

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

**DIVISION BENCH: HON'BLE SHRI JUSTICE S. C. SHARMA &
HON'BLE SHRI JUSTICE VIRENDER SINGH**

Writ Petition No.9870/2018

M/s. Pratibha Syntex Ltd. & Ors.

Versus

M. P. Electricity Regulatory Commission & Others

Writ Petition No.14185/2018

Shri Hari Prasad Sarda

Versus

M. P. Electricity Regulatory Commission & Others

Writ Petition No.14193/2018

M/s. Indra Vidhya Power

Versus

M. P. Electricity Regulatory Commission & Others

Writ Petition No.19777/2018

M/s. Ultra Tech Cement Ltd. & Another

Versus

M. P. Electricity Regulatory Commission & Others

Shri S. C. Bagaidya, learned Senior Counsel with Shri D. K. Chhabra, Shri Rounak Choukse and Shri Vijay Tulsian, learned counsel for the petitioners.

Shri Naman Nagrath, learned Senior Counsel with Shri Prakash Upadhyay and Shri Prasanna Prasad, learned counsel for the respondents – Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Limited, Madhya Pradesh Poorva Kshetra Vidyut Vitaran Company Limited and Madhya Pradesh Madhya Kshetra Vidyut Vitaran Company Limited.

O R D E R

(Delivered on this 30th October, 2018)

Per : S. C. Sharma, J.

Regard being had to the similitude in the controversy

involved in the present cases, the writ petitions were analogously heard and by a common order, they are being disposed of by this Court. Facts of Writ Petition No.9870/2018 are narrated hereunder.

02- The petitioners before this Court have filed present petition for quashment of Regulation 12.2 of the “Seventh Amendment” to the Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010 dated 17/11/2017 issued by the Madhya Pradesh Electricity Regulatory Commission.

03- The petitioners' contention is that by virtue of the amendment the State Commission has imposed Wheeling Charges, Cross Subsidy Surcharge, Additional Surcharge and such other charges under Section 42 of the Electricity Act, 2003 on the power generated by renewable sources (collectively these charges are referred to as “Open Access Charges”). The petitioners' contention is that amendment is *ultra vires* to the Electricity Act, 2003, it violates Article 14, 19 (1) (g) and Article 21 of the Constitution of India and is also in contravention of the Tariff Policy and the Electricity Policy framed under Section 3 of the Electricity Act, 2003 and the amendment is also in gross violation of Electricity (Procedure for Previous Publication) Rules, 2005.

04- The facts of the case, as stated in the writ petition,

reveal that the petitioner No.1 and 2 are the Companies incorporated under the Companies Act, 1956. The petitioner No.1 is the consumer of Solar Energy generated by the petitioner No.2. The petitioner No.3 is the association of the generator Companies and has been authorized by appropriate Board Resolution to file the present petition.

05- The petitioner No.1 Pratibha Syntex Limited, as stated in the writ petition, for fulfilling its power requirement by purchasing Solar Power through Open Access has entered into a purchase agreement with petitioner No.2. The contention of the petitioner No.1 is that on account of amendment, there is now illegal imposition of Cross Subsidy Surcharges and Additional Surcharge by respondent No.1 and the cost of power supplied to petitioner No.1 has increased than the conventional power.

06- The petitioners' contention is that by imposing Wheeling Charges, Cross Subsidy Surcharge, Additional Surcharge and other charges under Section 42 of the Electricity Act, 2003 on the power generated by renewable sources (collectively these charges are referred to as "Open Access Charges") by Clause-12.2 of the Seventh Amendment to Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010, the respondent has violated the provisions of Electricity Act, 2003 and

has also violated constitutional right guaranteed to the petitioners under Article 19 (1) (g) of the Constitution of India.

07- The Madhya Pradesh Electricity Regulatory Commission has framed Regulations known as Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010 and Regulation 12.2 has initially exempted Captive Consumers and Open Access Consumers from payment of Open Access Charges in respect of energy procured from renewable sources of energy. The Regulation was issued in the year 2010 and thereafter, by way of public notice dated 28/07/2017, the State Commission proposed to bring Seventh Amendment in respect of Regulations of 2010 and invited suggestions / objections / comments from general public.

08- The petitioner No.2 and 3 as well as other objectors submitted their objections and thereafter, the amendment was done in Clause 12.2 (Seventh Amendment). The petitioners' grievance is that by virtue of the amendment, which is under challenge, the exemption granted earlier to Captive Consumers and Open Access Consumers from payment of Open Access Charges in respect of energy produced from renewable sources of energy, has been withdrawn.

09- The petitioners' contention is that the Seventh

Amendment is *ultra vires* of Electricity Act, 2003. In this behalf it has been argued that under the Electricity Act, there are two classes of generators, Conventional Generator (Coal) and Non-conventional / Renewable Generator (Wind, Solar, Mini Hydro etc.) It has been further stated that Electricity Act provides for special dispensation with respect to Renewable Energy Generator / Non-conventional Generator and the same is evident from the Preamble in the policies formulated under Section 3 and 4 and Section 42, 61 and 86 of the Electricity Act, 2003. The relevant statutory provisions, over which heavy reliance has been placed by the petitioners, reads as under:-

“Preamble:- An Act 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, rationalization 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.

Section 3. (National Electricity Policy and Plan) -

(1) The Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.

(2) The Central Government shall publish National Electricity Policy and tariff policy from time to time.

Section 42. (Duties of distribution licensee and open access): -

(1)

(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....

(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.

Section 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:-

(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:

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

(e) 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 a distribution licensee;

Section 181. (Powers of 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.

(2) 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 following matters, namely: -

(p) reduction of surcharge and cross-subsidies under the third proviso to sub-section (2) of section 42;

(zp) any other matter which is to be, or may be, specified.”

10- The petitioners have further stated that Clause 12.2 of the Seventh Amendment to MPERC Regulations, 2010 takes away the benefits provided to the Renewable Energy Generators and therefore, the Regulation is *ultra vires* of Section 86 (1) (e), Section 61 and Section 181 of the Act as they provides for development and promotion of renewable energy.

11- The petitioner have further stated that the amendment is also against the provision of Section 42 (2) of the Electricity Act, 2003 and a plain reading of Section 42 (2) provides that the State Commission while introducing open access in phases as may be specified by Regulation in the respective State within one year of the appointed dated (i.e. 10/06/2003) shall give due regard to cross subsidies and other operational constraint. The first proviso to Section 42 (2) further provides that while introducing open access, the State Commission shall impose surcharge upon open access customers.

12- Learned counsel has further stated that Commission

granted exemption to renewable generators through MPERC (Co-generation and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010 from payment of surcharge and additional surcharge and once exemption is granted and taking advantage of such exemption, the generators have set up their plants in the State, the Commission cannot levy Cross Subsidy Surcharge and Additional Surcharge in the mid way in the year 2017. The power / authority of the Commission to levy surcharge in the mid way (i.e. after introduction of open access) is not available and the power is available only to reduce such surcharge and cross subsidies on whom it is levied (under the 3rd proviso of 42(2)]. He further submits that if Section 42 (2) main clause is not applicable at the present stage then provisos to Section 42 (2) are also not applicable and therefore, the Seventh Amendment is also *ultra vires* to the provision of Section 42 (2) of the Electricity Act, 2003.

13- He further submits that the amendment is in direct conflict with Section 181 (2) (p) of the Electricity Act, 2003, which provides that Regulation under Section 42 (2) of the Electricity Act, 2003 can be framed for reducing the surcharge and cross subsidies under the third proviso of Section 42 (2). The exercise of the power of Section 181 (2) (zp) for imposing Cross Subsidy Surcharge and additional surcharge is also goes contrary to Section 181 (1), which specifically says that State Commission can make Regulations

consistent with this Act and to carry out provisions of the Act.

14- It has been further contended that the levy of Cross Subsidy and Additional Surcharge to existing renewable energy generators will have the effect of crippling the Renewable Energy Market in the State of Madhya Pradesh and will result in making renewable power un-competitive and therefore, cannot be termed as a promotional measure under Section 86 (1) (e) of the Electricity Act, 2003.

15- In respect of levy of Additional Surcharge, learned counsel has stated that the same is also *ultra vires* to the parent Act. It has been further contended that the Additional Surcharge is levied to meet the fixed cost of distribution licensee arising out of his obligation to supply as provided under Sub Section (4) of Section 42 of the Electricity Act, 2003.

16- He further submits that the Wind and Solar Power are variable and intermittent in nature. The Open Access Consumers procuring Wind and Solar Power are not able to reduce their contract demand with the distribution licensee to the extent of such wind / solar power utilized by them due to intermittent and variable characteristic of wind / solar power. The net result is that Open Access Consumers are continuing to pay a Fix Charge / Demand Charges to distribution licensee. Since, such Open Access Consumers are paying a Fixed Charges / Demand Charges to

distribution licensee, there is no loss of revenue to a distribution licensee from such Open Access Consumers procuring wind and solar power and therefore, his contention is that the additional surcharge should not be levied upon the Solar Generators.

17- It has also been argued that Commission has exceeded its jurisdiction in framing such Regulation and the generators of the electricity are now receiving Rs.4.62 to Rs.5.10 per unit and if charges are made applicable, they will receive Rs.2.2 to Rs.2.68 per unit and all the generators will face financial crunches.

18- It has also been stated that Central Government has notified a Tariff Policy on 06/01/2006 in compliance of Section 3 of the Electricity Act, 2003 and the Tariff Policy of the Government of India also provide provisions for promoting generation of electricity from renewable sources. It has been stated that the amendment is also contrary to the Tariff Policy of the Government of India.

19- The petitioners have also placed reliance upon the National Electricity Policy framed by the Central Government notified on 12/02/2005 and again it has been argued that National Electricity Policy also provides that amount of surcharge and Additional Surcharge should not become so onerous that it eliminates the solar generating companies from competition and the surcharge should be reduced progressively in steps with the reduction of Cross Subsidies in light of Section 42 (2) of the

Electricity Act, 2003.

20- The petitioners have also placed reliance upon policy dated 17/10/2006 framed by State of Madhya Pradesh and their contention is that policy of the State Government also provides for grant of exemptions to open access customer, availing power from renewable sources, from payment of Open Access Charges.

21- The petitioners' contention is that the amendment is in direct conflict with the policies framed from time to time under the Electricity Act, 2003 as undoubtedly it is going to make the renewable power more costlier than conventional power. It has also been argued that Regulations are contrary to the statutory provisions as contained under the Electricity Act, 2003 and the apex Court in the case of **PTC India Ltd. Vs. Central Electricity Regulatory Commission & Ors** reported in **(2010) 4 SCC 603** has held that Regulation enacted under the Electricity Act, 2003 should be in consonance with the policies framed by the Central Government and therefore, as Regulation is not in consonance with the statutory provisions as contained under the Act of 2003, it deserves to be quashed. It has also been argued that Seventh Amendment is in contravention of Article 14, 19 (1) (g), 21 and 48-A of the Constitution of India.

22- Reliance has also been placed upon a judgment delivered in the case of **Cellular Operators Association of India**

Vs. TRAI reported in **(2016) 7 SCC 703**. It has also been argued that amendment is against the provisions of Electricity (Procedure for Previous Publication) Rules, 2005 as the Commission has not at all considered the objections and suggestions of the stake holders. It has also been argued that National Tariff Policy notified under Section 3 of the Electricity Act, 2003 is statutory and binding document on the State Commission as held by the apex Court in the case of **Energy Watchdog Vs. Central Electricity Regulatory Commission** (Appeal No.5399-5400 of 2016, dated 11/04/2017).

23- It has been further argued that Government of Madhya Pradesh, by its policy to promote renewable energy, dated 17/10/2006 has granted exemption to Open Access Customer availing power from renewable sources of payment of Open Access Charges and therefore, imposition of Cross Subsidy Surcharge and Additional Surcharge is contrary to the policy framed by the State Government and is also contrary to the statutory provisions as contained under Section 42(2) and is also in direct conflict of Section 181 (2) (zp) of the Electricity Act, 2003.

24- It has also been argued that the amendment is violative of Article 48-A of the Constitution of India because renewable power is more expensive in comparison to conventional power and further imposition of Cross Subsidy Surcharge at the same rate as that of conventional power will force the buyers to opt for conventional

power, which is more hazardous for environment. It has also been argued that by the impugned amendment the State Commission has violated the right of livelihood of the petitioners in most arbitrary and unreasonable manner and it is in clear violation of Article 300-A of the Constitution of India.

25- A prayer has been made to declare Clause-12.2 of the Seventh Amendment to MPERC (Co-generation and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010 as *ultra vires* of the Electricity Act, 2003 and also as null and void and to issue appropriate writ, order or direction quashing all the subsequent bill in pursuance to the impugned amendment Regulation, 2010.

26- The respondent No.2 has filed a detailed and exhaustive reply and their contention is that concept of open access has been statutorily introduced by the Electricity Act, 2003 in order to promote free trade of electricity. It has been further contended that Act of 2003 gives freedom to a consumer either to generate his own electricity (Captive Generation) or to purchase it from an independent power generator of his own choice. However, to facilitate it, Section 42 of the Electricity Act, 2003 casts a statutory obligation upon distribution licensee to develop and maintain an efficient, co-ordinate and economical distribution system in his area (Open Access) to any other licensee or consumer or a person

engaged in generation of electricity subject to compliance of Regulations framed in this regard and payment of charges as determined by appropriate Commission.

27- It has been further stated that Section 42 of the Electricity Act, 2003 empowers the State Commission not only to determine the charge for wheeling of electricity but also to determine surcharge in Open Access (Cross Subsidy Surcharge), which is to be utilized to meet the requirement of current level of Cross Subsidy within the area of supply of the distribution licensee.

28- Learned counsel for the respondent No.2 has placed reliance upon a judgment delivered by the Hon'ble Supreme Court on the issue of Open Access and Cross Subsidy Surcharge in the case of **Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission and Others** reported in **(2014) 8 SCC 444**. It has been further stated that Section 42 of the Electricity Act, 2003 makes it clear that Cross Subsidy Surcharge is a "Statutory Surcharge" and recoverable from all "Open Access Consumers" except from a person, who is seeking open access, for carrying electricity for his own use from his Captive Generating Plan.

29- The respondent No.2 has further stated that Section 42 nor any other provision of Electricity Act, 2003 exempt levy of CSS / Open Access Charges on the consumers availing open access from renewable sources of energy and the exemption, if any, is available

only to Captive Generators, subject to satisfaction of the condition that consumers who were enjoying exemption from payment of CSS/Open Access Charges are using the power for their personal use and prior to amendment the exemption enjoyed by petitioners was an act of MPERC and it is a settled preposition of law that exemption or concession is a right that can be taken away under the very power in exercise of which the exemption was granted.

30- It has been further stated that the MPERC is the authority, which had conferred said concession / relaxation, hence it has full jurisdiction and authority to withdraw it. The respondent No.2 has also stated that the petitioner enjoying concession has got no legally enforceable right against the Government or the authority to demand grant of any exemption or continue to grant concession in respect of payment of Open Access Charge / CSS. The respondent No.2 has further stated that as per Section 42 of the Electricity Act open access consumer like petitioners are under statutory obligation to pay CSS / Open Access Charge and exemption was a freedom granted to a class of Open Access Consumer from discharge of said obligation. However, under the statute it was always open for authority, granting such freedom, to reconsider the matter or to curtail or to withdraw the exemption.

31- It has been further submitted that growing number of industrial consumer availing open access from renewable source of

energy without payment of Cross Subsidy, has significantly affected capacity of distribution licensee to absorb the burden of cross subsidising the weaker section of the society. The distribution licensees, who were having statutory and social responsibility to supply electricity at subsidised rates to weaker consumers, were not in a position to bear it from their own revenue.

32- In order to continue with exemption of CSS / Open Access Charge to consumer of renewable generators, the said burden was required to be passed upon the other consumers of distribution licensee by increasing the tariff, which was not a wise option, as admittedly the petitioners and person similar situated are using infrastructure of distribution licensee and thus, are equally responsible to bear the burden of Cross Subsidy. It has been further contended that the amending regulation cannot be termed as arbitrary, *ultra vires* or illegal, because it does not suits to a section of consumers like petitioners, who are either engaged in business of trading in electricity, or bulk user / consumer of electricity for their non-domestic / industrial or commercial establishment.

33- It has been further stated that promotion for renewal energy like solar energy is equally important and still there are concessions, which are being granted to producers and consumers of energy procured from renewable source. The Electricity Act, 2003 has left it to the wisdom of State Commission like MPERC to decide

the manner in which it has to be done in case of renewable energy. The consumers / electricity generators like petitioner cannot decide the manner and method in which it is required to be carried out. The MPERC on 23/10/2015 has notified MPERC (Grid Connected Net Metering) Regulation, 2015 for promotion of renewable energy and has attained good positive result in encouraging even domestic consumers to generate electricity through roof-top solar panels. The consumers availing net metering facility, are existing consumer of distribution licensee, who generates electricity primarily for their own use and trade with distribution licensee for any access energy generated by them.

34- It has been further argued that the solar policy of the year 2012 framed by the Government grants relaxation in respect of payment of Electricity Duty and Cess along with 4% relaxation on Wheeling Charges. Relaxation from payment of CSS / Open Access Charges was never part of incentives in respect of Policy of 2012. The petitioners are still receiving all incentives as promised by Government of Madhya Pradesh in Part-C of Policy of the year 2012.

35- The respondent No.2 has stated that the petitioners' contention about renewable power being more expensive than the power generated from other sources has totally ignored a vital aspect which is very material in case of power generated from

conventional resources i.e. cost of fuel, which is a recurring cost in case of power generated from conventional resources and in case of generation of electricity from renewable power, the maintenance is almost negligible. The respondent No.2 has further stated that to promote renewable generation of energy, MPERC has specified that respondent distribution licensee are under an obligation to procure certain minimum percentage of electricity from renewable source of energy and therefore, all kind of concessions have been granted to the petitioner and no case for interference is made out in the matter.

36- The respondent No.2 has further stated that Electricity Act, 2003 does not make any discrimination with respect to the imposition of Cross Subsidy Surcharge upon the energy drawn through open access from renewal and non-renewal generators. In fact, the word used "shall" in first proviso to Section 42 makes it mandatory to pay surcharge in case of open access and a careful reading of this section would make it clear that such surcharge cannot be zero or completely eliminated for any class of consumers (except for captive users).

37- The respondent No.2 has further stated that the exemption which the petitioner used to enjoy, till the recent amendment came into force, was in fact contrary to the legislative mandate and has rightly been withdrawn by MPEFC. It has been further stated that proviso to Section 86 (1) (a) of the Electricity Act,

2003 makes it mandatory upon the State Commission to determine the wheeling charge and surcharge (Cross Subsidy Surcharge) in case of permission of open access. It has been further stated that Section 86 of the Electricity Act, 2003 does not authorized the Commission to grant any exemption from a statutory fee / surcharge, which is otherwise payable under the Act. Open access surcharge (Cross Subsidy Surcharge) is a statutory charge which cannot be exempted in exercise of power conferred under Section 86 (1) (e) of the Electricity Act, 2003.

38- The respondent No.2 has further stated that Section 86 (1) (e) provides for promotion of co-generation and generation of electricity from renewal sources of energy by State Commission, however, the power is restricted to two areas (i) provide suitable measures for connectivity with grid and sale of electricity to any person; (ii) compel the distribution licensee to purchase percentage of total consumption of electricity in area from renewable sources of energy (known as renewable purchase obligation 'RPO'). The respondent's contention is that statute clearly specifies the manner for promotion of Renewable Energy and therefore, the Commission cannot be expected to act in a manner, which is contrary to the intent of the the legislature by granting exemption perpetually from a statutory charge, which is otherwise leviable.

39- The respondent No.2 has further stated that Section 42

of the Electricity Act, 2003 deals with duties of a distribution licensee and open access in general. Any energy drawn from renewal sources do not constitute any special class for waiver of Cross Subsidy Surcharge. The respondent No.2 has stated that the petitioner has not challenged the levy of Cross Subsidy in general and the prayer is restricted to set aside the impugned amendment by virtue of which, they are also liable to pay Cross Subsidy as it is applicable to other class of consumer drawing energy from sources other than renewable energy.

40- The respondent No.2 has further stated that the petitioner's contention in the rejoinder in respect of Solar Power under Open Access is mere 0.28% of the total power required by Discom is fallacious and misleading as the figure presented by the petitioner is not backed by any reliable document. The figure presented by the petitioner deals with alleged energy drawn from solar sources, whereas Wind Energy, Hydro Energy, Bio-mass Energy and Municipal Solid Waste are the other sources of new and renewable energy. The figure collected by respondents in the year 2016-17, reflects that the renewable energy has generated 5182.89 million of units of electricity. It is further stated the capacity of generation through renewable energy is increasing day by day.

41- It has been further contended that the MPERC as well as State of Madhya Pradesh is promoting heavily establishment of

new plants, which are gradually increasing. There is a substantial increase in ROP, there is substantial growth in generation of electricity through renewable energy, which is increasing the liability of Cross Subsidy and therefore, the Cross Subsidy, which is statutory liability has to be satisfied by persons like the petitioners, especially keeping in view the Renewal Purchase Obligation. The respondent No.2 has stated that by no stretch of imagination, the amendment can be treated as *ultra vires*.

42- A similar reply has been filed by respondent No.3 Madhya Pradesh Power Transmission Company Limited and their contention is that it is only petitioner No.2, who has established Solar Power Project and executed an agreement dated 24/09/2013 and therefore, as the petitioner No.1 is not a party to the said agreement does not have any locus to file present petition. The respondent No.3 has also argued on similar lines and the learned counsel has contended that the amendment is not at all in violation of Article 19 of the Constitution of India. A prayer has been made for dismissal of the writ petition.

43- Rejoinder has also been filed in the matter and again an attempt has been made to establish before this Court that exemption granted earlier in respect of Open Access Charges was a right, which was being enjoyed by the petitioners and the same has been withdrawn by the amendment, which is violative of Article 19

as well as statutory provisions as contained under Section 42 and Section 86 (1) (e), hence, deserves to be quashed by this Court.

44- Heard learned counsel for the parties and perused the record and the matter is being disposed of with the consent of the parties at motion hearing stage itself.

45- The petitioner No.1 and 2 before this Court are the Companies incorporated under the Companies Act, 1956. The petitioner No.1 is a consumer of Solar Energy generated by the petitioner No.2 and the petitioner No.3 is an association of the generator companies of electricity generated from renewable sources (Solar Power). The petitioners are aggrieved by the Seventh Amendment made to the Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010 and the amendment has been challenged on the ground that it is *ultra vires* of the Electricity Act, 2003. It violates the provision of Article 14, 19 (1) (g) and Article 21 of the Constitution of India and it is in contravention of the Tariff Policy and Electricity Policy framed under Section 3 of the Electricity Act, 2003 and is in gross violation of Electricity (Procedure for Previous Publication) Rules, 2005.

46- The State Commission in exercise of power conferred under Section 39 (2) (d), 40 (c), 42 (2) and (3), 86 (1) (c) read with

Section 181 (1) of the Electricity Act, 2003 enacted Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Intra- State Open Access in Madhya Pradesh) Regulations, 2005. Subsequently, in exercise of powers conferred under Section 181 (2) (zp) read with Section 86 (1) (e) of the Electricity Act, 2003, the State Commission has notified Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of Electricity From Renewable Sources of Energy) (Revision-I) Regulations, 2010 and by the aforesaid Regulation the Commission has revised Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of Electricity from Renewable Sources of Energy) Regulation, 2008.

47- The Regulation 12.2 prior to its amendment reads as under:-

“12.2 Wheeling charges, Cross subsidy surcharge and applicable surcharge on wheeling charges shall be applicable as decided by the Commission from time to time. Captive consumers and Open Access Consumers shall be exempted from payment of Open Access Charges in respect of energy produced from Renewable Sources of Energy.”

The amendment, which has been brought in force by virtue of notification published in official Gazette dated 17/11/2017 (Seventh Amendment) reads as under:-

“12.2 Wheeling charges, Cross subsidy surcharge and additional surcharge on the wheeling charges and such other charges, if any, under Section 42 of the Electricity Act, 2003 shall be applicable at the rate as decided by the Commission from time to time in its retail supply tariff order.”

By reading unamended provision and the amended

statutory provision, it is evident that the following has been deleted by introducing the amendment as under:-

“Captive consumers and Open Access Consumers shall be exempted from payment of Open Access Charges in respect of energy produced from Renewable Sources of Energy.”

48- The relevant statutory provisions, which are necessary to decide the present writ petition, as contained under the Electricity Act, 2003 are reproduced below:-

“Section 39. (State Transmission Utility and functions):

(1) The State Government may notify the Board or a Government company as the State Transmission Utility:

Provided that the State Transmission Utility shall not engage in the business of trading in electricity:

Provided further that the State Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

(2) The functions of the State Transmission Utility shall be-

- (a) to undertake transmission of electricity through intra-State transmission system;
- (b) to discharge all functions of planning and co-ordination relating to intra-State transmission system with -
 - (i) Central Transmission Utility;
 - (ii) State Governments;
 - (iii) generating companies;
 - (iv) Regional Power Committees;
 - (v) Authority;
 - (vi) licensees;
 - (vii) any other person notified by the State Government in this behalf;
- (c) to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the

load centres;

- (d) to provide non-discriminatory open access to its transmission system for use by-
- (i) any licensee or generating company on payment of the transmission charges ; or
 - (ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

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

Provided also that the manner of payment and utilisation of the surcharge shall 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.

Section 40. (Duties of transmission licensees): It shall be the duty of a transmission licensee -

- (a) to build, maintain and operate an efficient, co-ordinated and economical inter-State transmission system or intra-State transmission system, as the case may be;
- (b) to comply with the directions of the Regional Load Despatch Centre and the State Load Despatch Centre as the case may be;
- (c) 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:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

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

Provided also that the manner of payment and utilisation

of the surcharge shall be specified by the Appropriate 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.

Section 42. (Duties of distribution licensee and open access): - (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

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

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

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

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

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

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

(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-section (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.

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

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(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;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) 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 a distribution licensee;

- (f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;
- (g) levy fee for the purposes of this Act;
- (h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;
- (i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;
- (j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and
- (k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely:-

- (i) promotion of competition, efficiency and economy in activities of the electricity industry;
- (ii) promotion of investment in electricity industry;
- (iii) reorganization and restructuring of electricity industry in the State;
- (iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(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. (Powers of 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.

(2) 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 following matters, namely: -

- (a) period to be specified under the first proviso of section 14;
- (b) the form and the manner of application under sub-section (1) of section 15;
- (c) the manner and particulars of application for licence to be published under sub-section (2) of section 15;
- (d) the conditions of licence section 16;

- (e) the manner and particulars of notice under clause(a) of subsection (2) of section 18;
- (f) publication of the alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;
- (g) levy and collection of fees and charges from generating companies or licensees under sub-section (3) of section 32;
- (h) rates, charges and the term and conditions in respect of intervening transmission facilities under proviso to section 36;
- (i) payment of the transmission charges and a surcharge under sub-clause (ii) of clause(d) of sub-section (2) of section 39;
- (j) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;
- (k) manner and utilisation of payment and surcharge under the fourth proviso to sub-clause(ii) of clause (d) of sub-section (2) of section 39;
- (l) payment of the transmission charges and a surcharge under sub-clause (ii) of clause (c) of section 40; (m) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (c) of section 40;
- (n) the manner of payment of surcharge under the fourth proviso to sub-clause (ii) of clause (c) of section 40;
- (o) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;
- (p) reduction of surcharge and cross-subsidies under the third proviso to sub-section (2) of section 42;
- (q) payment of additional charges on charges of wheeling under subsection (4) of section 42;
- (r) guidelines under sub-section (5) of section 42;
- (s) the time and manner for settlement of grievances under sub-section (7) of section 42;
- (t) the period to be specified by the State Commission for the purposes specified under sub-section (1) of section 43;
- (u) methods and principles by which charges for electricity shall be fixed under sub-section (2) of section 45;
- (v) reasonable security payable to the distribution licensee under sub-section (1) of section 47;
- (w) payment of interest on security under sub-section (4) of section 47;
- (x) electricity supply code under section 50;

- (y) the proportion of revenues from other business to be utilised for reducing wheeling charges under proviso to section 51;
- (z) duties of electricity trader under sub-section (2) of section 52;
- (za) standards of performance of a licensee or a class of licensees under sub-section (1) of section 57;
- (zb) the period within which information to be furnished by the licensee under sub-section (1) of section 59;
- (zc) the manner of reduction of cross-subsidies under clause (g) of section 61;
- (zd) the terms and conditions for the determination of tariff under section 61;
- (ze) details to be furnished by licensee or generating company under sub-section (2) of section 62;
- (zf) the methodologies and procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;
- (zg) the manner of making an application before the State Commission and the fee payable therefor under sub-section (1) of section 64;
- (zh) issue of tariff order with modifications or conditions under subsection(3) of section 64;
- (zi) the manner by which development of market in power including trading specified under section 66;
- (zj) the powers and duties of the Secretary of the State Commission under sub-section (1) of section 91;
- (zk) the terms and conditions of service of the secretary, officers and other employees of the State Commission under sub-section (2) of section 91;
- (zl) rules of procedure for transaction of business under sub-section (1) of section 92;
- (zm) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;
- (zn) the manner of service and publication of notice under section 130;
- (zo) the form of preferring the appeal and the manner in which such form shall be verified and the fee for preferring the appeal under sub-section (1) of section 127;
- (zp) any other matter which is to be, or may be, specified.

(3) All regulations made by the State Commission under this Act shall be subject to the condition of previous publication.”

The aforesaid statutory provisions make it very clear that Madhya Pradesh Electricity Regulatory Commission by virtue of the statutory provisions as contained under the Electricity Act, 2003 is competent to issue such regulations and subsequent amendment as has been done in the present writ petition.

49- The petitioners' contention is that the amending Regulation is not in conformity and furtherance with the parent statute. It is also violative of National Electricity Policy and National Tariff Policy notified by the Central Government dated 06/01/2006 and the generating units have been established in the State of Madhya Pradesh only on account of the assurances given by the State Government for promoting generation of electricity from Solar Power Projects.

50- Heavy reliance has been placed upon the Policy framed by the State of Madhya Pradesh of the year 2012, which is on record as Annexure-P/2. The policy framed by the State Government provides for Incentives and Part-C of the Policy deals with "Incentives" and the same reads as under:-

- “1. **Electricity duty & cess exemption** : All Solar power projects (including captive units) will be eligible for exemption from payment of electricity duty and cess for a period of 10 years from the date of commissioning of the project.
2. **Wheeling charges** : Facility of wheeling will be available to all solar power projects through MPPTCL / MP Discoms, as case may be, as per wheeling charges specified by MPERC. For above wheeling charges, GoMP will provide a grant of four percent (4%) in terms of energy injected and the balance, if any, shall be borne by the

project developer.

3. **Banking -**

Banking of 100% of energy in every financial year shall be permitted subject to the following conditions –

- i. The figures of banked energy during the Financial Year shall be subject to verification by the officials of the concerned State Distribution Company / State Power Trading Company. The Developer will be required to pay two percent (2%) of the banked energy towards banking charges to the concerned State Distribution Company / State Power Trading Company.
- ii. The return of banked energy shall be based on Regulations issued by MPERC from time to time.
- iii. The balance energy, if any, at the end of a Financial Year after return of banked energy shall be purchased by the concerned State Distribution Company / State Power Trading Company in accordance with the rules / directions of MPERC.

4. **Contract demand reduction:** The Industrial Consumers opting to buy power from Solar Power Project under category II and III shall be allowed corresponding pro-rata reduction in Contract Demand on a permanent basis but subject to the decision of MPERC in this regards.
5. **Third Party sale:** Third Party sale within or outside the State of M.P. will be allowed as per Electricity Act, 2003 and the Orders and / or Regulations issued by MPERC from time to time.
6. **Industry status:** The Solar projects implemented under this Solar Policy will have the status of industry and will be eligible for all benefits under Industrial Promotion Policy (or subsequent amendments from time to time). In case of any inconsistency between the Madhya Pradesh Industrial Promotion Policy and Solar policy, the provisions under the new Solar Policy shall prevail.
7. **Entry tax / VAT Exemption:** The equipments purchased for installation of Solar Power plants under the policy shall be exempted from VAT and entry tax as per entry number 71, schedule-1 of VAT notification 2002 and entry 1 of schedule-1 of entry tax notification 1976.
8. **CDM benefits:** CDM benefits to the solar power project Developers/Investors shall be as per the provisions specified by MPERC.
9. Regarding other facilities/incentives such as Open Access, Reactive Power and Renewable Purchase Obligation, the provisions specified by MPERC shall be applicable.”

51- The petitioner is already enjoying the Incentives as per the State Policy and none of the incentives granted to the petitioner has been withdrawn. Section 42 of the Electricity Act, 2003 empowers the State Commission not only to determine the charge for wheeling of electricity but also determine surcharge in open access (Cross Subsidy Surcharge), which is to be utilized to meet the requirement of current level of Cross Subsidy within the area of supply of the distribution licensee.

52- Section 42 and 86 nowhere provides for exemption from payment of surcharge and Cross Subsidy Surcharge. On the contrary, proviso to Section 86 (1) (a) of the Electricity Act, 2003 makes it mandatory upon the State Commission to determine the wheeling charge and surcharge (Cross Subsidy Surcharge) in case of permission of Open Access. In fact it does not authorize the Commission to grant any exemption from a statutory fee / surcharge, which is otherwise payable under the Act and by no stretch of imagination Open Access Surcharge (Cross Subsidy Surcharge) can be exempted in exercise of power conferred under Section 86 (1) (e) of the Electricity Act, 2003.

53- Section 86 (1) (e) of the Electricity Act, 2003 provides for promotion for co-generation and generation of electricity from Renewable Sources of Energy by the State Commission and the same is being done in the State of Madhya Pradesh. The

respondents are under an obligation to purchase percentage of total consumption of electricity in area from Renewable Purchase Obligation.

54- Section 42 of the Electricity Act, 2003 deals with duties of distribution licensee and open access in general. Any energy drawn from renewal energy sources do not constitute any special class for waiver of Cross Subsidy Surcharge.

55- The issue of Cross Subsidy Surcharge has been considered by the Hon'ble Supreme Court in the case of **Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission and Others** reported in **(2014) 8 SCC 444**. Paragraph No.23 to 30 of the aforesaid judgment reads as under:-

“(2) Open Access and Cross-Subsidy Surcharge (CSS)

23. Open access implies freedom to procure power from any source. Open access in transmission means freedom to the licensees to procure power from any source. The expression “open access” has been defined in the Act 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”.

24. The Act mandates that it shall be duty of the transmission utility/licensee to provide non-discriminatory open access to its transmission system to every licensee and generating company. Open access in transmission thus enables the licensees (distribution licensees and traders) and generating companies the right to use the transmission systems without any discrimination. This would facilitate sale of electricity directly to the distribution companies. This would generate competition amongst the sellers and help reduce, gradually, the cost of generation/procurement.

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 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.

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 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 subsidizing a low and consumer if he falls in the category of subsidizing 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."

In light of the aforesaid judgment delivered by the apex Court and plain reading of the Electricity Act, 2003 would make it clear that Cross Subsidy Surcharge is a "Statutory Surcharge" and is recoverable from all "Open Access Consumer" except from the person, who is seeking open access for carrying out electricity for his own use from his captive generating plant. Section 42 nor any other provision under the Electricity Act, 2003 exempts levy of Cross

Subsidy Surcharge / Open Access Charges on the consumers availing open access from “Renewable Sources of Energy”.

56- In fact the earlier exemption granted to the petitioners was an act of MPERC, which was certainly contrary to the mandate of Section 42 and Section 86 of the Electricity Act, 2003 and the concession which was granted earlier by MPERC has been withdrawn and since the concession was granted by MPERC, therefore, MPERC was well within its jurisdiction to withdraw the same. The petitioner being beneficiary of concession does not have any legally enforceable right against Government or authority to demand grant of any exemption or continue to grant concession in respect of payment of Open Access Charge / Cross Subsidy Surcharge.

57- It has been argued by learned Senior Counsel appearing on behalf of the petitioners that concession which has been earlier granted to the petitioners, cannot be withdrawn as the MPERC does not have the power to legislate on the subject. The apex Court while dealing with the issue of withdrawal of hill development rebate in the case of **Shree Sidhballi Steels Limited and Others Vs. State of Uttar Pradesh and Others** reported in **(2011) 3 SCC 193** in paragraph No.11 has held as under:-

“11. In the reply it is mentioned that there is a provision of filing review before the Commission in case the petitioners feel aggrieved but they are not justified in making grievance directly before this Court regarding introduction of new tariff rates and/or withdrawal of rebate by filing a writ petition under **Article 32 of**

the Constitution. After mentioning that the agreement entered into by the petitioners with Respondent 2 Corporation contains a clause that the rates/tariff fixed/revised by the supplier i.e the replying respondent, from time to time, would also be applicable to the petitioners, it is asserted that in view of the said clause, the petitioners are estopped from challenging the revision of the tariff made under statutory exercise of powers for greater public interest.”

58- In the case of **Kothari Industrial Corporation Limited Vs. Tamil Nadu Electricity Board and Another** reported in **(2016) 4 SCC 134**, the apex Court has held that there is no estoppel against law and recipient of a concession has no legally enforceable right against the Government to grant or to continue to grant a concession except to enjoy benefits of concession during the period of its grant. The apex Court in paragraph No.10 and 11 of the aforesaid judgment has held as under:-

“10. The question referred to this bench, as noticed, is whether the State would be estopped from altering/modifying the benefit of concessional tariff by means of the impugned G.O No. 861 dated 30.4.1982 on the principle of promissory estoppel. In fact, insofar as the caustic soda unit of M/s. Kothari Industrial Corporation Ltd., subsequently taken over by Southern Petro Chemical Industrial Corporation Ltd., is concerned, strictly speaking, the above question would not even arise inasmuch as at the time when the unit was set up and had started commercial production, the Act had not yet come into force. The promise, if any, was made by the letter dated 29.6.1976 on the terms noticed above, namely, the tariff payable by the industry was to be at a rate less than what was applicable to the other two units of the State for the first three years and thereafter at the rate equivalent to what was being paid by the said two units.

11. Be that as it may, the question referred has been squarely answered by this Court in *Shree Sidhali Steels Limited vs. State of Uttar Pradesh & Ors.*[1] wherein this Court has considered a similar question with regard to the withdrawal of concessional tariff/rebate to an industrial unit carrying on business in the hill areas of the State of U.P. (now the State of Uttarakhand). After an in depth consideration of the provisions of Section 48/49 of the Electricity Supply Act, 1948 under which the concessional tariff/rebate was granted and the provisions of Section 21 of the General Clauses Act as well as the provisions

of the U.P. Electricity Reforms Act, 1999 under which the concessional tariff/rebate was later withdrawn this Court in para 51 came to the following conclusion –

“From the above discussion, it is clear that the petitioners cannot raise plea of estoppel against the Notification dated 7.8.2000 reducing hill development rebate to 0% as there can be no estoppel against the statute.”

In light of the aforesaid judgment, the concession which was granted to the petitioners has been withdrawn and the petitioners were having a right only to enjoy the concession during the period it was available to the petitioners.

59- In the case of **State of Tamil Nadu and Another Vs. P. Krishnamurthy and Others** reported in **(2006) 4 SCC 517**, the apex Court in paragraph No.15 and 16 has held as under:-

“15. There is a presumption in favour of constitutionality or validity of a sub-ordinate Legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a sub-ordinate legislation can be challenged under any of the following grounds :-

- (a) Lack of legislative competence to make the sub-ordinate legislation.
- (b) Violation of Fundamental Rights guaranteed under the Constitution of India.
- (c) Violation of any provision of the Constitution of India.
- (d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
- (e) Repugnancy to the laws of the land, that is, any enactment.
- (f) Manifest arbitrariness/unreasonableness (to an extent where court might well say that Legislature never intended to give authority to make such Rules).

16. The court considering the validity of a sub-ordinate Legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the

subordinate Legislation conforms to the parent Statute. Where a Rule is directly inconsistent with a mandatory provision of the Statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the Rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the Parent Act, the court should proceed with caution before declaring invalidity.”

In light of the aforesaid judgment, it can never be said that principles of natural justice and fair play has been violated.

60- Learned counsel for the petitioners has placed reliance upon a judgment delivered in the case of **Indian Express Newspapers (Bombay) Private Ltd. and Others Vs. Union of India and Others** reported in **(1985) 1 SCC 641** and his contention is that in light of the aforesaid judgment, the amendment is bad in law as MPERC does not have the power to introduce the amendment by which Wheeling Charges, Cross Subsidy Surcharge, Additional Surcharge and such other charges have been levied upon the petitioners.

61- This Court has carefully gone through the aforesaid judgment and is of the considered opinion that in the present case, the MPERC is jurisdictionally competent to amend the Regulations framed by it earlier and concession which is not a right, has rightly been withdrawn.

62- The apex Court in the case of **Cellular Operators Association Of India Vs. Telecom Regulatory Authority of India** reported in **(2016) 7 SCC 703** has laid down a test for declaring a

statute / notification as *ultra vires*. The apex Court in the aforesaid judgment in paragraphs No.34 and 42 to 44 has held as under:-

“34. In *State of Tamil Nadu v. P. Krishnamoorthy*, (2006) 4 SCC 517, this Court after adverting to the relevant case law on the subject, laid down the parameters of judicial review of subordinate legislation generally thus:-

“15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

- (a) Lack of legislative competence to make the subordinate legislation.
- (b) Violation of fundamental rights guaranteed under the Constitution of India.
- (c) Violation of any provision of the Constitution of India.
- (d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
- (e) Repugnancy to the laws of the land, that is, any enactment.
- (f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation – [See: *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641 at Para 75].

43. The test of “manifest arbitrariness” is well explained in two judgments of this Court. In *Khoday Distilleries Ltd. v. State of Karnataka*, (1996) 10 SCC 304, this Court held:

“It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(g) may not be available to the appellants, the rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not

executive action but delegated legislation. The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the lawmaking power. In the case of *Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors.* [(1985) 1 SCC 641 : 1985 SCC (Tax) 121 : (1985) 2 SCR 287], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary". Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, "Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires". In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."

(emphasis supplied)

44. Also, in *Sharma Transport v. Government of Andhra Pradesh*, (2002) 2 SCC 188, this Court held:

"25. ... The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone. ..."

In the present case, none of the aforesaid contingencies as mentioned in paragraph 34 have been satisfied by the petitioners while challenging the validity of the impugned notification and

therefore, the question of interference by this Court does not arise.

The incentives granted to the generators / consumers generating electricity from renewable resources, as per State policy are still continuing.

63- Not only this, to promote renewable generation of energy, MPERC has specified the following minimum percentage of electricity to be procured by the respondent distribution licensees from the renewable sources of energy. The relevant clause of regulation of 2010 as amended *vide* notification dated 01/09/2017 is reproduced as under:-

“4.1. The minimum quantum of electricity to be procured by all the Obligated Entities from generators of Renewable Energy including Co-generation from Renewable Sources of electricity expressed as percentage of their total annual procurement of Electrical Energy excluding consumption met from hydro sources of power during the following Financial years shall be as under, namely:-

| S. No. | Financial Year | Co-generation and other Renewable Sources of Energy | | |
|--------|----------------|---|---------------|-----------|
| | | Solar (%) | Non Solar (%) | Total (%) |
| 1 | 2 | 3 | 4 | 5 |
| 1 | 2010-11 | - | 0.80 | 0.80 |
| 2 | 2011-12 | 0.40 | 2.10 | 2.50 |
| 3 | 2012-13 | 0.60 | 3.40 | 4.00 |
| 4 | 2013-14 | 0.80 | 4.70 | 5.50 |
| 5 | 2014-15 | 1.00 | 6.00 | 7.00 |
| 6 | 2015-16 | 1.00 | 6.00 | 7.00 |
| 7 | 2016-17 | 1.25 | 6.50 | 7.75 |
| 8 | 2017-18 | 1.50 | 7.00 | 8.50 |
| 9 | 2018-19 | 1.75 | 7.50 | 9.25 |
| 10 | 2019-20 | 4.00 | 8.00 | 12.00 |
| 11 | 2020-21 | 6.00 | 8.50 | 14.50 |
| 12 | 2021-22 | 8.00 | 9.00 | 17.00 |

From the aforesaid table, it can be seen that by the Financial Year 2021-22 distribution companies are bound to purchase, 17% of their electricity requirement from renewable source of energy, which itself a great incentive for the promotion of renewable energy.

64- In short, the incentives which have been granted to the promoters of renewable energy are still in existence and the amendment in the impugned Regulation is well within the power of MPERC, it does not violate any provisions, neither the purpose of Electricity Act, 2003 nor the constitutional rights guaranteed to the petitioner under the Constitution of India.

65- This Court does not find any reason to interfere with the amendment. Hence, the petition is dismissed and all other connected petitions are also dismissed.

Certified copy as per rules.

(S. C. SHARMA)
J U D G E

(VIRENDER SINGH)
J U D G E