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HIGH COURT OF CHHATTISGARH, BILASPUR**Order reserved on 05-04-2018****Order delivered on 31-08-2018****WPC No. 1262 of 2013**

1. Vandana Global Ltd. Having Its Office At Vandana Bhawan, M.G.Road, Raipur (CG), Through Its Authorized Representative

---- Petitioner**Versus**

1. State Of Chhattisgarh Through The Secretary, Ministry Of Power, Raipur, Chhattisgarh
2. Chhattisgarh State Electricity Regulatory Commission Through Its Secretary, Irrigation Colony, Shanti Nagar, Raipur, Chhattisgarh
3. Chhattisgarh State Power Distribution Company Ltd, Through Its Managing Director Daganiya, Raipur, Chhattisgarh

---- Respondent**WPC No. 91 of 2014**

1. M/s G.R. Sponge And Power Ltd. A company under the Companies Act 1956 and the Companies Act, 2013 (as applicable), Having Its Registered Office At Agrawal Complex, Samta Colony, Raipur, Chhattisgarh.

---- Petitioner**Versus**

1. State Of Chhattisgarh, Through The Secretary, Ministry Of Power, Raipur, Chhattisgarh.
2. C.G. State Electricity Regulatory Commission, Through Its Secretary, Irrigation Colony, Shanti Nagar, Raipur, Chhattisgarh.
3. C.G. State Power Distribution Company Ltd, Through Its Managing Director Daganiya, Raipur, Chhattisgarh.

---- Respondents**WPC No. 102 of 2016**

1. Bhagwati Power And Steel Ltd. A Company Under The Companies Act 1956 And The Companies Act 2013 (As

Applicable), Having Its Registered Office D-22, Sector 5, Devendra Nagar, Tehsil And District Raipur, Chhattisgarh, Through Its Managing Director Rajkumar Kejriwal, Aged About 55 Years, S/o Late Shri Murlidhar Kejriwal, R/o Flat No. 6 B, Mohini Block, Jaishree Merlin Vihar, Pandri Tarai Road, Raipur, 492001, Police Station Mowa, Post Pandri, District Raipur, Chhattisgarh.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through The Secretary, Department Of Energy, Mantralaya, New Raipur, Post Office And P.S. New Raipur, District Raipur, Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, Through Its Secretary, Irrigation Colony, Shanti Nagar, Post Office Shanti Nagar, Police Station Telibandha, Tehsil And District Raipur, Chhattisgarh.
3. Chhattisgarh State Power Distribution Company Ltd. Through Its Managing Director, Danganiya, Post Office Ravi Shanker University Campus, P.S. Daganiya, Tehsil And District Raipur, Chhattisgarh.

---- Respondents

WPC No. 372 of 2015

1. M/s Nalwa Steel And Power Limited Raigarh, Chhattisgarh, Through Its Authorized Representative And Power Of Attorney Holder Shri Anuj Jaiswal, S/o Late Shri R.P. Jaiswal, Aged About 42 Years, R/o Nalwa Steel And Power Limited, Post Office Gerwani, Police Station Punjipatra, Raigarh, Chhattisgarh.

---- Petitioner

Versus

1. State Of Chhattisgarh Through The Secretary, Ministry Of Power, Raipur, Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, Through Its Secretary, Irrigation Colony, Shanti Nagar, Raipur, Chhattisgarh.
3. Chhattisgarh State Power Distribution Company Ltd. Through Its Managing Director Daganiya, Raipur, Chhattisgarh.

---- Respondents

WPC No. 769 of 2016

1. M/s Sks Ispat & Power Ltd. A Company Incorporated Under The Companies Act, 1956, Through Its Authorized Signatory, Shri

Gopal Garg, Having Its Office At 501 B. Elegant Business Park, Andheri Kurla Road, J.B. Nagar, Andheri, (E) Mumbai 400059 And Factory At Siltara Industrial Growth Centre, Phase II, 18th Milestone, Bilaspur, Road, Raipur. Chhattisgarh.

---- **Petitioner**

Versus

1. Union Of India, Thorough The Secretary, Ministry Of Power Urja Bhawan, New Delhi.
2. Chhattisgarh State Electricity Regulatory Commission, Through Its Secretary, Having Its Secretary, Having Its Regd. Office At Civil Lines, G.E. Road, Raipur, Chhattisgarh – 492001.
3. State Of Chhattisgarh, Thorough The Secretary, Department Of Energy, Mantralaya, Naya Raipur Chhattisgarh.
4. Chhattisgarh State Power Distribution Company Ltd. Through The Managing Director, 4th Floor, Vidyut Sewa Bhawan, Daganiya, Raipur Chhattisgarh 492013.
5. The Chief Electircal Inspector, Government Of Chhattisgarh, Mantralaya, Naya Raipur, Chhattisgarh.

---- **Respondents**

WPC No. 777 of 2014

1. Shree Nakoda Ispat Ltd., A Company incorporated under the Companies Act, 1956, Through Its Authorized Signatory, Shri S.K. Jha, Having Its Office At Near Railway Crossing, Mowa, P.O. Shankar Nagar Raipur, Chhattisgarh – 492007.

---- **Petitioner**

Versus

1. State Of Chhattisgarh, Through The Secretary, Department Of Energy, Mantralaya, Naya Raipur, Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, A body corporate having perpetual succession and a common seal constituted by the State Govt. of Chhattisgarh under Section 82 (1) of the Electricity Act, 2003, Having Its Regd. Office At Civil Lines G.E. Road, Raipur, Chhattisgarh.
3. Chhattisgarh State Power Distribution Company Ltd. Through The Managing Director, 4th Floor, Vidyut Sewa Bhawan, Daganiya, Raipur, Chhattisgarh – 492013.

---- **Respondent**

WPC No. 1313 of 2014

1. Salasar Steel & Power Ltd. A Company incorporated under the Companies Act, 1956, Through Its Authorized Signatory, Shri Manish Mohta, Having Its Registered Office At 1st Floor Bhatia Complex, Opp. Rajkumar College G.E. Road, Raipur, Chhattisgarh – 492001.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through Its Secretary, Department Of Energy, Mantralaya, Naya Raipur , Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, A body corporate having perpetual succession and a common seal constituted by the State Govt. of Chhattisgarh under Section 82 (1) of the Electricity Act, 2003, Having Its Regd. Office At Civil Lines G.E. Road, Raipur, Chhattisgarh – 492001.
3. Chhattisgarh State Power Distribution Company Ltd. Through The Managing Director, 4th Floor, Vidyut Sewa Bhawan, Daganiya, Raipur, Chhattisgarh – 492013.

---- Respondents

WPC No. 1368 of 2013

1. Shri Bajrang Power & Ispat Ltd. Aged About 51 Years Through Its Authorized Signatory Pankaj Singhal S/o Trilok Chand Singhal R/o Flat No. 101, Block 16, Ashoka Ratna, Shankar Nagar, Police Station Mawa Post Office Shankar Nagar, Tehsil and Distt. Raipur, Chhattisgarh and Address of the Firm : Village Borjhara, Urla Industrial Area, P.S. & Post Office: Urla, District Raipur, 493221, Chhattisgarh.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through The Secretary, Department Of Energy, Mantralay, New Raipur, Post Office And P.S. New Raipur Distt. Raipur, Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, Through Its Secretary, Irrigation Colony, Shanti Nagar, Post Office Shanti Nagar, Police Station Telibandha Tehsil And Distt. Raipur C.G.
3. Chhattisgarh State Power Distribution Company Ltd. Through Its Managing Director, Daganiya Post Office Ravi Shanker University Campus, P.S. Daganiya, Tehsil And District Raipur C.G.

---- Respondents

WPC No. 1391 of 2014

1. Bhagwati Steel And Power Limited, Through Its Authorized Signatory, Nitesh Vijay Agrawal, Age 32 Years, S/o Shri Vijay Agrawal, R/o House No. 6, Diamond Villa, VIP Estate, Opp. Golden Homes, PS And Post Mowa, Distt Raipur – 492007 Chhattisgarh And Address Of The Registered Office, D-22, Sector 5, Devendra Nagar, Tahsil & District Raipur - 492001, Chhattisgarh.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through the Secretary, Department Of Energy, Zero Point, New Mantralaya, PS Mandir Hasaud, Naya Raipur, Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, Through Its Secretary, Irrigation Colony, Shanti Nagar, Post Office: Shanti Nagar, P.S Telibandha, Tahsil & District – Chhattisgarh.
3. Chhattisgarh State Power Distribution Company Ltd. Through Its Managing Director, Daganiya, Post Office Ravi Shanker University Campus, P.S Daganiya, Tahsil & Distt. Raipur, Chhattisgarh.

---- Respondents

WPC No. 1408 of 2013

1. Rashmi Sponge Iron & Power Industries Ltd. (Formerly Known As Rashmi Sponge Iron Pvt. Ltd), Having Registered Office At BU-5, First Floor, Vishaka Enclave, Pithampura, New Delhi 88, Through Its Authorized Signatory.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through The Secretary, Ministry Of Power, Raipur, Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, Through Its Secretary Irrigation Colony, Shanti Nagar, Raipur, Chhattisgarh.
3. Chhattisgarh State Power Distribution Company Ltd, Through Its Managing Director, Daganiya, Raipur, Chhattisgarh.

---- Respondents

WPC No. 1793 of 2017

1. Bhagwati Steel And Power Limited Having Its Registered Office At D-22, Sector-5, Devendra Nagar, Raipur 492001, Chhattisgarh. Through Its Authorized Signatory Kashyap Kejriwal, Aged About 31 Years S/o Shri Rajkumar Kejriwal, Working As A Executive Director Of the Company, R/o Bunglow No. 10 Nivriti, Las Vista, Amlidih, V I P Road Raipur, Police Station Telibandha, Tehsil Revenue And Civil District Raipur, Chhattisgarh.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through The Secretary, Ministry Of Power, Raipur, Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, Through Its Secretary Irrigation Colony, Shanti Nagar, Raipur Chhattisgarh.
3. Chhattisgarh State Power Distribution Company Limited, Through Its Managing Director Daganiya, Raipur Chhattisgarh.

---- Respondents

WPC No. 1813 of 2014

1. IND Synergy Ltd. A Company under the Companies Act 1956 and the Companies Act, 2013 (as applicable), Having Its Registered Office At Gokulpuram, Kachna Road, Khamardih, Raipur, CG., Through Its Authorized Signatory Satydeep Sahukar, Aged about 50 Years, S/o Late Satyanand Sahukar, R/o Near Ram Mandir, Shantinagar, P.S. Telibandha, Post Telibandha, Distt Raipur, Chhattisgarh.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through The Secretary, Department Of Energy, Mantralaya, New Raipur, Post Office And P.S. New Raipur, Distt. Raipur, Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, Through Its Secretary, Irrigation Colony, Shanti Nagar, Post Office: Shanti Nagar, P.S. Telibandha, Tahsil & Distt. Raipur, Chhattisgarh.
3. Chhattisgarh State Power Distribution Company Ltd, Through Its Managing Director, Daganiya, Post Office Ravi Shanker University Campus, P.S. Daganiya, Tahsil & Distt. Raipur, Chhattisgarh.

---- Respondents

WPC No. 1818 of 2013

1. Ind Synergy Ltd. Through Its Authorized Signatory, G Surya Rao, aged about 51 years, S/o Lt G. Butchayya, R/o LIG 171, Sector-1, Saddu, Post Office Saddu, P.S. Mowa, C.G. Housing Board Colony, Tahsil And Distt. Raipur, C.G. And Address Of The Firm, Gokulpuram, Kachna Road, Kamardih, Shankar Nagar, Raipur, Chhattisgarh- 492007.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through The Secretary, Department Of Energy, Mantralaya, New Raipur, Post Office And Police Station - New Raipur, Distt. Raipur, Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, Through Its Secretary, Irrigation Colony, Shanti Nagar, Post Office Shanti Nagar, P.S. Telibandha, Tahsil & Distt. Raipur, Chhattisgarh.
3. Chhattisgarh State Power Distribution Company Ltd. Through Its Managing Director, Daganiya, Post Office Ravi Shankar University Campus, P.S. Daganiya, Tahsil & Distt. Raipur, Chhattisgarh.

---- Respondents

WPC No. 1861 of 2014

1. Monnet Ispat And Energy Ltd. (Formerly Known As Monnet Ispat Limited) A Company Incorporated Under The Companies Act 1956, Having Its Registered Office At Monnet Marg Mandir Hasaud P.S. Mandir Hasaud Distt. Raipur C.G. And A Corporate Office At 11, Masjid Moth Greater Kailash Part II P.S. C.R. Park New Delhi Through Its Authorised Signatory Shri B.N. Sinha S/o Late Shri S.B Sinha Aged about 56 Years R/o Geetanjali Enclave Ring Road No. 2, Bilaspur P.S. Civil Lines, Bilaspur, C.G.

---- Petitioner

Versus

1. Union Of India, Thorough Its Secretary Ministry Of Power, Urja Bhawan, New Delhi.
2. Chhattisgarh State Electricity Regulatory Commission A body corporate having Perpetual Succession And A Common Seal Constituted By The State Govt. Of Chhattisgarh Under Section 82 (1) Of The Electricity Act 2003, Having Its Regd. Office At Civil Lines G.E. Road Raipur C.G. Thorough Its Secretary
3. State Of Chhattisgarh, Through The Secretary Department Of Energy, Mantralaya, Naya Raipur C.G.

4. Chhattisgarh State Power Distribution Company Ltd. Through The Managing Director, 4th Floor, Vidyut Sewa Bhawan, Daganiya, Raipur, Chhattisgarh - 492013.
5. The Chief Electrical Inspector Govt. Of Chhattisgarh 36/437, 1st Floor, Near Phawara Chowk, Byron Bazar, Raipur – 492101, Chhattisgarh.

---- Respondents

WPC No. 1862 of 2014

1. Monnet Ispat And Energy Ltd. (Formerly Known As monnet Ispat Limited) A Company Incorporated Under the Companies Act 1956, Having Its Registered Office At Monnet Marg Mandir Hasaud P.S. Mandir Hasaud Distt. Raipur C.G. And A Corporate Office At 11, Masjid Moth Greater Kailash Part II P.S. C.R. Park New Delhi, Through Its Authorised Signatory Shri B.N. Sinha S/o Late Shri S.B. Sinha Aged 56 Years R/o Geetanjali Enclave Ring Road No. 2, Bilaspur P.S. Civil Lines, Bilaspur, Chhattisgarh.

---- Petitioner

Versus

1. Union Of India, Through The Secretary Ministry Of Power, Urja Bhawan New Delhi.
2. Chhattisgarh State Electricity Regulatory Commission, A body Corporate having Perpetual Succession And A Common Seal Constituted By The State Govt. Of C.G. Under Section 82 (1) Of The Electricity Act 2003, Having Its Regd. Office At Civil Lines G.E. Road Raipur C.G. - 492001. Thorough Its Secretary,
3. State Of Chhattisgarh, Through The Secretary Department Of Energy, Mantralaya, Naya Raipur, Raipur, Chhattisgarh.
4. Chhattisgarh State Power Distribution Company Ltd. Through The Managing Director, 4th Floor, Vidyut Sewa Bhawan, Daganiya, Raipur, Chhattisgarh – 492013.
5. The Chief Electrical Inspector Govt. Of Chhattisgarh 36/437, 1st Floor, Near Phawara Chowk, Byron Bazar, Raipur - 492101, Chhattisgarh.

---- Respondents

WPC No. 1876 of 2014

1. Monnet Ispat & Energy Ltd. (Formerly Known As Monnet Ispat Limited) A Company Incorporated Under The Companies Act 1956, Having Its Registered Office At Monnet Marg Mandir

Hasaud P.S. Mandir Hasaud Distt. Raipur C.G. And A Corporate Office At 11, Masjid Moth Greater Kailash Part II, P.S. C.R. Park New Delhi, Through Its Authorised Signatory Shri B.N. Sinha S/o Late Shri S.B. Sinha Aged 56 Years R/o Geetanjali Enclave Ring Road No. 2, Bilaspur P.S. Civil Lines, Bilaspur, Chhattisgarh.

---- Petitioner

Versus

1. Union Of India, Thorough Its Secretary Ministry Of Power, Urja Bhawan, New Delhi.
2. Chhattisgarh State Electricity Regulatory Commission, A Body Corporate having Perpetual Succession And A Common Seal Constituted By The State Govt. Of C.G. Under Section 82 (1) Of The Electricity Act 2003, Having Its Regd. Office At Civil Lines G.E. Road Raipur C.G. -492001. Thorough Its Secretary
3. State Of C.G. Through The Secretary Department Of Energy, Mantralaya, Naya Raipur, Chhattisgarh.
4. C.G. State Power Distribution Company Ltd. Through The Managing Director, 4th Floor, Vidyut Sewa Bhawan, Daganiya, Raipur, Chhattisgarh – 492013.
5. The Chief Electrical Inspector Govt. Of Chhattisgarh 36/437, 1st Floor, Near Phawara Chowk, Byron Bazar, Raipur - 492101 Chhattisgarh.

---- Respondent

WPC No. 1884 of 2013

1. M/s Godawari Power And Ispat Ltd. A Company Incorporated under the Companies Act, 1956, Through Its Authorized Signatory, Shri Y.C. Rao, Having Its Regd. Office At 428/2, Phase I, Industrial Area, Siltara, Distt. Raipur, P.S. Dharsiwa, C.G. 493111.
2. Mr. Abhishek Agrawal, S/o Shri B.L. Agrawal, Aged About 30 Years R/o Siddharth, Geeta Nagar, Raipur, P.S. Saraswati Nagar, Raipur Chhattisgarh – 492001.

---- Petitioner

Versus

1. Union Of India, Through The Secretary, Ministry Of Power, Urja Bhawan, New Delhi.
2. Chhattisgarh State Electricity Regulatory Commission, A Body Corporate having Perpetual Succession And A Common Seal Constituted By The State Govt. Of C.G. Under Section 82 (1) Of

The Electricity Act 2003, Having Its Regd. Office At Civil Lines
G.E. Road Raipur C.G. -492001.

3. State Of C.G. Through The Secretary Department Of Energy,
Mantralaya, Naya Raipur, Chhattisgarh.
4. C.G. State Power Distribution Company Ltd. Through The
Managing Director, 4th Floor, Vidyut Sewa Bhawan, Daganiya,
Raipur, Chhattisgarh – 492013.
5. The Chief Electrical Inspector, Govt. Of C.G., Mantralaya Naya
Raipur, Chhattisgarh.

---- Respondents

WPC No. 2112 of 2017

1. Salasar Steel & Power Limited, A Company Incorporated Under
The Companies Act, 1956, Through Its Authorized Signatory,
Shri Manish Mohta, Having Its Registered Office At 1st Floor,
Bhatia Complex, Opp. Rajkumar College, G. E. Road, Raipur,
Chhattisgarh - 492001.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through The Secretary, Department Of
Energy, Mantralaya, Naya Raipur, Chhattisgarh.
2. Chhattisgarh State Electricity Regulatory Commission, A Body
Corporate Having Perpetual Succession And A Common Seal
Constituted By The State Govt. Of Chhattisgarh Under Section
82 (1) Of The Electricity Act, 2003, Having Its Regd. Office At
Civil Lines, G. E. Road, Raipur, Chhattisgarh 492001.
3. Chhattisgarh State Power Distribution Company Ltd., Through
The Managing Director, 4th Floor, Vidyut Sewa Bhawan,
Daganiya, Raipur, Chhattisgarh 492013.

---- Respondents

WPC No. 2133 of 2015

1. Rameshwaram Steel And Power Private Limited A Company
Incorporated Under The Companies Act, 1956, Having Its
Registered Office At Chhal Road, Vill- Bade Gumda, Tahsil
Gharghoda, P. S. Gharghoda Dist Raigarh, Chhattisgarh
Through Its Authorised Signatory.

---- Petitioner

Versus

1. Union Of India, Through The Secretary, Ministry Of Power, Urja
Bhawan, New Delhi.

2. Chhattisgarh State Electricity Regulatory Commission, Having Its Regd. Office At Civil Lines, G. E. Road, Raipur, Chhattisgarh 492001.
3. State Of Chhattisgarh, Through The Secretary, Department Of Energy, Mantralaya, Naya Raipur, Chhattisgarh.
4. Chhattisgarh State Power Distribution Company Ltd., Through The Mananging Director, 4th Floor, Vidyut Sewa Bhawan, Daganiya, Raipur, Chhattisgarh 492013.
5. The Chief Electrical Inspector, Government Of Chhattisgarh, Mantralaya, Naya Raipur, Chhattisgarh.

---- Respondents

WPC No. 2135 of 2015

1. Monnet Ispat And Energy Ltd. A Company Incorporated Under The Companies Act 1956, Having Its Registered Office At Monnet Marg, Mandir Hasaud, P. S. Mandir Hasaud, District Raipur, Chhattisgarh And A Corporate Office At 11, Masjid Moth, Greater Kailash Part- II, P. S. C. R. Park, New Delhi, New Delhi, Through Its Authorised Signatory.

---- Petitioner

Versus

1. Union Of India, Through The Secretary, Ministry Of Power, Urja Bhawan, New Delhi.
2. Chhattisgarh State Electricity Regulatory Commission, Through Its Secretary, Having Its Regd. Office At Civil Lines, G. E. Road, Raipur, Chhattisgarh 492001.
3. State Of Chhattisgarh, Through The Secretary, Department Of Energy, Mantralaya, Naya Raipur, Chhattisgarh.
4. Chhattisgarh State Power Distribution Company Ltd., Through The Mananging Director, 4th Floor, Vidyut Sewa Bhawan, Daganiya, Raipur, Chhattisgarh 492013.
5. The Chief Electrical Inspector, Government Of Chhattisgarh, Mantralaya, Naya Raipur, Chhattisgarh.

---- Respondent

For respective petitioners :

Shri Sanjay Sen, Sr. Advocate, Shri Prashant Singh, Sr. Advocate, Shri Vaibhav Shukla, Shri Hemant Singh, Ms. Ankita Bafna, Shri Malay Shrivastava, Shri Ankit Singhal, Ms. Amita Bais, Shri Shobhit Koshta and Shri Ashish Bernard, Advocates for the receptive petitioners.

For Respondent/UOI :

Assistant Solicitor General

For Respondent/State :

Shri P.K. Bhaduri, Govt. Advocate for the State.

For respective respondents :

Shri Raj Kumar Mehta, Ms. Suparna Shrivastava, Shri Abhivav Kandekar, Ms. Himanshi Andley and Shri Anumeh Shrivastava, Advocates for the respective respondents.

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Ram Prasanna Sharmam
C A V Order

The following order of the Court was delivered by **Prashant Kumar Mishra, J.**

1. The present batch of writ petitions have been preferred for issuance of appropriate writ declaring the following Regulations notified by the respondent – Chhattisgarh State Electricity Regulatory Commission (henceforth 'the Regulatory Commission') as *ultra vires* to the Electricity Act, 2003 (henceforth 'the 2003 Act') and the Constitution of India.

- (i) Regulation 11(6)(b)(ii) of the Chhattisgarh State Electricity Regulatory Commission (Intra State Open Access in Chhattisgarh) Regulations, 2005 (henceforth 'the 2005 Regulations'), introduced by amendment dated 20-7-2007.
- (ii) Regulation 33(6)(b)(ii) of the Chhattisgarh State Electricity Regulatory Commission (Intra State Open Access in Chhattisgarh) Regulations, 2011 (henceforth 'the 2011 Regulations').
- (iii) The petitioners have also prayed for quashment of the demand-cum-disconnection notices issued against them on different dates by the respondent – Chhattisgarh State Power Distribution Company Limited (henceforth 'the Distribution Company') levying cross subsidy surcharge for the year 2008-09 to 2011-12.

2. The background facts on the basis of which the petitioners have claimed declaration of the Regulations as *ultra vires* are that all the petitioners except Nalwa Steel & Power Limited have established Captive Power Plant (henceforth 'CPP') within their factory premises for manufacturing of Steel, Sponge Iron, Ferro Alloy commodities, etc. and are, thus, generating company. The power generated from the CPP is used at various units within the premises or outside for carrying out the manufacturing activity and, thus, the CPP is claimed to be a part of the companies

overall activity. Due to slump in the steel industry petitioners could not use the entire electricity generated at the CPP, therefore, the surplus power was exported or sold to outside power consumers. When the petitioners could not fulfill the requirement of consuming more than 51% of the electricity generated for their own use, they cease to be CPP in accordance with Rule 3 of the Electricity Rules, 2005 (henceforth 'the 2005 Rules') for the financial years 2008-09 to 2011-12.

3. The period during which the petitioners loose their captive status, the respondent Distribution Company has levied and demanded cross subsidy charge on the strength of the impugned Regulations, on the amount of power generated by the petitioners, as according to the Distribution Company, once the captive status is lost then cross subsidy charge is payable even if the lines of the licensee i.e. Distribution Company are not used. Thus, the respondent Regulatory Commission is seeking to impose cross subsidy charge even in cases where open access has not been availed by the petitioners.
4. Petitioner in WPC No.372 of 2015, Nalwa Steel & Power Limited has prayed for the same relief, like other petitioners, however, this petitioner would claim that it is a part of diversified Jindal Group and has established the CPP of 286 MW and is, therefore, a generating company. Petitioner Nalwa Steel is supplied power by Jindal Steel & Power Limited without using the transmission network of the Distribution Company. Thus, the supply has been

made through a dedicated transmission line set up by the petitioner at its own costs and, as such, JSPL also lost its captive status, as it could not consume more than 51% power generated through its CPP for its own use during the relevant period.

5. The petitioners have also pleaded that they are not the consumers of the Distribution licensee nor there is any supply agreement nor a consumer meter or number and have never opted for or have been granted open access in terms of the applicable Regulations and have not used the transmission or distribution system owned by the State transmission and distribution licensees, therefore, the petitioners have not been charged with payment of either any transmission or wheeling charges.
6. It is contended by Shri Sanjay Sen, Sr. Advocate, Shri Prashant Singh, Sr. Advocate, Shri Vaibhav Shukla, Shri Hemant Singh, Ms. Ankita Bafna, Shri Malay Shrivastava, Shri Ankit Singhal, Ms. Amita Bais, Shri Shobhit Koshta and Shri Ashish Bernard, learned counsel appearing for the respective petitioners, that the impugned Regulations introducing levy of cross subsidy surcharge on a category of persons who are neither 'consumers' nor availing 'open access' in terms provided under the 2003 Act and the applicable Regulations, therefore, the impugned Regulations are in violation of Section 39(2)(d)(ii), 40(c)(ii) and the first and second proviso to Section 42 (2) of the 2003 Act. Such rule/regulation is intrinsically connected with definition of

'consumer' and 'open access', therefore, the Regulatory Commission has exceeded its powers by framing the impugned Regulations because the petitioners are not the consumers and have never availed the open access. It is also put forth that the impugned Regulations creates a category of 'deemed consumer' or 'deemed open access', however, there is no legal sanction for creating such deeming legal fiction. It is further argued that the impugned amendment Regulation of 2007 being notified only on 20-7-2007 it cannot be applied retrospectively for the reason that some of the petitioners have availed power supply in the financial year 2006-07 i.e. ending on 31-3-2007.

7. Learned counsels for the petitioners would further contend that to fall within the definition of 'consumer' as provided under Section 2 (15) of the 2003 Act the person is to be supplied electricity for his use by a licensee or by the Government or by any other person engaged in the business of supply of electricity to the public under the Act or any other law and further that the premises of such person is connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, therefore, the petitioners having not fulfilling the necessary requisites as they are not supplied electricity by the licensee or Government or any other person nor the petitioner companies are connected with the works of licensee, Government or such other person, they are not liable to pay CSS.

8. According to the petitioners, since they are generating electricity for captive use or are otherwise a generating company when they are selling electricity to any other person, at the same time, they cannot be termed as 'consumer'. Taking recourse to the provisions contained in Sections 10 to 15 of the 2003 Act, it is next contended that as a generating company they are not supplying electricity to members of public and are otherwise exempted from grant of licence under Section 13 of the 2003 Act, therefore, a generating company does not fall in the category that supplies electricity to the public. As a corollary, the words '*any other person engaged in the business of supplying electricity to the public*' as provided under Section 2 (15) of the 2003 Act would only mean persons as mentioned in Section 13 who are exempted from grant of license and can undertake supply of electricity to the public.
9. It is lastly contended that a delegated legislation cannot have retrospective effect. Conceding that the grant of retrospective applicability of the impugned Regulation has not been adequately dealt with in the grounds of the petitions, it is putforth that it is settled principle of law that a pure question of law can be raised even if the same is not pleaded in the petition.
10. Shri Raj Kumar Mehta, Ms. Suparna Shrivastava, Shri Abhivav Kandekar, Ms. Himanshi Andley and Shri Anumeh Shrivastava, learned counsel appearing for the respondent Regulatory Commission and the Distribution Company, respectively would

submit, at the outset, that the issue raised in this batch of writ petitions is no longer *res integra* as the Supreme Court in **Sesa Sterlite Limited v Orissa Electricity Regulatory Commission and Others**¹ has already set at rest the issue of levy of cross subsidy charge (CSS) payable by the consumer of electricity to distribution licensee of the area. Elaborating the submission, it is argued that the Regulation would impose cross subsidy surcharge on such consumers who receive supply of electricity from a person other than the area distribution licensee, however, it is not leviable where a captive generating plant is carrying electricity generated by it to the destination of its own use. For the relevant period all the petitioners have lost their captive status, therefore, the distribution company was within its authority to raise the subject bills against the petitioners for payment of cross subsidy surcharge on the electricity consumed by them in the relevant years in terms of the impugned Regulations.

11. According to the learned counsels, cross subsidy has an in-built element of tariff determined for a distribution licensee who is supplying power to various classes of consumers including the consumers falling in the 'subsidized category'. Whenever the consumer of the subsidizing category i.e. the industrial consumers avail supply from a source other than the distribution licensee in the area, it loses element of cross subsidy and the element of cross subsidy is recovered from the person who is

¹ (2014) 8 SCC 444

availing supply from another source. The recovery of cross subsidy is known as cross subsidy surcharge payable by the subsidizing category i.e. industrial consumers to the distribution licensee.

12. It is argued that the generating company supplying electricity directly to a consumer without the instrumentality of a distribution licensee is subject to payment of cross subsidy surcharge for not availing the supply net work of the distribution licensee. Levy of cross subsidy surcharge is for balancing the cost of supply as between the subsidizing consumers and subsidized consumers of the licensee, therefore, the said levy is used for off-setting against the tariff recovered from the subsidized category below the cost of supply and, thus, it is not a tax, hence provisions of Article 265 of the Constitution of India are not attracted.
13. Referring to the relevant definitions under Section 2 and the provisions contained under Sections 39 & 42, it is argued that levy of cross subsidy surcharge on the petitioners is mandated under the parent Act, therefore, the subject Regulation is *intra vires* of the 2003 Act.
14. Learned counsels appearing for the respondents would then refer Rule 3 of the 2005 Rules and the order passed by the Supreme Court in **Monnet Ispat & Energy Ltd. Etc. v Union of India, Etc.**² wherein the validity of the said Rules has been upheld. It is, thereafter, submitted that the petitioners having

2 Civil Appeal No.18506-18507 of 2017 decided on 13-11-2017

failed to utilise more than 51% of the power generated by it for its own use, they lose their captive status and in such eventuality the petitioner can only be a consumer and not otherwise. The moment petitioners become consumer in the area of distribution licensee, they become liable and the distribution licensee becomes entitled to levy cross subsidy surcharge. Learned counsel would vehemently submit that availing of open access is not necessary for levy of cross subsidy surcharge.

15. Shri P.K. Bhaduri, learned Govt. Advocate appearing for the State, has also referred to the judgment rendered by the Supreme Court in **Sesa** (supra) and **Monnet Ispat & Energy Ltd.** (supra) to defend the validity of the impugned Regulations.
16. In order to dwell on the issue concerning the validity of subject Regulations, certain definitions/expressions in the 2003 Act would need reference, therefore, Section 2 (3) (8), (15), (16), (17), (19), (47), (70), (72) & (73) reproduced hereunder :

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

xxx xxx xxx

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

xxx xxx xxx

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

xxx xxx xxx

(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;

(16) "dedicated transmission lines" means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be;

(17) "distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;

xxx xxx xxx

(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;

xxx xxx xxx

(47) "open access" 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;

xxx xxx xxx

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

xxx xxx xxx

(72) "transmission lines" means all high pressure cables and overhead lines (not being an essential

part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switchgear and other works;

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

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

38. Central Transmission Utility and functions.-

xxx xxx xxx

(2) The functions of the Central Transmission Utility shall be—

xxx xxx xxx

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

xxx xxx xxx

ii. any consumer as and when such open access is Provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the Central Commission:

xxx xxx xxx

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

39. State Transmission Utility and functions.-

xxx xxx xxx

2. The functions of the State Transmission Utility shall be—

xxx xxx xxx

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

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

ii. any consumer as and when such open access is Provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

xxx xxx xxx

42. Duties of distribution licensee and open access.-

1. It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

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

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

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

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

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

Provided also that the State Government shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

3. Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

4. Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

5. Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

6. Any consumer, who is aggrieved by non-redressal of his grievances under sub-sec. (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

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

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

18. Before proceeding to take up the issue concerning challenge to the impugned Regulations we shall briefly refer to a previous challenge thrown by some industries having captive generating plant to Rule 3 of the 2005 Rules. The said Rule deals with the requirement of captive generating plant providing that no power plant shall qualify as a 'captive generating plant' unless the electricity generated in such plant consumes more than 51% of the aggregate electricity for its captive use. Vires of the said provisions was assailed before this Court in **Monnet Ispat & Energy Limited v. Union of India and Others**³ which came to be dismissed by the Division Bench of this Court on 30-1-2013. In the said matter challenge to the subject Regulations was also made, however, that issue was left open to be agitated again, if the need so arises. The Division Bench decision in **Monnet Ispat & Energy Limited** (supra) was assailed before the Supreme Court in **Monnet Ispat & Energy Ltd. Etc. v Union of India, Etc.** Civil Appeal No.18506-18507 of 2017, which came to be dismissed by the Supreme Court on 13-11-2017 holding the Rule 3 (1)(a)(ii) to be *intra vires*.

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

³ WPC No.3140 of 2011 & 4481 of 2011 (decided on 30-1-2013)

captive use, they cease to have the status of captive power plant.

20. We shall now dwell upon the issue concerning challenge to the impugned Regulations i.e. Regulation 11 (6) (b) (ii) of the 2005 Regulations; 2005 Regulations was amended w.e.f. 20-7-2007; and Regulation 33 (6) (b) (ii) of the 2011 Regulations, which are reproduced herein under for ready reference :

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

11. Charges of Open Access

xxx xxx xxx

6. Surcharge –

xxx xxx xxx

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

xxx xxx xxx

(ii) Such surcharge shall be based on the current level of cross subsidy of the tariff category / tariff slab and / or voltage level to which such open access customers, belong or are connected to, as the case may be. It is to be calculated based on the difference between the applicable tariff rate to the consumer category concerned if the electricity is supplied by the distribution licensee and the cost to the licensee for such supply.

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

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

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

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

"(ii) Cross subsidy surcharge shall also be payable by such consumer who receive supply of electricity from a person other than the distribution licensee in whose area of supply is located, irrespective of whether he avails such supply through transmission/distribution network of the Board/licensee or not."

16. Sub-clause (6)(b)(ii) of the principal Regulations shall be renumbered as sub-clause (6) (b) (iii) and the sentence of the clause beginning "it is to be" shall be substituted by the following:

"It is to be calculated based on the average cost method by taking the difference between the average tariff for such supply voltage for the consumer of subsidizing category and the average cost of supply for the licensee."

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

33. Open access charges

xxx xxx xxx

6. Cross subsidy Surcharge –

xxx xxx xxx

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

xxx xxx xxx

(ii) Cross subsidy surcharge shall also be payable by such consumer who receive supply of electricity from a person other than the distribution licensee in whose area supply is located, irrespective of whether it avails such supply through transmission/ distribution network of the licensee or not.

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

receive supply of electricity from a person other than the area distribution licensee in whose area supply is located, irrespective of whether it avails such supply through transmission/ distribution network of the licensee or not. Such surcharge is, however, not leviable where a captive generating plant is carrying electricity generated by it to the destination of his own use. It is to bear in mind that while fixing the tariff, the tariff recovered from the subsidizing category i.e. to whom electricity is supplied at a rate lower than the cost of supply is used by the distribution licensee for off-setting the tariff recovered from the ordinary consumer below the cost of supply. This additional tariff on the subsidizing category is referred as subsidy and whenever such generating plant which supplies electricity for its own use, but at the same time has lost its captive status is levied cross subsidy surcharge because while consuming its own generated electricity, it does not pay cross subsidy as it has not availed supply from the distribution licensee of the area. In such situation, the distribution licensee having lost the cross subsidy, it recovers the same from such consumer who avail supply from another source. The cross subsidy surcharge thus becomes a levy on the subsidizing consumer which would have paid it to the distribution licensee in the form of cross subsidy had it continued to receive supply from the distribution licensee and not from another source.

22. Under the 2003 Act the 'open access' is defined to mean the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission. Under Section 39 the State Transmission Utility is enjoined to provide non-discriminatory open access to its transmission system for use by (i) any licensee or generating company on payment of the transmission charges; or (ii) any consumer as and when such open access is Provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission.
23. Under Section 42 (2) of the 2003 Act, the State Commission has been obligated to introduce open access in such phases and subject to such conditions as may be specified within one year of the appointed date. The first proviso to Section 42 (2) permits open access on payment of a surcharge in addition to the charges for wheeling whereas the second proviso states that such surcharge is to be utilised to meet the requirement of current level of cross subsidy within the area of the distribution licensee and is to be progressively reduced in the manner as may be specified by the State Commission. Thus, a consumer who has been availing supply of power from the area distribution

licensee may avail supply of power from another source on payment of surcharge to the area distribution licensee so as to enable the licensee to utilise the same for meeting the current levels of cross subsidy.

24. It is also to be seen that cross subsidy and surcharge have been made an integral part of electricity supply under the above mentioned provisions. It is for this reason, supply availed from a source other than the area distribution licensee through the means of open access is necessarily to be subjected to payment of cross subsidy surcharge.
25. Petitioners have contended that since they are not availing power supply from the distribution licensee they are not the consumers and further since they have not availed open access, provisions contained in Section 42 (2) of the 2003 Act would not apply, therefore, they are not liable to pay cross subsidy surcharge and, as such, the Regulation fall foul of the provisions contained in the 2003 Act.
26. Section 2 (15) of the 2003 Act defines the word 'consumer' to mean any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case

may be. Similarly, under Section 10 (2) generating company may supply electricity (i) to a licensee directly; and/or (ii) to a consumer as per Regulations framed under Section 42 (2), which includes a provision for payment of cross subsidy surcharge. Thus, whether supply can be availed by a consumer through the distribution licensee or by a generating company; only two modes are permissible and supply through any other mode is not contemplated under the Act. The Act nowhere contemplates supply of electricity by a generating company to any consumer through own transmission and distribution system or without availing the licence from appropriate Commission except the captive power plants.

27. Under Section 2(16) a captive generator is permitted to construct its own dedicated transmission line for point to point transmission from its captive generating plant to the destination of its use. Thus, each of the petitioners have connected their captive generating plants to their industrial loads by constructing dedicated lines. It is also to be seen that Section 42 (2) exempts a captive generator from payment of cross-subsidy surcharge when open access is availed for carrying electricity to the destination of his own use through dedicated line, however, when the petitioners have lost their captive status for the subject period they were no longer entitled to get exemption as provided under the fourth proviso to Section 42 (2). The moment challenge to Rule 3 of the 2005 Rules was negated by this High Court and

the Hon'ble Supreme Court, the petitioners cease to be a captive user, therefore, the connected load or the 'own use' ceases to be a captive consumption. The 2003 Act would contemplate only two types of consumption of electricity, first by consumer as defined under Section 2 (15) and other is own use, therefore, when the consumption ceases to be captive consumption then it remains consumption by a consumer and not otherwise. Whenever electricity is consumed by a person, it cannot be to any third category than the consumer and own use. During the relevant period the petitioners have used their connected load as a consumer availing supply from a generating company and not by a captive generator as they have lost their status by virtue of operation of law and precisely for this reason they are not entitled for exemption from payment of cross subsidy. The moment the petitioners become a consumer, the area distribution licensee becomes entitled to levy cross subsidy surcharge from such generator which has supplied electricity to its connected load because the supply is not received through distribution licensee and by operation of legal fiction it is deemed to be by way of open access as there is no third mode of supply.

28. In **Sesa** (supra) the petitioner was not drawing or utilising any electricity from the distribution licensee, yet the Odisha State Commission directed **Sesa** to pay cross subsidy surcharge holding **Sesa** to be a consumer. The Supreme Court referred the nature of dispute between the parties in para 21 thus :

21. From the aforesaid narration of events as well as arguments of the counsel for the parties, it has become manifest that the primary dispute relates to CSS which the appellant is called upon to pay to WESCO. As per the appellant no such CSS is payable and the PPA which was submitted by the appellant to the State Commission for approval, should have been accorded due approval by the State Commission.

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

25. While open access in transmission implies freedom to the licensee to procure power from any source of his choice, open access in distribution with which we are concerned here, means freedom to the consumer to get supply from any source of his choice. The provision of open access to consumers, ensures right of the consumer to get supply from a person other than the distribution licensee of his area of supply by using the distribution system of such distribution licensee. Unlike in transmission, open access in distribution has not been allowed from the outset primarily because of considerations of cross-subsidies. The law provides that open access in distribution would be allowed by the State Commissions in phases. For this purpose, the State Commissions are required to specify the phases and conditions of introduction of open access.

26. However open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensee's obligation to supply. Consequent to the enactment of the Electricity (Amendment) Act, 2003, it has been mandated that the State Commission shall within five years necessarily allow open access to consumers having demand exceeding one megawatt.

3) Cross-Subsidy Surcharge (CSS)—Its rationale

27. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts — one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.

28. Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the consumers do not go out of their fold to get supply from some other source.

29. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross-subsidy. Thus, the

State Electricity Regulatory Commissions are authorised to frame open access in distribution in phases with surcharge for:

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

(b) obligation to supply.”

30. Therefore, in the aforesaid circumstances though CSS is payable by the consumer to the distribution licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. In a nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidising a low end consumer if he falls in the category of subsidising consumer. Once a cross-subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross-subsidy within the area. A fortiori, even a licensee which purchases electricity for its own consumption either through a “dedicated transmission line” or through “open access” would be liable to pay cross-subsidy surcharge under the Act. Thus, cross-subsidy surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such distribution licensee in whose area it is situated. Such surcharge is meant to compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee.

30. The Supreme Court, thereafter, noted the facts of Sesa's case and its arguments to hold in paras 31 & 32 that Sesa was liable to pay cross subsidy surcharge. Paras 31, 32 & 47 are as under :

(4) Application of the Cross-Subsidy Surcharge principle

31. In the present case, admittedly, the appellant (which happens to be the operator of an SEZ) is situate within the area of supply of WESCO. It is seeking to procure its entire requirement of electricity from Sterlite [an independent power producer (IPP)] (which at the relevant time was a sister concern under the same management) and thereby is seeking to denude WESCO of the cross-subsidy that WESCO would otherwise have got from it if WESCO were to supply electricity to the appellant. In order to be liable to pay cross-subsidy surcharge to a distribution licensee, it is necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated and it is not necessary that such consumer should be connected only to such distribution licensee but it would suffice if it is a “consumer” within the aforesaid definition.

32. Having regard to the aforesaid scheme, in the normal course when the appellant has entered into PPA with Sterlite, another electricity generating company, and is purchasing electricity from the said company it is liable to pay CSS to WESCO. Admittedly under the PPA, the appellant is purchasing his electricity from the said generating station and it is consumed by the single integrated unit of the appellant. The appellant therefore, qualifies to be a “consumer” under Section 2(15) of the Electricity Act. It is also not in dispute that the unit of the appellant is in the area which is covered by the licences granted to WESCO as distribution licensees.

xxx xxx xxx

47. Having regard to the aforesaid factual and legal aspects and keeping in mind the purpose for which CSS is payable, as explained in detail in the earlier part of this judgment, we are of the view that on the facts of this case it is not possible for the appellant to avoid payment of CSS to WESCO. We, therefore, do not find any merit in this appeal which is accordingly dismissed.

31. In the case at hand also, all the petitioners would indisputably fall within the area of supply of State distribution licensee. Since the petitioners, like Sesa, were not availing power supply from the distribution licensee, but were obtaining supply from its own generating plant, which has already lost its captive status, they become consumer under Section 2 (15) of the 2003 Act as held by the Supreme Court in Sesa's case at paras 31 & 32. Case at hand is, thus, squarely covered by the decision of the Supreme Court rendered in Sesa (supra).
32. Turning back to the challenge thrown by the petitioners to the validity of the impugned Regulations, it is to be seen that the Regulations only sought to reiterate provisions of the 2003 Act particularly Section 42 (2) thereof because the petitioners have lost their captive status.
33. It would be appropriate for us to again refer to the Sesa's judgment wherein the argument raised by the Sesa, with the aid of Section 42 of the 2003 Act was that cross subsidy surcharge is payable to the distribution licensee of the area of supply only

when the distribution system of such distribution licensee is used for supply of electricity and CSS can only be levied on open access customers i.e. a consumer who has availed of or intends to avail of open access. Thereafter, the Hon'ble Supreme Court discussed the special features of the 2003 Act, the concept and rationale of open access and cross subsidy surcharge and eventually held in the following words in para 29 :

“29. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross subsidy. Thus, the State Electricity Regulatory Commissions are authorized to frame open access in distribution in phases with surcharge for:

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

(b) obligation to supply.

34. The Supreme Court further held, in categorical terms in para 30 that CSS is payable by the consumer to the distribution licensee of the area in question when it decides not to take supply from Distribution company but to avail it from another source. It was further held that a fortiori, even a licensee which purchases electricity for its own consumption either through a dedicated transmission line or through open access would be liable to pay cross subsidy surcharge under the Act.
35. The above extracts from the Sesa judgment puts a full stop to the contention of the petitioners and closes all avenues for any

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

36. The argument that CSS is a tax should not detain us for long for the reason that the Supreme Court in **Indian Aluminum Co. and Others v State of Kerala and Others**⁴ held (paras 27 & 28) that surcharge stands for an additional or extra charge or payment. It is a super-added charge, a charge over and above the usual or current dues and the term 'surcharge' in substance is an addition to the stipulated rate of tariff. The nomenclature, therefore, does not alter the position. It was further held that the expression 'surcharge' in the context of taxation means an additional imposition which results in enhancement of the tax and the nature of the additional imposition is the same as the tax on which it is imposed as surcharge. The nature of such imposition is the same, viz., land revenue on which it is a surcharge". It would thus be settled law that surcharge is additional duty or tax imposed in addition to the original levy, on the same topic.
37. Petitioners have also contended that the Regulation has been made with retrospective effect because the CSS is levied on the electricity consumed by the petitioners in the year 2006-07. Countering the submission respondents have argued that the Regulations were already in place in the year 2005, which was amended in the year 2007 and thereafter Regulations were again

4 (1996) 7 SCC 637

framed in the year 2011. On a reading of 2005 Regulations, it would appear that the power to levy CSS was available with the respondents even in the year 2005, therefore, even without the amended Regulations levy is lawful and the argument is misconceived.

38. On the basis of above analysis of the provisions of the 2003 Act and the Regulations as also the pronouncements made by the Supreme Court in **Sesa** (supra), we must reject the challenge to the constitutional validity of the Regulation 11 (6) (b) (ii) of the 2005 Regulations as amended in 2007 and the Regulation 33 (6) (b) (ii) of the 2011 Regulations. It is accordingly rejected.
39. In the result, all the writ petitions, *sans substratum*, are liable to be and are hereby dismissed, leaving the parties to bear their own cost(s).

Sd/-

Judge
(Prashant Kumar Mishra)

Sd/-

Judge
(Ram Prasanna Sharma)

Gowri