission, distribution and trading in electricity; section 14 provides for grant of license for the aforesaid purposes; licensees and non-licensees cannot be treated alike; section 19 also deals with power to revoke license. section 23 also intends to issue directions to licensee; there is no control on captive power plants envisaged under the aforesaid provisions of the Act of 2003.

It was further submitted that 97% of the power in the State is being handled by the Discoms and they as licensees are already purchasing renewable energy as already prescribed by the Regulatory Commission; captive power plants generate 3% power in the State; under the regulations impugned, the captive power plants are required to purchase renewable energy ranging from 6% to 8.20%; the Regulatory Commission has created a plethora of problems including exorbitant penalty for the captive power plants for non-fulfilment of their purchase targets; captive power plants are not in the business of purchase of electricity; there is no authority with the Regulatory Commission to force the generator of energy to

become purchaser of electricity and thus, the action is violative of Article 19(1)(g) of the Constitution; petitioners cannot be compelled to purchase renewable energy; there is not enough renewable energy available in Rajasthan so as to fulfil the obligation imposed upon the petitioners; benefit would ultimately go to the other states where renewable energy is in abundance; it would be prudent to inject renewable energy generated by RE generators into the grid where there is perennial shortage of power; it should not have been foisted upon captive power plants. Thus, regulations of 2007 and 2010 are null and void so far as they relate to captive power plants and open access consumers.

Reliance has also been placed by the learned counsel for the petitioners on the decision taken on 28th May, 2007 in the Chief Ministers' Conference held in New Delhi; impugned Regulations are juxtaposed to the National Electricity Policy and Tariff Policy; prices are Rs.3.59 per unit which are high considering average price for the surplus and inadvertent power if so supplied by the petitioners' captive generation to the grid is about Rs.2.50 per unit and Rs.1.5- per unit respectively; the respondents are bound by promissory estoppel considering the fair play, they have invested huge amount and thus, no such obligation could have been imposed; there is no provision for fixing the rate at which energy shall be purchased by any person including captive power plant from renewable energy source;

Regulations of 2004 provide the rate at which the distribution licensee shall purchase energy from renewable energy source, but no such rate has been or could have been fixed in relation to captive power plants.

Mr.Virendra Lodha, Sr.Counsel with Mr.Ankit Jain, Mr.Bipin Gupta and Mr.Pradeep Kalwania for the respondents have submitted that the Regulatory Commission is fully empowered under the Act of 2003 to frame the Regulations of 2007 and 2010 in respect of captive power plants and open access consumers; generating companies and captive generation are also within the purview of the Act of 2003 as is evident from sections 7 and 9 contained in Part III of the Act of 2003 relating to 'generation of electricity'; Part IV of the Act of 2003 deals with 'licensing' from sections 12 to 24; 'transmission of electricity' is dealt with in Part V of the Act of 2003; Part VI deals with the 'distribution of electricity'; 'tariff' has been dealt with in Part VII of the Act of 2003 'constitution, power and functions of the Regulatory Commission' are contained in Part X of the Act of 2003; even 'transmission facilities' are within the purview of the Regulatory Commission as provided in Section 9 and section 10 provides duties of the generating companies; under sections 53(e) and 60 of the Act of 2003, directions can be issued by the Regulatory Commission to generating companies; Regulations in question have been framed by the Regulatory Commission in exercise of power

conferred upon it under section 86(1)(e) and 181 of the Act of 2003; section 86(1)(b) is independent provision and section 86(1)(e) is not to be read with section 86(1)(b); the expression 'total consumption of electricity in the area of a distribution licensee' contained in section 86(1)(e) can be by three ways either supply through distribution licensee or supply from captive power plants by using lines and transmission of distribution licensee or from any other source by using transmission lines of distribution licensee; the area would always be of distribution licensee and the system is of distribution licensee; the types of consumption cannot be divided in the word 'total consumption' which would be the result in case the petitioners' submission is accepted; when consumption in the area of distribution licensee is through captive power plant or open access, it is open to impose obligation upon captive power plants and open access consumers to purchase energy from renewable source.

It has been further submitted by the learned counsel appearing for the respondents that object behind the obligation is to promote generation of electricity from renewable sources which would have long impact in protecting the environment; they have referred to break up of the power generation; in order to promote generation of renewable energy, the obligation has been put on the captive power plants and open access consumers; coal is dominating the scenario of

electricity generation; thermal generation causes generation of green house gases (GHG) namely, carbon dioxide CO₂, sulphur dioxide, nitrogen oxide and solid particulate matters which beyond specified limit are hazardous for life; global warming affected by increased emission of green house gases and consequent change in climate have become international concern; object of regulation is in the greater interest of public at large and has long impact to prevent global warming in future.

It has been further submitted by the learned counsel for the respondents that National Electricity Policy strengthens the action of the Regulatory Commission as under the said policy, the Regulatory Commission can also issue direction to any person including captive power plant and open access consumers to purchase percentage of renewable energy and if the case of the petitioners that obligation should be imposed upon distribution licensee only is accepted, it would amount to discrimination and expression 'total consumption' contained in section 86(1)(e) would lose its significance.

It has been further submitted by the learned counsel for the respondents that consumption from any source has to be total consumption; the case of petitioners that there could be only one figure of total consumption which would be of licensees is misconceived as there can be two distribution licensees in the same area and there is no restriction and when

two licensees are there, the consumption of each licensee would be different but at the same time it would include in total consumption; it has relation with the consumption of petitioners also having captive power plants; the electricity produced from renewable source has the inherent advantage of being most environment friendly; Regulations are applicable for all distribution licensees including deemed distribution licensees, open access consumers and the captive power plants having capacity of more than 1 MW; Regulations have been issued in greater public interest as energy generated through renewable source is pollution free and the same are in accordance with the provisions of the Act of 2003, National Electricity Policy and Tariff Policy; reliance has also been placed on Articles 21 and 51-A(g) of the Constitution which casts duty to protect and improve the natural environment and impugned Regulations have been framed keeping in view the objectives to protect ecology and environment from pollution.

In the facts and circumstances of the case, following questions arise for consideration:-

“(1) Whether the Rajasthan Electricity Regulatory Commission is empowered to frame the *Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) Regulations, 2007* in exercise of power conferred under section 86(1)(e) read with section 181 of the Act of 2003 and the *Rajasthan Electricity Regulatory*

Commission (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010 in exercise of the powers conferred under sections 61, 66, 86(1)(e) and 181 of the Act of 2003 in respect of captive power plants and open access consumers imposing RE obligation upon them to purchase minimum energy from renewable source and to pay surcharge in case of short fall in fulfilment of such RE obligation;

(2) Whether as per the Scheme of the Act, the Regulatory Commission has framed the impugned Regulations repugnant to the National Electricity Policy, 2005 and Tariff Policy, 2006;

(3) Whether the Regulatory Commission could have imposed surcharge on the captive power plants and open access consumers in the event of their failure to fulfil the RE obligation."

In order to appreciate the controversy, it is necessary to consider the relevant provisions of the Electricity Act , 2003.

The Electricity Act, 2003 was enacted to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity

tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

The 'area of supply', has been defined in Section 2(3) of the Act of 2003, which means the area within which a distribution licensee is authorized by his license to supply electricity. 'Captive generating plant" defined in Section 2(8) 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. 'Cogeneration" has been defined in Section 2(12) which means a process which simultaneously produces two or more forms of useful energy (including electricity). Section 2(17) defines 'distribution licensee" to mean a licensee authorized to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply. The 'distribution system' has been defined in section 2(19) to mean the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers. 'electrical plant' as defined in Section 2(22) means any plant,

equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity. Section 2(28) defines 'generating company' which means any company or body corporate or association or body of individuals, whether incorporated or not or artificial juridical person, which owns or operates or maintains a generating station. 'open space' has been defined in Section 2 (47) to mean the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission. The aforesaid definitions contained in Sub-sections (3), (8), (12), (17), (19), (22), (28) and (47) of Section 2 of the Act of 2003 are quoted below:-

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

(3) 'area of supply' means the area within which a distribution licensee is authorized by his license to supply electricity.

(8) 'Captive generating plant' means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any cooperative society or association of persons for generating electricity primarily for use of members of such cooperative society or association.

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

(17) 'distribution licensee' means a licensee authorized to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply.

(19) 'distribution system' means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers.

(22) 'electrical plant' means any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity, but does not include-

- (a) an electric line; or*
- (b) a meter used for ascertaining the quantity of electricity supplied to any premises; or*
- (c) an electrical equipment, apparatus or appliance under the control of a consumer.*

(28) 'generating company' means any company or body corporate or association or body of individuals, whether incorporated or not or artificial juridical person, which owns or operates or maintains a generating station.

(47) 'open space' means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission."

Section 7 of the Act of 2003 provides that any generating company may establish, operate and maintain a generating station without obtaining a license under the said Act if it

complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73. Section 7 is quoted below:-

“7. Generating company and requirement for setting up of generating station.- Any generating company may establish, operate and maintain a generating station without obtaining a license under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73.”

Section 9 relates to Captive generation and it contains non-obstante clause that notwithstanding anything contained in the Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines. Section 9 is quoted below:-

“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 license shall be required under this Act for supply of electricity generated from a captive generating plant 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."

Section 12 of the Act of 2003 deals with the licensing for the purposes of transmission of electricity or distribution of electricity or undertaking trading in electricity. Section 14 deals with the grant of license to transmit electricity as a transmission licensee; or to distribute electricity as a distribution licensee or to undertake trading electricity as an electricity trader, in any area as may be specified in the license. However, no license is required for setting up captive power plants.

In Part IV of the Act of 2003 from sections 12 to 24 various provisions for procedure for grant of license, conditions of license, amendment of license, revocation of license, sale of utilities of licensees, vesting of utility in purchaser, directions to licensees, suspension of distribution license and sale of utility etc. have been provided.

Part V of the Act of 2003 deals with transmission of electricity in inter-state transmission and other provisions

relating to transmission .

Part VI deals with the distribution of electricity and contains the provisions with respect to distribution licensees, duties of distribution licensees and open access, duty to supply on request, exception from duty to supply electricity, power to recover charges, power to recover expenditure, power to require security, additional terms of supply etc. It also contains the provisions with respect to electricity traders, provision relating to safety and electricity supply, control of transmission and use of electricity, use etc. of meters, disconnection of supply in default of payment. It also contains provisions with respect to consumer protection, standards of performance of license, market domination etc. Section 60 is quoted below:-

“60. Market domination.- The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.”

“Tariff” has been defined in Part VII of the Act of 2003. Section 61 provides that the Appropriate Commission has power to promote co-generation and generation of electricity from renewable sources of energy and it can specify the terms and conditions for the determination of tariff. Section 62 also

deals with determination of tariff by the Appropriate Commission in accordance with the Act of 2003. Section 66 provides that Appropriate Commission shall endeavor to promote the development of market including trading in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard. As Sections 61 and 66 were also invoked while framing the Regulations of 2010, they are quoted below:-

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

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;

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

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

66. Development of market.- The Appropriate Commission shall endeavor to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard."

Thus, Section 61(h) clearly empowers the Regulatory Commission to promote cogeneration and generation of electricity from renewable sources of energy while specifying terms and conditions for determination of tariff.

Part X of the Act of 2003 contains constitution, powers and functions of the Regulatory Commission. Section 82 deals with the constitution of State Commission known as 'Electricity Regulatory Commission' of the concerned State. The State Commission shall consist of not more than three Members including the Chairperson. Functions of the State Commission have been dealt with in section 86. Section 86(1)(b) & (e) and 86(4) are relevant and the same are quoted below:-

"86. Functions of State Commission.- (1) The State Commission shall discharge the following functions,

namely: -

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(4) In discharge of its functions the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3."

Section 181 of the Act of 2003, which has also been invoked while framing the impugned Regulations, empowers the State Commission to make regulations. Sub-section (1) of Section 181 provides that the State Commission may by notification make regulations consistent with the Act of 2003 and rules generally to carry out the provisions of the Act. Sub-section (2) of Section 181 provides that in particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the matters contained in clauses (a) to (zp). Section 181 (1) is quoted below:-

“181. Powers of the State Commissions to make regulations.-(1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.”

It is also worthwhile to mention here the relevant provisions of the National Electricity Policy, 2005 and Tariff Policy, 2006 published under section 3 of the Act of 2003 as the Regulatory Commission shall be guided by the aforesaid policies in discharge of its functions as mandated by section 86(4).

In compliance of the provisions of Section 3 of the Act of 2003, the Central Government has notified the National Electricity Policy on 12th February, 2005. The National Electricity Policy contains various provisions with respect to National Electricity Plan, Rural Electrification, Generation, Hydro Generation, Thermal Generation, Nuclear Power, Non-conventional Energy Sources, Renovation and Modernization, Captive Generation, Transmission, Distribution, Recovery of Cost of Services and Targetted Subsidies, Technology Development and Research Development, Competition Aimed At Consumer Benefits, Financing Power Sector Programmes Including Private Sector Participation, Transmission & Distribution Losses, Energy Conservation Environmental Issues, Training And Human Resource Development, Cogeneration and Non-conventional Energy Sources, Protection of Consumer Interests And Quality Standards & Coordinated Development.

The provisions with respect to captive generation contained in Paras 5.2.24 to 5.2.26 and cogeneration and non-conventional energy sources contained in Paras 5.12.1 to 5.12.3 of the National Electricity Policy are quoted below:-

“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, non-conventional 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.

5.12 Co-generation and Non-conventional Energy Sources.

5.12.1. Non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of electricity based on such sources of energy. For this purpose, efforts need to be made to reduce the capital cost of projects based on non-conventional and renewable sources of energy. Cost of energy can also be reduced by promoting competition within such projects. At the same time, adequate promotional measures would also have to be taken for development of technologies and a sustained growth of these sources.

5.12.2. The Electricity Act 2003 provides that co-generation and generation of electricity from non-conventional sources would be promoted by the SERCs by providing suitable measures for connectivity with grid and sale of electricity to any person and also by specifying, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. Such percentage for purchase of power from non-conventional sources should be made applicable for the tariffs to be determined by

the SERCs at the earliest. Progressively the share of electricity from non conventional sources would need to be increased as prescribed by State Electricity Regulatory Commissions. Such purchase by distribution companies shall be through competitive bidding process. Considering the fact that it will take some time before non-conventional technologies compete, in terms of cost, with conventional sources, the Commission may determine an appropriate differential in prices to promote these technologies.

5.12.3 Industries in which both process heat and electricity are needed are well suited for cogeneration of electricity. A significant potential for co-generation exists in the country, particularly in the sugar industry. SERCs may promote arrangements between the co-generator and the concerned distribution licensee for purchase of surplus power from such plants. Co-generation system also needs to be encouraged in the overall interest of energy efficiency and also grid stability.”

(emphasis added by us)

In compliance of Section 3 of the Act of 2003, the Central Government notified the Tariff Policy on 6.1.2006 in continuation of the National Electricity Policy notified on 12.2.2005. Para 6.4 of the Tariff Policy is quoted below:-

“6.4 Non-conventional sources of energy generation including co-generation:

(1) Pursuant to provisions of section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage for purchase of energy from such sources

taking into account availability of such resources in the region and its impact on retail tariffs. Such percentage for purchase of energy should be made applicable for the tariffs to be determined by SERCs latest by April 1, 2006.

It will take some time before non-conventional technologies can compete with conventional sources in terms of cost of electricity. Therefore, procurement by distribution companies shall be done at preferential tariffs determined by the Appropriate Commission.

(2) Such procurement by Distribution Licensees for future requirements shall be done, as far as possible, through competitive bidding process under Section 63 of the Act within suppliers offering energy from same type of non-conventional sources. In the long term, these technologies would need to compete with other sources in terms of full costs.

(3) The Central Commission should lay down guidelines within three months for pricing non-firm power, especially from non-conventional sources, to be followed in cases where such procurement is not through competitive bidding."

(emphasis added by us)

The Regulations of 2007 framed by the Regulatory Commission are applicable to distribution licensee including deemed distribution licensee, open access consumer and captive power plant of installed capacity 1 MW and above. The RE Obligation shall be applicable on the electricity drawn from the captive power plant and through Open Access. Regulation 4 of the Regulations of 2007 is quoted below:-

"4. Renewable Energy Obligation (RE Obligation):-

(1) The RE Obligation shall be applicable on the electricity drawn from the CPP and through Open Access.

(2) RE Obligation for the minimum purchase of RE shall be as under:-

S.NO. Year Obligation expressed as % age of total energy drawn other than from distribution licensee

<i>1.</i>	<i>2007-08</i>	<i>4.88%</i>
<i>2.</i>	<i>2008-09</i>	<i>6.25%</i>
<i>3.</i>	<i>2009-10</i>	<i>7.45%</i>
<i>4.</i>	<i>2010-11</i>	<i>8.50%</i>
<i>5.</i>	<i>2011-12</i>	<i>9.50%</i>

(3) The RE Obligation for a distribution licensee including deemed licensee shall be governed by the Rajasthan Electricity Regulatory Commission (Power purchase & procurement process of distribution licensee) Regulations, 2004."

Regulation 5 of the Regulations of 2007 provides for payment of renewable energy surcharge for short fall in obligation. Regulation 5 is quoted below:-

"5. Payment of Renewable Energy surcharge for short fall in Obligation:-

(1) Any short fall to meet the RE obligations shall be subject to payment of RE surcharge by the distribution licensee, open access consumer and Captive Power Plant. The payment of renewable energy surcharge shall be made to State Transmission Utility (STU).

(2) The surcharge collected by STU will be credited to a

fund to be utilized for creation of transmission system infrastructure of Renewable Energy power plants.

(3) RE surcharge will be as notified by the Commission from time to time. For the year 2007-08 the RE surcharge shall be Rs.3.59/kwh and shall continue until revised."

The Regulations of 2010 were framed by the Regulatory Commission vide notification dated 23rd December, 2010 in exercise of the powers conferred under sections 61, 66, 86(1)(e) and 181 of the Act of 2003. Regulation 4 deals with renewable purchase obligation and Regulation 9 provides consequences of default. Both Regulations 4 and 9 are quoted below:-

"4. Renewable Purchase Obligation

(1) Every 'Obligated Entity' shall procure electricity generated from renewable energy sources as per purchase obligation under existing regulations/order(s) as may be amended by the Commission from time to time.

(2) The existing obligation is given below:-

(a) Distribution licensees:-

(i) Obligation in respect of Wind and Biomass energy as per RERC (Renewable Energy Obligation) Regulation, 2007 and RERC (Power purchase & procurement process of distribution licensee) Regulations, 2004 is as under (minimum):-

<i>S.No.</i>	<i>Year</i>	<i>Wind</i>	<i>Bio-mass</i>
<i>1.</i>	<i>2010-11</i>	<i>6.75%</i>	<i>1.75%</i>
<i>2.</i>	<i>2011-12</i>	<i>7.50%</i>	<i>2.00%</i>

(ii) Obligation for Solar Power:-

PPA upto 100 MW, excluding capacity under

GBI/incentive scheme of Govt.of India as per order dated 25.5.2010 issued for generic tariff of solar power plants.

(b) Captive consumers of CPP/open access consumers: Purchase obligation as per RERC (Renewable Energy Obligation) Regulations, 2007 including cogeneration:-

S.NO. Year Obligation expressed as percentage of total energy drawn other than from distribution licensee

<i>1.</i>	<i>2010-11</i>	<i>8.50%</i>
<i>2.</i>	<i>2011-12</i>	<i>9.50%</i>

9. Consequences of Default.

(1) If the obligated entity does not fulfil the specified renewable purchase obligation, the Commission may direct the obligated entity to deposit into a separate fund, to be created and maintained by obligated entity, on RPO charge as the Commission may determine on the basis of the short fall in units of RPO and the forbearance price decided by the Central Commission separately in respect of solar and non solar REC;

Provided that the fund so created shall be utilized, as may be directed by the Commission partly for purchase of certificates through State Agency and partly for development of transmission and sub-transmission infrastructure for evacuation of power from generating stations based on renewable energy sources.

(2) Further where any obligated entity fails to comply with the renewable purchase obligation, it shall also be liable for penalty as may be decided by the Commission under section 142 of the Act;

Provided that the monetary penalty so imposed shall not be allowed as a pass through in the ARR in case of distribution licensee:

Provided further that in case of genuine difficulty in complying with the renewable power purchase obligation because of non-availability of renewable energy and/or certificates, the obligated entity can approach the Commission to carry forward the compliance requirement to the next year or seek its waiver:

Provided also that where the Commission has consented to carry forward of compliance requirement or its waiver, the provision of Regulation 9(1) of these Regulations or the provision of section 142 of the Act shall not be invoked.”

Vide Notification dated 24th May, 2011, the Regulatory Commission in exercise of the powers conferred under section 181 read with section 86(1)(e) of the Act of 2003 has made the *Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) (1st Amendment) Regulations, 2011* and the table existing below regulation 4(2) of the Regulations of 2007 was replaced as is evident from Regulation 2 of the Regulations of 2011. Regulation 2 of Regulations of 2011 is quoted below:

“2. Amendment.

The table existing below regulation 4(2) of Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) Regulations, 2007 shall be replaced by

the following:-

S.NO. Year Obligation expressed as percentage of energy consumption (%).

<i>1.</i>	<i>2011-12</i>	<i>6.00</i>
<i>2.</i>	<i>2012-13</i>	<i>7.10</i>
<i>3.</i>	<i>2013-14</i>	<i>8.20</i>

For the purpose of this sub regulation, energy consumption shall mean 'consumption of obligated entity' as defined in regulation 3(g) of RERC (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010."

In the light of the aforesaid provisions, it is apparent that thrust of the Act of 2003, provisions contained in the National Electricity Policy, 2005 and the Tariff Policy, 2006 is to ensure that there is no licensing of captive power generation of energy and generating company may establish, operate and maintain generating station without obtaining a license under the Act of 2003; at the same time, there is need to promote co-generation and generation of electricity from non-conventional sources; it is provided in Para 6.4 of Tariff Policy, Para 5.12.2 of the National Electricity Policy and Section 86(1)(e) of the Act of 2003 that the Regulatory Commission shall fix minimum percentage for purchase of energy from such sources taking into account availability of such resources in the region and its impact on retail tariffs; non-conventional technologies cannot compete with conventional

sources in terms of cost of electricity, as such, Regulatory Commission has power to determine the preferential tariffs.

The submission raised by the petitioners is that under section 7 of the Act of 2003, the generating company can establish, operate and maintain generating station including captive power plant without obtaining a license; section 9 contains non-obstante clause; licensing is contemplated only to transmit electricity, distribute electricity or undertake trading in electricity as provided under section 12 and license can be granted under section 14 for the aforesaid purposes and thus, licensees stand on different footing and the industries like petitioners having independent captive power plants cannot be treated alike licensees as they are not required to obtain license for setting up captive power plants and they have to be given free play and cannot be obligated to purchase energy from renewable sources; for regulation of supply, distribution, consumption or use of electricity, directions are contemplated to the licensee alone under section 23 of the Act of 2003 and no directions could have been given by the Regulatory Commission to the petitioners having captive power plants to purchase energy from renewable source as they are not licensees; they could not be treated alike licensees and thus, imposition of RE obligation through impugned Regulations cannot be sustained.

In our opinion, obligations upon licensee are different and merely by the fact that no license is required to be obtained by

the petitioners for establishing, operating and maintaining captive power plant by virtue of Sections 7 and 9 of the Act of 2003, it cannot be inferred that the petitioners involved in the manufacture of various industrial activities such as cement, textile, chemical, clinker, guwar gum powder, rayons, white cement, copper, tyre, tube, flaps, fertilizers, agri.-inputs, non-ferrous metals, lead, zinc etc., cannot be fastened with the obligation to purchase energy from renewable sources as provided in the Regulations of 2007 and 2010. The provisions made with respect to obligations and liabilities for licensee cannot come in the way to carry out the objectives of the Act of 2003, National Electricity Policy and Tariff Policy. Under section 86(1)(e) the Regulatory Commission has to discharge the function for promoting co-generation and generation of energy from renewable sources. Section 53(e) provides that the Authority may, in consultation with the State Government, specify suitable measures for keeping by a generating company or licensee the maps, plans and sections relating to supply or transmission of electricity. Section 60, which deals with market domination, empowers the Regulatory Commission to issue directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry. Thus,

generating company is not totally free from the control of the Regulatory Commission, as submitted by the petitioners.

When we come to the provisions contained in Section 86 (1) (e) and 181 of the Act of 2003 of the Act of 2003 under which the impugned Regulations have been framed, the Regulatory Commission has to discharge functions for promoting cogeneration and generation of electricity from renewable sources of energy and for this purpose, the Regulatory Commission has power to provide suitable measures for connectivity with the grid and sale of electricity to any person and also specify for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. Thus, it is apparent that under Section 86(1)(e) of the Act of 2003, the Regulatory Commission has power to direct the petitioners running captive power plants to purchase energy from renewable sources considering the percentage of the total consumption of electricity in the area of distribution licensee. The word 'total consumption' has been used by the legislature in Section 86(1)(e) and total consumption in an area of a distribution licensee can be by three ways either supply through distribution licensee or supply from captive power plants by using lines and transmission lines of distribution licensee or from any other source by using transmission lines of distribution licensee. The area would always be of distribution licensee, as the transmission lines and

the system is of distribution licensee, the total consumption is very significant. The total consumption has to be seen by consumers of distribution licensee, captive power plants and on supply through distribution licensee. It cannot be inferred by mention of area of distribution licensee that only consumers of the distribution licensee are included. The total consumption has the reference to the various modes of consumption which are possible in the area of distribution licensee. In case the submission of the petitioners is accepted, in that event, the consumers of the distribution licensee would only be saddled with the liability of renewable energy obligation, that would be discriminatory when consumption is through captive power plant or open access. The total consumption in the area of distribution licensee would be total consumption in all modes otherwise anomalous results would occur.

The objective behind imposition of RE obligation upon captive power plants and open access consumers is to promote generation of electricity from renewable sources; it would have long lasting impact in protecting environment; as per CEAs annual report of 2003, the installed capacity is 107973 MW in the country; the break up is hydro power generation- 26910 MW (24.9%), thermal power generation 76607 MW (71%) nuclear power generation 2720 MW (2.5%) and wind power generation 1736 MW (1.6%), out of thermal power generation coal comprises 63801 MW, gas- 11633 MW and diesel 1173 MW

representing 59.1% and 10.8% and 1.1% of the total installed capacity respectively; thus, the coal is dominating the scenario and will continue to do so in future also; the thermal generation causes generation of green house gases (GHG) namely, carbon dioxide CO₂, sulphur dioxide, nitrogen oxide and solid particulate matter which beyond a specific limit are hazardous for health; global warming is affected by increased emission of green house gases resulting into fundamental changes in approach towards development of energy sector in all the countries; objective behind imposition of RE obligation is in the greater public interest which would have long impact on protection of environment; there is need of the hour to protect environment; it is in ecology to boost interest of the production by utilizing renewable sources of energy; Regulatory Commission has solemn obligation to protect and improve the present and future environment generation; Article 51-A(g) of the Constitution casts duty on the citizen to protect and improve the natural environment; considering the global warming, mandate of Article 21 and 51-A(g) of the Constitution, provisions of the Act of 2003, National Electricity Policy and Tariff Policy, the action has been taken by the Regulatory Commission imposing obligation upon captive power plant and open access consumers also to purchase electricity from renewable sources and the same is in public interest as energy generated from renewable sources is pollution free. There are

no purchasers of the energy generated by renewable sources; they cannot compete in the market as such production is costly; the Regulatory Commission has been conferred with the power to impose obligation on captive power plants and open access consumers also to purchase energy from renewable sources in order to protect ecology from environmental degradation; merely because petitioners are having independent captive power plants and they are not licensees, still they can be asked to promote and purchase energy from renewable sources and we find that the RE obligation imposed upon captive power plants and open access consumers through impugned Regulations cannot in any manner be said to be restrictive of any of the rights conferred on the petitioners under Article 19 (1)(g) of the Constitution nor the obligation can be said to be violative of Article 14 of the Constitution.

In *Krishnan Kakkanth V/s Government of Kerala and ors.* (AIR 1997 SC 128), the Apex Court held that fundamental rights guaranteed under Article 19 are not absolute but the same are subject to reasonable restrictions to be imposed against enjoyment of such rights. The reasonableness of restriction is to be determined in an objective manner and from the stand point of the interests of general public and not from the stand point of the interests of the persons upon whom the restrictions are imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in

a given case, it operates harshly and even if the persons affected be petty traders. In determining the infringement of the right guaranteed under Article 19(1), the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, enter into judicial verdict. Under clause (1)(g) of Article 19, every citizen has a freedom and rights to choose his own employment or take up any trade or calling subject only to the limits as may be imposed by the State in the interests of public welfare and the other grounds mentioned in clause (6) of Article 19. But the Constitution does not recognize franchise or rights to business which are dependent on grants by the State or business affected by public interest. In the present case, RE obligation on the captive power plant and open access consumers to purchase minimum energy from renewable sources and to pay surcharge in case of short fall in meeting out the RE obligation, has been imposed under the impugned Regulations and such RE obligation cannot in any manner be regarded as restrictive infringing rights of the petitioners under Article 19(1)(g) of the Constitution.

Para 6.4 of the Tariff Policy also authorizes the Regulatory Commission to fix minimum percentage for purchase of energy from renewable sources taking into account the availability of such resources in the region; Tariff Policy

also provides that non-conventional sources of energy generation including cogeneration cannot compete at present with conventional sources in terms of cost of electricity, therefore, preferential tariff can be determined by the Regulatory Commission. The provisions are not confined to the distribution companies only. Para 5.12.1 of the National Electricity Policy also provides that non-conventional sources of energy being the most environment friendly, there is an urgent need to promote generation of electricity based on such sources of energy. In our opinion, the RE obligation, which has been put on the petitioners running captive power plants, under the Regulations of 2007 and 2010 is in furtherance of the aforesaid objective; it is a promotional measure taken for growth of renewable energy by directing purchase of particular percentage of energy from renewable sources; at the same time, it is open to the industries like the petitioners to generate electricity through captive power plants to the maximum and no restriction has been put up on quantity of generation of electricity by the industries, only obligation is that they have to purchase certain percentage of energy from renewable sources considering total consumption.

Para 5.12.2 of the National Electricity Policy provides that under the Act of 2003, the Regulatory Commission would promote co-generation and generation of electricity from non-conventional sources by providing suitable measures for

connectivity with grid and sale of electricity to any person and also by specifying for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. Thus, it is open to the Regulatory Commission to prescribe the percentage of the total consumption of electricity in the area of a distribution licensee and percentage of total consumption can be specified in the area of distribution licensee as per the National Electricity Policy, precisely it has been done under the impugned Regulations as the consumption from captive power plant is also consumption which has to be included in the total consumption in the area of distribution licensee.

As per Para 5.2.24 of the National Electricity Policy relating to captive generation, the liberal provision in the Act of 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. Cost effectiveness is also one of the objectives of setting up of captive power plant under Para 5.2.24 and to utilize electricity generated by large number of captive and standby generating stations in India, they have surplus capacity that could be supplied to the grid continuously or during certain time periods. Thus, by imposing RE obligation upon captive power plants and open access consumers, it cannot be said that any of the

objectives of the National Electricity Policy or Tariff Policy or Act of 2003 have been defeated; there is no embargo put under the impugned Regulations on their functioning; at the same time, promotion of energy from renewable sources has to be made so as to protect environment and global warming.

Section 86(1)(b) of the Act of 2003 has been relied upon by the petitioners which provides that the Regulatory Commission in discharge of the functions may regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. In our opinion, as apparent from the very language of Section 86(1)(b), it deals with the purchase and procurement process of distribution licensees and also deals with the prices at which electricity shall be procured from the generating companies and in case generating companies are having surplus, it is open for them to supply to the grid. The provisions of Section 86(1)(e) of the Act of 2003 provides independent functions and the provisions contained in Section 86(1)(b) cannot control and confine the operation of Section 86(1)(e) with respect to distribution licensee only; Section 86(1)(b) deals with power to regulate electricity purchase and procurement process of distribution licensees and the price at which electricity shall be procured

from the generating companies or licensees, whereas Section 86 (1)(e) deals with promotion of co-generation and generation of electricity from "renewable source" of energy by providing suitable measures which are specified in the said provisions and thus, section 86(1)(b) cannot control and confine operation of Section 86(1)(e) to distribution licensee alone, as suggested by the petitioners. We have no hesitation in rejecting the said submission of petitioners. On plain reading of the aforesaid provision, submission is not borne out.

Section 86(4) provides that in discharge of its functions, the Regulatory Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3. We find no repugnancy in the impugned Regulations framed by the Regulatory Commission imposing RE obligation upon captive power plant and open access consumers to purchase energy from renewable sources nor they can be regarded violative of National Electricity Policy, 2005 and Tariff Policy, 2006 published under section 3 of the Act of 2003 by the Central Government, rather impugned Regulations aim to fulfil the objectives of the said policies.

It was also submitted on behalf of the petitioners that Section 181(1) of the Act of 2003 gives only general power to the Regulatory Commission to frame Regulations consistent with the Act and the rules generally to carry out the provisions of the said Act and none of the matters contained in clauses (a) to

(zp) of Section 181(2) provide for framing of the impugned Regulations in respect of captive power plant and open access consumers and thus, they submitted that framing of the impugned Regulations is beyond the rule making authority conferred upon the Regulatory Commission under section 181 of the Act of 2003. The submission is based upon misconception of provisions of Section 86(1)(e); as we have already rejected the submission that Section 86(1)(b) has to control the operation of Section 86(1)(e), the submission is baseless. Section 181(1) provides that the State Commission may by notification, make regulations consistent with the Act and the rules generally to carry out the provisions of the said Act and as per the interpretation of Section 86(1)(e) alongwith National Electricity Policy and Tariff Policy for promotion of renewable energy, we find that the power to frame impugned Regulations under sections 86(1)(e) and 181 of the Act of 2003 imposing RE obligation upon captive power plant and open access consumers to purchase energy from renewable sources, has been rightly exercised by the Regulatory Commission and the impugned Regulations cannot in any manner be said to be beyond provisions contained in the Act of 2003 or National Electricity Policy or Tariff Policy; Section 86(1)(e) authorizes the Regulatory Commission to impose RE obligation upon the industries having independent captive power plants and open access consumers and thus, it cannot be said that the impugned

Regulations imposing RE obligation on captive power plant and open access consumers are contrary to the object and purpose of the Act of 2003 or National Electricity Policy or Tariff Policy. The RE obligation put on the captive power plants and open access consumers to purchase minimum energy from renewable source and to pay surcharge in case of shortfall in meeting out the obligation through impugned Regulations are clearly sustainable in law.

In *PTC India Ltd. V/s Central Electricity Regulatory Commission* ((2010) 4 SCC 603), the Apex Court has considered the scope and analysis of the Act of 2003 and held that the Act of 2003 contemplates three kinds of delegated legislation. Firstly, under Section 176, the Central Government is empowered to make rules to carry out the provisions of the Act. Correspondingly, the State Governments are also given powers under Section 180 to make rules. Secondly, under Section 177, the Central Authority is also empowered to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Thirdly, under Section, 178 the Central Commission can make regulations consistent with the Act and the rules to carry out the provisions of the Act. SERCs have a corresponding power under Section 181. A holistic reading of the Act of 2003 leads to the conclusion that regulations can be made as long as two conditions are satisfied, namely, that they are consistent with the Act and that they are made for carrying out the

provisions of the Act. The Apex Court rejected the contention that under the Act of 2003, the power to make regulations under section 178 has to be correlated to the functions ascribed to each authority under the Act of 2003 and that CERC can enact regulations only on topics enumerated in section 178(2). The Apex Court has further held that apart from section 178(1) which deals with "generality" even under section 178(2) (ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of the Act of 2003. Trading is an activity recognized under the Act of 2003. The Apex Court has laid down thus:-

"28. The 2003 Act contemplates three kinds of delegated legislation. Firstly, under Section 176, the Central Government is empowered to make rules to carry out the provisions of the Act. Correspondingly, the State Governments are also given powers under Section 180 to make rules. Secondly, under Section 177, the Central Authority is also empowered to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Thirdly, under Section 178, the Central Commission can make regulations consistent with the Act and the rules to carry out the provisions of the Act. SERCs have a corresponding power under Section 181. The rules and regulations have to be placed before Parliament and the State Legislatures, as the case may be, under Section 179 and 182. The Parliament has the power to modify the rules/ regulations. This power is not conferred upon the State Legislatures. A holistic reading of the 2003 Act leads to the conclusion that regulations can be made as long as two conditions are

satisfied, namely, that they are consistent with the Act and that they are made for carrying out the provisions of the Act.

65. The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of "general application", a Regulation stands on a higher pedestal vis-à-vis an Order (decision) of CERC in the sense that an Order has to be in conformity with the regulations. However, that would not mean that a regulation is a pre- condition to the order (decision). therefore, we are not in agreement with the contention of the appellant(s) that under the 2003 Act, power to make regulations under Section 178 has to be correlated to the functions ascribed to each authority under the 2003 Act and that CERC can enact regulations only on topics enumerated in Section 178(2). In our view, apart from Section 178(1) which deals with "generality" even under Section 178(2)(ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of 2003 Act. Trading is an activity recognized under the said 2003 Act."

In the present case, the impugned Regulations framed by the Regulatory Commission imposing RE obligation on the captive power plant and open access consumers to purchase minimum energy from renewable sources and to pay surcharge in case of shortfall in meeting out the RE obligation, are consistent with the Act of 2003, National Electricity Policy and Tariff Policy and they are made for carrying out the provisions of the Act of 2003, National Electricity Policy and Tariff Policy.

Reliance has been placed by the petitioners on the decision of the Apex Court in *Global Energy Limited and anr. V/s Central Electricity Regulatory Commission* ((2009) 15 SCC 570) wherein the Apex Court has laid down that rule making power for carrying out the purpose of the Act is a general delegation and such a general delegation may not be held to be laying down any guidelines and thus, by reason of such a provision alone, the regulation making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act. The Apex Court in *Global Energy Limited* (supra) has laid down thus:-

"25. It is now a well settled principle of law that the rule-making power 'for carrying out the purpose of the Act' is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act.

*26. We may, in this connection refer to a decision of this Court in *Kunj Behari Lal Butail V/s State of H.P.* (2000) 3 SCC 40 wherein a three Judge Bench of this Court held as under: (SCC p.47, para 14)*

"14. We are also of the opinion that a delegated power to legislate by making rules 'for carrying out the purpose of the Act' is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not

contemplated by the provisions of the Act itself"

(See also State of Kerala V/s Unni (2007) 2 SCC 365 (SCC paras 32 to 37) and A.P. Electricity Regulatory Commission V/s R.V.K. Energy (P) Ltd. (2008) 17 SCC 769)"

The Apex Court in the case of Global Energy Ltd. (supra) has further laid down that when any criterion is fixed by a statute or by a policy, an attempt should be made by the authority making the delegated legislation to follow the policy formulation broadly and substantially and act in conformity therewith. Reliance has been placed on the decision in Clariant International Ltd. V/s SEBI ((2004) 8 SCC 524)) and Ministry of Chemicals & Fertilizers, Govt. of India V/s Cipla Ltd. ((2003) 7 SCC 1). The Apex Court has further laid down in Global Energy Ltd. (supra) that the reform legislation sought to bring in transparency in the work of the public sector, it postulates competition from the private sector. The power of Regulatory Commission to impose qualification/restrictions should be read in line with the larger object of the Act. As Section 52 does not empower the regulation making authority to provide for qualification or disqualification, the delegated legislation or a subordinate legislation must conform exactly to the power granted.

In view of the discussion made by us, we are of the considered opinion that what has been specifically provided in the National Electricity Policy, Tariff Policy and Section 86(1)(e)

of the Act of 2003, the same has been given the shape in the Regulations framed by the Regulatory Commission for which it was specifically empowered and thus, it does not travel beyond the provisions of the Act of 2003 or National Electricity Policy or Tariff Policy. Hence, the above decision is of no help to the petitioners.

It was also submitted on behalf of the petitioners that surcharge could not have been levied in view of fifth proviso to Section 39(2) of the Act of 2003. The surcharge is levied only in case of non-fulfilment of RE obligation as provided in the impugned Regulations; taking of surcharge on non-fulfilment of any obligation is common and not unusual; it is in the form of additional charge; reliance has been placed on proviso to Section 39, which deals with State Transmission Utility and functions; sub-section (2) of section 39 deals with the functions of the State Transmission Utility; under section 39(2)(d), it is obligated on the State Transmission Utility to provide non-discriminatory open access to its transmission system for use by any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission, however, it is provided 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. The aforesaid proviso of Section 39(2) cannot come to rescue the petitioners as the surcharge taken under section 39(2)(d) deals with respect to provide non-discriminatory open access to its transmission system for use by any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42 on payment of the "transmission charges and a surcharge" thereon, as may be specified by the State Commission; Section 42(2) provides that the State Commission shall introduce open access in such phases and subject to such conditions as may be specified within one year of the appointed date by it; it is not the case of such surcharge being levied; the levy and surcharge being different under section 39(2), it cannot come to rescue the petitioners.

Reliance has also been placed on Section 40, which deals with the duties of transmission licensees; it is provided that it shall be the duty of transmission licensee to provide non-discriminatory open access to its transmission system for use by any consumer as and when such open access is provided by the State Commission under sub-section (2) of Section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission. However, it is provided that such surcharge shall not be leviable in case open access provided to a person who has established a captive generating plant for carrying the electricity to the destination

of his own use. The surcharge levied in Section 40 is altogether different from the surcharge being levied in case of shortfall in meeting out the RE obligation and thus, fifth proviso to Section 40 would also not come to help the petitioners. Similarly, fourth proviso to Section 42 is also not attracted. Hence, sections 39, 40 and 42 of the Act of 2003 cannot come to rescue the petitioners. The power to fix tariff and the obligation contains the power to prescribe surcharge also. The Regulatory Commission has not exceeded its power or authority in imposing surcharge in case of shortfall in fulfilling the RE obligation.

Reliance has also been placed by the petitioners on the decision in *M/s Bisra Stone Lime Co.Ltd. V/s Orissa State Electricity Board & anr.* (AIR 1976 SC 127) wherein the Apex Court has dealt with the word 'surcharge' and held that the word 'surcharge' is not defined in the Electricity (Supply) Act, 1948, but etymologically, inter-alia, surcharge stands for an additional or extra charge or payment. Surcharge is thus a superadded charge, a charge over and above the usual or current dues. It is in substance an addition to the stipulated rates of tariff. The nomenclature therefore, does not alter the position. The Apex Court further laid down that the enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act. Merely because there was special

agreement between the parties, it could not be said that the stipulated rates could not be increased by adding the surcharge in question. The decision is of no help to the petitioners, rather levy of surcharge is justified even as per the aforesaid decision.

Reliance has also been placed on the decision of the Apex Court in *Nagrik Upbhokta M.Manch V/s Union of India and ors.* ((2002) 5 SCC 466) wherein it has been held that any levy imposed by executive order for maintaining the public distribution system must satisfy Article 265 and requirement of legislative competence. The Apex Court in the context of the provisions of the Essential Commodities Act has further held that what the State Government, Director and the Collectors have done, goes beyond the powers conferred by the Act and the Kerosene Order; they have arrogated to themselves a power of levying a tax and the same was held to be unauthorized and impermissible. There is no quarrel with the aforesaid proposition, but the RE obligation put on the captive power plants and open access consumers to purchase energy from renewable sources and to pay surcharge in case of shortfall in fulfillment of RE obligation through impugned Regulations, is permissible under the provisions of the Act of 2003, National Electricity Policy and Tariff Policy. The Apex Court in the case of *M/s Bisra Stone Lime Co.Ltd. V/s Orissa State Electricity Board and anr.* (supra) has considered nature of levy of surcharge and held that surcharge is an additional or extra

charge or payment, it is in substance an addition to the stipulated rates of tariff and enhancement of the rates by way of surcharge is well within the power of the Board. Hence, imposition of surcharge is permissible. Thus, the ratio laid down in the case of *Nagrik Upbhokta M.Manch (supra)* is not attracted.

It was also submitted on behalf of the petitioners that there is promissory estoppel created in the way of imposing RE obligation upon captive power plant and open access consumers to purchase minimum energy from renewable sources and to pay surcharge in the event of shortfall in meeting out RE obligation. We find that the imposition of RE obligation upon captive power plant and access consumers to purchase energy from renewable sources and to make payment of surcharge in case of short fall in fulfilling the RE obligation is within the competence and authority of the Regulatory Commission under the provisions of the Act of 2003, National Electricity Policy and Tariff Policy; when there is statutory provision and National Electricity Policy and Tariff Policy also provide for the same, there is no question of promise being extended not to impose such RE obligation, intendment was otherwise; merely by the fact that licensing of captive power plant has been taken away, imposition of RE obligation upon industries having captive power plants cannot be said to be restrictive measure imposed upon them; plea of estoppel is not at all attracted.

It has also been submitted on behalf of the petitioners that 97% of the energy is being handled by the Discoms, they are purchasing energy, as such, it was not necessary to impose RE obligation upon industries having captive power plants to purchase energy from renewable sources; captive power plants generate 3% power in the State; under the impugned Regulations, the captive power plants are required to purchase energy from renewable source ranging from 6% to 8.20%; while 6000 MW power is being handled in the State, effectively it would mean purchase of about 10 MW of renewable energy in the entire State and for such a small quantum of power, the Regulatory Commission has created plethora of problems including exorbitant penalties on captive power plants for non-fulfilment of their purchase targets. The submission raised by itself counters the substance of it; it is only for promotional purpose and to make renewable energy production effective, RE obligation has been imposed, as per the provisions of the Act of 2003, National Electricity Policy and Tariff Policy and keeping in view the mandate of Articles 21 and 51A(g) of the Constitution.

The submission that there is not enough energy available in the Rajasthan, thus, there should not be any RE obligation to purchase energy from renewable sources and it would benefit other States who are producing renewable energy. The submission has no legs to stand; whatever energy is being generated in Rajasthan and by others in the form of renewable

energy, that has to be promoted, it has to be used and if obligation has been put to purchase energy from renewable sources, the same cannot be termed as onerous; it is in the spirit of Section 86(1)(e), National Electricity Policy and Tariff Policy framed under section 3 of the Act of 2003.

Reliance has been placed on the decision of the Apex Court in *Tata Power Company Ltd. V/s Reliance Energy Limited and ors.* ((2009) 16 SCC 659) in which the Apex court has observed that the Parliament by making the Act of 2003 clearly acknowledged the necessity of providing a greater room for generation of electrical energy so as to enable the country to meet its requirements. The Apex Court further observed that de-licensing of generation as also grant of free permission of captive generation is one of the main features of the Act of 2003 and the primary object was to free the generating companies from the shackles of licensing regime. The Apex Court has held that licensing provisions cannot be brought back through the side door of Regulations. The Apex Court laid down thus:-

“75. The core question which, therefore arises for consideration is as to whether despite the Parliamentary intent of giving a go-bye to its licensing policy to generating companies, whether through imposing stringent regulatory measures the same purpose should be allowed to be achieved?

83. The Primary object, therefore, was to free the generating companies from the shackles of licensing

regime.

84. If de-licensing of the generation is the prime object of the Act, the courts while interpreting the provisions of the statute must guard itself from doing so in such a manner which would defeat the purpose thereof. It must bear in mind that licensing provisions are not brought back through the side door of Regulations.

109. A generating company has to make a huge investment and assurances given to it that subject to the provisions of the Act he would be free to generate electricity and supply the same to those who intend to enter into an agreement with it. Only in terms of the said statutory policy, he makes huge investment. If all his activities are subject to regulatory regime, he may not be interested in making investment. The business in regard to allocation of electricity at the hands of the generating company was the subject matter of the licensing regime."

The Apex Court in *Tata Power Company Ltd.* (supra) has considered the provisions of Section 86(1)(b) read with section 23. In the present case, in view of the provisions contained in section 86(1)(e), which is independent of Section 86(1)(b) and deals with the separate sphere, in our opinion, it cannot be said that by providing RE obligation, a regulatory regime has been brought back by the side door nor it can be said that the Regulations are in the form of unruly horse as laid down by the Apex Court in *U.P. Power Corporation Ltd. V/s NTPC Ltd. & Ors.* ((2009 (6) SCC 235).

Reliance has also been placed on the resolution adopted by Chief Ministers' Conference on 28th May, 2007 in which it

was observed that an estimated captive generating capacity about 20,000 MW is being sub-optimally utilized in a phase of critical power shortage and thus, it was resolved that no generating capacity would be left idle. The States would facilitate captive power plants to provide spare generating capacity to the grid and strive to do away with restrictive levies, duties and regulations in a time bound manner. By the aforesaid decision, it cannot be said that imposition of RE obligation upon captive power plants to purchase energy from renewable sources and to pay surcharge in case of short fall in fulfilling RE obligation, is restrictive in any manner; the decision cannot be said to be in any way diluting the Act of 2003, National Electricity Policy and Tariff Policy.

Reliance has also been placed by the petitioners on the decision of the Apex Court in *Real Food Products Ltd. and ors. V/s A.P.State Electricity Board and ors.* ((1995) 3 SCC 295) in which the Apex Court has laid down that when the State Government directed to fix concessional tariff for agricultural pump sets at a flat rate per H.P., it does not relate to the question of policy which the Board must follow. However, in indicating the specific rate in a given case, the action of the State Government may be in excess of the power of giving a direction on the question of policy, which the Board, if its conclusion be different, may not be obliged to be bound by it; in such matter, ultimate decision has to be taken by the Board and

it is open to the Board to accept opinion of the State Government even about the specific rate; if the direction of the State Government is exceeding the area of policy, the Board may not be bound by it unless it takes the same view on merits itself. No assistance can be drawn from the aforesaid decision as we have found in the present case that the impugned Regulations are in tune with the Act of 2003, National Electricity Policy and Tariff Policy envisaged under the Act of 2003.

Reliance has also been placed by the petitioners on the decision in Consumer Online Foundation and Ors. V/s Union of India and ors. ((2011) 5 SCC 360) in which the Apex Court has dealt with the levy and collection of development fee from embarking passengers at Delhi and Mumbai International Airports; the Apex Court has also considered the distinction between the charges, fees and rent collected under section 22 and the development fees levied and collected under section 22A of the Airports Authority of India Act, 1994; the Apex Court laid down that development fees levied under section 22A is really a cess or a tax for a special purpose and thus, Article 265 of the Constitution is attracted; it is settled principle of statutory interpretation that any compulsory exaction of money by the Government such as a tax or a cess has to be strictly in accordance with law and for these reasons a taxing statute has to be strictly construed. In the present case, we find no violation of the aforesaid principle by the Regulatory

Commission while framing the impugned Regulations imposing RE obligation on captive power plants and open access consumers to purchase minimum energy from renewable sources and to pay surcharge in case of non-fulfilment of said RE obligation, rather the impugned Regulations have been framed strictly in accordance with the provisions of the Act of 2003, National Electricity Policy and Tariff Policy.

The petitioners have also relied upon the decision of the Apex Court in *M.Chandru V/s Member-Secretary, Chennai Metropolitan Development Authority and anr.* ((2009) 4 SCC 72) wherein the Apex Court held that when a levy or an imposition is questioned, the court has to inquire into its real nature to find out whether it is a fee or tax and whether power to levy the tax or fee is conferred on that authority and if it falls beyond, to declare it ultra vires. The Apex Court further held that while there is no 'quid pro quo' between a taxpayer and the authority in case of a tax, there is a necessary co-relation between fee collected and the service intended to be rendered. Of-course the 'quid pro quo' need not be understood in mathematical equivalence but only in a fair correspondence between the two. A broad co-relationship is all that is necessary. In the present case, we find no violation of the aforesaid principle while framing the impugned Regulations imposing RE obligation upon captive power plants and open access consumers to purchase energy from renewable sources

and to pay surcharge in case of non-fulfilment of RE obligation, rather RE obligation has been put to promote renewable energy.

Coming to submission as to quorum of Regulatory Commission and its consequence on validity of framing of Regulations, submission is that hearing was done by two members and thereafter, at the time of finalizing Regulations of 2007 only one member did it. In our opinion, submission has no merit. Section 82(4) of the Act of 2003 provides that the State Commission shall consist of not more than three Members including the Chairperson. With the single member in office, obviously the State Commission shall function with that single member. Section 93 of the Act of 2003 clearly provides that no act or proceeding of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission. Due to superannuation of Chairperson and one Member, the Regulatory Commission has to be manned by one person. The quorum depends upon the number of members in office. The member of the Commission includes the Chairperson of such Commission also. In view of the specific provisions contained in Section 93, the impugned Regulations of 2007 do not suffer from any defect including quorum or jurisdiction. It was open to Shri K.L.Vyas to frame the Regulations. The submission is baseless and it is rejected.

Thus, in view of the discussion made above, we find that the Rajasthan Electricity Regulatory Commission is empowered to frame the *Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) Regulations, 2007* in exercise of power conferred under section 86(1)(e) read with section 181 of the Act of 2003 and the *Rajasthan Electricity Regulatory Commission (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010* in exercise of the powers conferred under sections 61, 66, 86(1)(e) and 181 of the Act of 2003 in respect of captive power plants and open access consumers imposing RE obligation upon them to purchase minimum energy from renewable sources and to pay surcharge in case of short fall in fulfilment of such RE obligation and the same cannot be said to be ultra vires the provisions of the Act of 2003 nor they can be said to be repugnant to Articles 14 and 19(1)(g) of the Constitution of India or National Electricity Policy, 2005 or Tariff Policy, 2006 framed under section 3 of the Act of 2003. We further find that the Regulatory Commission is also empowered to impose surcharge on the captive power plants and open access consumers in the event of their failure to fulfil the RE obligation. As interim stay order has been enjoyed by the petitioners, we direct that the liability under the impugned Regulations be fulfilled forthwith.

Resultantly, the writ petitions being devoid of merits are hereby dismissed. Parties to bear their own costs.

(NARENDRA KUMAR JAIN-I), J.

(ARUN MISHRA), C.J.

Parmar

All the corrections made in the judgment/order have been incorporated in the judgment/order being emailed.

N. K. Parmar, PS.