A HINDUSTAN ZINC LTD.

v.

RAJASTHAN ELECTRICITY REGULATORY COMMISSION

(Civil Appeal No.4417 of 2015)

B MAY 13, 2015

[V. GOPALA GOWDA AND R. BANUMATHI, JJ.]

Rajasthan Electricity Regulatory Commission C *(Renewable Energy Obligation) Regulations, 2007; Rajasthan Electricity Regulatory Commission (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010: Constitutional validity of the Regulations 2007 and 2010 directing the* D *captive power plants to purchase minimum energy from renewable sources – Held: The object of imposing RE Obligation is protection of environment and preventing pollution by utilising Renewable Energy Sources as much as possible in larger public interest – The Regulations* E *impose reasonable restrictions upon the captive gencos as permissible u/Art.19(6) of the Constitution – The impugned Regulations fall within the four corners of the Act of 2003 as well as Electricity Policy, 2005 – National Electricity Policy, 2005 – Electricity Act, 2003 – s.86(1) – Constitution of India,* F *1950 – Articles 19(1)(g), 19(6), 51A(g).*

Electricity Act, 2003: ss.2(3), 86(1) – Captive power plant – Regulatory jurisdiction of Commission – Held: The mere fact that no licence is required for Establishment, Operation G *and Maintenance of a Captive Power Plant would not imply that the industries engaged in various commercial activities putting up such Captive Power Plants cannot be subjected to Regulatory Jurisdiction of the Commission – RE obligation*

H

has been imposed upon the consumption of electricity whether purchased from the Distribution Licensee or consumed from its own Captive Power Plant or through open access.

Dismissing the appeals and disposing of the I.A.s, the Court

HELD: 1. These Regulations are framed by the RERC with a laudable objective of achieving Directive Principles of the State Policy as provided in Article 48A read with Fundamental Duties under Article 51A(g) of the Constitution, which mandate upon the State and its instrumentalities to protect the environment in the area with a view to see that the citizens/residents of the area to lead a healthy life. To achieve the same it has framed the National Electricity Policy, 2005. Further, the impugned Regulations framed by the RERC which impose reasonable restriction as provided under Article 19(6) of the Constitution of India to achieve the Directive Principles of State Policy and to see that the State and its instrumentalities shall discharge their fundamental duties to protect and maintain environment in the area to facilitate the residents and living creatures to live peacefully. [Paras 15, 16] [1122-G-H; 1123-A-B]

2. The Electricity Act of 2003 being a self-contained comprehensive legislation in the matter of generation, transmission and supply of energy to its consumers, the provisions of Section 82 of the Act of 2003 enjoin upon every State Government to constitute a Regulatory Commission in their respective State to regulate the implementation of the provisions of the Act of 2003 by framing suitable Regulations and Rules with reference to the matters/entries enumerated in Section 181 of the Act of 2003 and accordingly the State of Rajasthan has constituted the RERC. [Para 26] [1130-F-G; 1131-A]

3. Where the validity of subordinate legislation is

A challenged, question to be asked is whether power given to the rule making authority has been exercised for the purpose for which it was given. The Court has to examine the nature, object and scheme of the legislation as a whole to consider what is the area over which
B powers are conferred upon the rule making authority. However, the Court has to start with the presumption that the Rule is *intra-vires* and has to be read down only to save it from being declared *ultra-vires* in case the Court finds that the above presumptions stand rebutted
C and the impugned regulations are relatable to the specific provision contained in Section 86(1)(e) of the Act. Para 4.2.2 of the National Action Plan on Climate Change and Preamble of the Act of 2003 emphasise upon
D promotion of efficient and environmentally benign policies to encourage generation and consumption of green energy to sub-serve the mandate of Article 21 read with Article 48A of the Directive Principles of the State Policy and Article 51A(g) of the Fundamental Duties
E enlisted under Chapter IVA of the Constitution of India. Further, the said Regulations are consistent with the International obligations of India, as India has ratified to the Kyoto Protocol on 26.08.2002. Further, the impugned Regulations which impose reasonable restrictions upon
F the captive generating plant owners are permissible under Article 19(6) of the Constitution of India. [Paras 28, 29] [1132-E-G; 1133-A-D]

4. In case, the legislature intended power of the
G Regulatory Commission to be confined to the Distribution Licensee, the said words and phrases of Section 86(1)(e) would have read "total electricity purchased and supplied by distribution licensee". The mere fact that no licence is required for Establishment,
H Operation and Maintenance of a Captive Power Plant

does not imply that the industries engaged in various commercial activities putting up such Captive Power Plants cannot be subjected to Regulatory Jurisdiction of the Commission and required to purchase certain quantum of energy from Renewable Sources. The RE obligation has been imposed upon the consumption of electricity whether purchased from the Distribution Licensee or consumed from its own Captive Power Plant or through open access. [Para 34] [1137-B-E]

5. The term 'in the area of distribution licensee' under the provisions has to be read along with definition of 'area of supply' as provided under Section 2(3) of the Act of 2003 which defines it as the area within which distribution licensee is authorized by his license to supply electricity. Further, proviso 6 to Section 14 of the Act of 2003 provides that Appropriate Commission may grant a licence to two or more persons to supply electricity through their own distribution system within the same area and therefore, in case there are more than one distribution licensee within the same area of supply, the term 'total consumption in the area of distribution license' would include the consumption by Captive Power Plant Consumers also and Open Access Consumers who fall in the 'area' of distribution licensee. The other phrase 'total consumption' has been used by the legislature in Section 86(1)(e) and total consumption in an area of a distribution licensee can be by three ways either supply through distribution licensee or supply from Captive Power Plants by using lines and transmissions lines of distribution licensee or from any other source. The area would always be of distribution licensee as the transmission lines and the system is of distribution licensee, the total consumption is very significant. The total consumption has to be seen by consumers of

A distribution licensee, Captive Power Plants and on supply through distribution licensee. [Para 35] [1137-H; 1138-A-E]

6. Section 43(2) of the Act of 2003 provides that open B access consumers are also located/situated within the area of distribution licensees and are also connected to the distribution network of such licensees and therefore, the electricity consumed by such open access consumers shall also be necessarily included in the term C *"Total Consumption in the area of distribution licensee"*. Similarly, captive power consumers are also located/ situated within area of distribution licensee and are connected to the Distribution Network of Distribution licensees either for wheeling electricity or for backup D power, if needed. Therefore, the term for *"Total Consumption in the area of distribution licensee"* would also include such captive power consumers also and accordingly, Section 86(1)(e) grants the State Commission power to specify a minimum percentage of E renewal energy to be purchased out of the total consumption of electricity in the area of distribution licensee which would include the distribution licensee/ s, open access consumers and the captive power consumers. A distribution licensee is obliged to supply F power to Captive Power Plants and Open Access Consumer under Section 43 of the Act of 2003, if there is a request to supply. In such view of the matter, it will be highly discriminatory to only subject the regular G consumers of the distribution licensee to bear the cost of purchase of renewable energy and to exempt the gencos from the Open Access Consumers or Captive Power Plants from the obligation to purchase/share the cost for purchase of renewable power despite being H connected to the distribution network of the distribution licensee and despite the fact that they can demand back

up power from such licensee any time they want. Thus, in order to realize the attempt of reducing dependence on fossil fuels, it can be said that the impugned Regulations are imperative in the larger public interest and are just reasonable restrictions imposed upon the captive gencos as permissible under Article 19(6) of the Constitution of India. [Paras 36, 39] [1140-H; 1141-A-D]

7. The RERC has enacted 2007 and 2010 Regulations requiring the Captive Power Plants and Open Access Consumers to purchase a minimum quantum of Energy from Renewable Energy Sources, in order to effectuate the provisions of the Constitution of India, Electricity Act and the National Electricity Policy, since energy generated from Renewable Sources is pollution free. The Right to live with healthy life guaranteed under Article 21 of the Constitution of India includes the Right to live in a pollution free environment. [Para 40] [1141-E-F]

8. In terms of impugned Regulation 9 of the Regulations, if a default is made in fulfilling RE obligation then, obligated entity has to deposit the Renewable Purchase Obligation (RPO) charge. The deposit of the RPO charge is compensatory in nature. Sections 142 and 147 of the Act of 2003 provide the statutory back-up for penal consequences in contravention of the impugned Regulations framed under Section 181 r/w Section 86(1)(e) of the Act of 2003. The penalty imposed by the impugned Regulations upon the Captive Generating Companies who do not comply with the requirements as provided under Regulation 9 of the impugned Regulations of 2010 are not in nature of 'tax' but it is a 'surcharge' levied under Section 39(2) of the Act but an alternative mode of enforcement of Regulation upon them for ensuring its compliance to achieve the laudable

A **object of the Act, in case obligated entity make default in fulfilling the renewable purchase obligation as provided under the Regulation 9 of the impugned Regulations 2010. [Para 43] [1144-D-H; 1145-A-B]**

B **9. The impugned Regulations have been enacted in order to effectuate the object of promotion of generation of electricity from renewable sources of energy as against the polluting sources of energy which principle is enshrined in the Act, the National Electricity Policy of**
C **2005 and the Tariff Policy of 2006. The provisions requiring purchase of minimum percentage of energy from renewable sources of energy have been framed with an object of fulfilling the constitutional mandate with a view to protect environment and prevent pollution in**
D **the area by utilizing renewable energy sources as much as possible in larger public interest. RE obligation imposed on the captive gencos under the impugned Regulations is neither *ultra vires nor* violative of the provisions of the Act of 2003 and cannot in any manner**
E **be regarded as a restriction on the fundamental rights guaranteed to the appellants under the Constitution. Article 51A(g) of the Constitution of India cast a fundamental duty on the citizen to protect and improve**
F **the natural environment. The RE obligation imposed upon captive power plants and open consumers through impugned Regulation cannot in any manner be said to be restrictive or violative of the fundamental rights conferred on the appellants under Articles 14 and**
G **19(1)(g) of the Constitution of India. [Paras 44, 50] [1146-E-H; 1147-A; 1151-D, F]**

Society For Unaided Pvt. Schools of Rajasthan v. U.O.I. & Anr. **(2012) 6 SCC 1: 2012 (2) SCR 715;** *J.K. Industries Ltd. & Anr. v. Union of India & Ors.* **(2007) 13 SCC 673: 2007**
H **(12) SCR 136 – relied on.**

Tata Power Company Ltd. v. Reliance Energy Ltd. and Ors. **(2009) 16 SCC 659: 2009 (9) SCR 625;** *Global Energy Ltd. and Anr. v. Central Electricity Regulatory Commission* **(2009) 15 SCC 570: 2009 (9) SCR 22;** *Dayal Singh & Ors. v. Union of India & Ors.* **(2003) 2 SCC 593:2003 (1) SCR 714;** *M. Chandru v. Member Secretary, Chennai Metropolitan Development Authority & Anr.* **(2009) 4 SCC 72: 2009 (2) SCR 661;** *Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawala & Ors.* **(1992) 3 SCC 285: 1992 (3) SCR 328;** *Consumer Online Foundation v. Union of India & Ors.* **(2011) 5 SCC 360 : 2001 (5) SCR 911 – held inapplicable.**

Union of India & Ors. v. S. Srinivasan **(2012) 7 SCC 683:2012 (6) SCR 34 ;** *PTC India Ltd. v. Central Electricity Regulatory Commission* **(2010) 4 SCC 603: 2010 (3) SCR 609;** *ITW Signode India Ltd. v. Collector of Central Excise* **(2004) 3 SCC 48: 2003 (5) Suppl. SCR 751;** *Secretary, Ministry of Chemicals & Fertilizers, Government of India v. Cipla Ltd. And Ors.* **(2003) 7 SCC 1: 2003 (2) Suppl SCR 177;** *Tatoba Bhau Savagave & Anr. v. Vasantrao Dhindiraj Deshpande & Ors.* **(2001) 8 SCC 501;** *J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P. & Ors.* **AIR 1961 SC 1170: 1961 SCR 185;** *Aswini Kumar Ghose & Anr. v. Arabinda Bose & Anr.* **AIR 1952 SC 369: 1953 SCR 1;** *Subhash Kumar v. State of Bihar & Ors.* **(1991)1 SCC 598: 1991 (1) SCR 5;** *M.C. Mehta v. Union of India & Ors.* **2004) 12 SCC 118: 2004 (3) SCR 128;** *Municipal Corpn. of Greater Mumbai & Ors. v. Kohinoor CTNL Infrastructure Co (P) Ltd.* **(2014) 4 SCC 538;** *Chairman, SEBI v. Shriram Mutual Funds & Anr.* **(2006) 5 SCC 361: 2006 (2) Suppl. SCR 833 – referred to.**

CASE LAW REFERENCE

2012 (2) SCR 715	**relied on.**	**Para 16**

A	2009 (9) SCR 625	held inapplicable.	Para 20
	2009 (9) SCR 22	held inapplicable.	Para 21
	2003 (1) SCR 714	held inapplicable.	Para 24
B	2009 (2) SCR 661	held inappliicable.	Para 24
	1992 (3) SCR 328	held inapplicable.	Para 24
	2001 (5) SCR 911	held inapplicable.	Para 24
C	2012 (6) SCR 34	referred to.	Para 24
	2010 (3) SCR 609	referred to.	Para 27
	2003 (5) Suppl. SCR 751	referred to.	Para 27
D	2003 (2) Suppl SCR 177	referred to.	Para 27
	2001 (3) Suppl. SCR 609	referred to.	Para 28
	2007 (12) SCR 136	relied on.	Para 28
E	(2001) 8 SCC 501	referred to.	Para 31
	1961 SCR 185	referred to.	Para 32
	1953 SCR 1	referred to.	Para 33
F	1991 (1) SCR 5	referred to.	Para 40
	2004 (3) SCR 128	referred to.	Para 40
	(2014) 4 SCC 538	referred to.	Para 40
G	2006 (2) Suppl. SCR 833	referred to.	Para 43
	(2003) 7 SCC 1	referred to.	Para 47

H CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4417 of 2015.

From the Judgment and Order dated 31.08.2012 of the High Court of Judicature for Rajasthan at Jaipur in D. B. Civil Writ Petition No. 10911 of 2012.

WITH

C. A. Nos. 4418-4420, 4421-4422, 4423-4424, 4425, 4426, 4427-4428, 4429, 4430-4431, 4432-4433 and 4434 of 2015.

Jayant Bhushan, S. Ganesh, Meenakshi Arora, S. B. Upadhyay, Krishnan Venugopal, Dhruv Agarwal, Shiv Mangal Sharma, AAG, Sanjeev Kapoor, Prateek Kumar, Divya Chaturvedi, Shikhar Srivastava, Ajay Bhargava, Vanita Bhargava, Nitin Mishra (For Khaitan & Co.), Ankur Saigal, Mahesh Agarwal, Rishi Agrawala, E. C. Agarwala, S. Venkatesh, Anuj P. Agarwala, Mohit D. Ram, Siddhesh Kotwal, Bansuri Swaraj, Annirudh Sharma, Shreya Bhatnagar, Nirnimesh Dube, U. A. Rana, Mrinal Alkar Majumdar (For Gagrat & Co.), P. N. Bhandari, Indu Sharma, Shibashish Misra, M. Rambabu, N. Eshwara Rao, Tatini Basu, Praveen Kumar, Raj Kumar Mehta, Elangbam Premjit Singh, Abhishek Upadhyay, Vishal Gupta, Hemant Singh, Sharmila Upadhyay, Saurabh Rajpal, Anjali Chauhan, Kumar Mihir, Udai Rathore, Vishal Gupta, Praveen Kumar, Kumar Rajesh, Sunaina Kumar for the appearing parties.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. Leave granted.

2. These appeals by way of Special Leave are filed seeking to assail the order dated 31.08.2012, passed by the High Court of Rajasthan at Jaipur, in D.B. Civil Writ Petition No. 10911 of 2012 and batch matters, whereby, the High Court has upheld the validity of the Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) Regulations,

A 2007 and Rajasthan Electricity Regulatory Commission (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010, directing the appellants to purchase minimum energy from renewable sources and comply with their liability under the said
B Regulations.

3. Brief facts which led to the filing of these cases are as under:

C The appellants in this group of appeals are companies engaged in the business of production, manufacturing, selling non-ferrous metals, zinc and their by-products. They have established their own captive generation power plants in terms of the Electricity Act, 2003 (for brevity 'Act of 2003'). The
D Rajasthan Electricity Regulatory Commission (for brevity 'RERC') in exercise of its power under Sections 61, 66, 86(1)(e) and 181 of the Act of 2003, vide Notifications dated 23.3.2007 and 23.12.2010, framed RERC (Renewable Energy Obligation) Regulations, 2007 (for brevity "the Regulations of
E 2007") and RERC (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010 (for brevity "the Regulations of 2010"), respectively. The impugned Regulations imposed Renewable
F Energy obligation (RE obligation) on the Captive Gencos and other obligated entities including the appellants herein, who are Captive Gencos and open access consumers, to purchase minimum energy from renewable sources and to pay surcharge in case of shortfall in meeting the RE obligation.

G 4. The appellants have challenged the validity of the above-mentioned Regulations, by filing writ petitions before the High Court. The High Court vide its common impugned judgment dated 31.8.2012, after having discussed the legal
H contentions urged on behalf of the parties at length, has dismissed the writ petitions as being devoid of merit. The High

Court held that the RERC is empowered to frame the impugned Regulations of 2007 and 2010 and levy charge and surcharge thereby for not complying with obligations, in exercise of the powers conferred under Sections 61, 66, 86(1)(e) and 181 of the Act of 2003, in respect of the RE obligation imposed upon captive power plants and open access consumers, to purchase minimum energy from renewable sources and to pay surcharge in case of shortfall in fulfilment of such RE obligation. The High Court was of the opinion that neither the impugned Regulations can be said to be *ultra vires* the provisions of the Act of 2003 nor can it be said to be repugnant to Articles 14 and 19(1)(g) of the Constitution of India or the National Electricity Policy, 2005 or the Tariff Policy, 2006 framed under Section 3 of the Act of 2003. The appellants herein are seeking to assail the above common judgment and order dated 31.08.2012 passed by the Division Bench of the High Court.

5. Learned senior counsel for the appellants contended that the impugned Regulations are *ultra vires* to Sections 7, 9, 86(1)(a) and (e) and 181 of the Act of 2003, and also the fundamental rights guaranteed to the appellants under Articles 14, 19(1)(g) and it is in violation of Article 265 of the Constitution of India, the National Electricity Policy, 2005 and the Tariff Policy, 2006. They have contended that the Act of 2003 has been enacted by the Parliament with a view to encourage participation of private sectors involved in generation of electricity and with that objective, generation of electricity was de-licensed and captive generation was freely promoted and in this manner the impugned Regulations are violative of the basic object and intendment with which the Act was enacted. Further, it has been asserted that the National Electricity Policy, 2005 as well as the Tariff Policy, 2006 were framed to promote production of energy and utilization thereof to the maximum extent in respect of the captive generation plants and not to

A compulsorily force them to lower down their production of energy by making them purchase renewable energy as per the newly framed the impugned Regulation No.9 of Regulations 2010. It was also contended by them that the Act of 2003 has totally liberalized the establishment of captive power plants
B and kept them out of any licensing and regulatory regime, neither any licence nor any approval from any authority is required to install a captive power plant and thus, the RERC had no jurisdiction to impose any obligation for compulsory purchase of electricity from a renewable energy source; the
C renewable energy source and captive generating plant are both alternative sources of energy which have to be promoted, one cannot be placed on higher or lower footing. The RERC by imposing a compulsory obligation to purchase electricity from
D renewable source and to pay surcharge in case of shortfall in meeting out the RE obligation as per the Regulation referred to supra has acted beyond the object sought to be achieved under the National Electricity Policy, 2005 as well as the Act of 2003.

E 6. It was further contended by the learned senior counsel that the provisions relied upon by the RERC can be made applicable to "distribution licensee" and not to a generator of electricity. A captive generating plant cannot be said to be a
F distribution licensee. It was alleged that as per Section 86(1)(b) of the Act of 2003, the State Commission has power to regulate electricity purchase and procurement process of distribution licensees only including the price at which electricity shall be procured from the generating companies
G or licensees or from other sources through agreements for purchase of power for distribution and supply to the consumers within the State.

7. It was also urged by the learned senior counsel that
H the imposition of surcharge by the RERC in case of shortfall in meeting with the RE obligation, as specified under the

impugned Regulations is also without authority of law and contrary to Article 265 of the Constitution of India. A

8. It is further submitted that the Act of 2003 is enacted by the Parliament with the object of providing the establishment of captive power plant and thereby the licensing and regulatory regime has been kept out of it. It is further contended by the learned counsel for the appellants that neither any licence nor any approval from any authority is required to install a captive power plant and therefore, the RERC has no jurisdiction to impose any obligation upon such Captive Power Plant for purchase of renewal energy compulsorily. The renewal energy source and captive generating plants are both alternative sources of energy to be generated which is the policy that has to be promoted and therefore, one cannot be placed on a higher or lower footing than the other. The RERC by imposing the RE obligation upon the Captive Power Plant Company/owner to purchase renewal energy compulsorily from renewable source and to pay such charge in case of shortfall to meet out the obligation is contrary to the object and intendment sought to be achieved under the provisions of the Act of 2003 and the same is also opposed to the National Electricity Policy, 2005 and the Tariff Policy, 2006. B C D E

9. The learned senior counsel on behalf of the appellants has further placed strong reliance upon the Preamble of the Act of 2003, which *inter alia* provides for the promotion of efficient and environmentally benign policies and also placed strong reliance upon the definitions under provisions of the Act of 2003, namely, Section 2 (3) - 'area of supply', Section 2(17) -'distribution licensee' and Section 9 -'captive generation'. Strong reliance has been placed upon the said provisions of the Act to substantiate the legal position. Section 9 of the Act of 2003 provides that notwithstanding anything contained in the Act of 2003, a person may construct, maintain or operate a captive generating plant and dedicated F G H

A transmission lines provided that supply of electricity from the Captive Generating Plant through the grid shall be regulated in the same manner as the generating station of a generating company. Second proviso to Section 9 further provides that no license shall be required under the Act for supply of electricity
B generated from a captive generating plant to any licensee in accordance with the provisions of the Act and the Rules and Regulations made there under subject to regulations made under sub-section (2) of Section 42 of the Act of 2003, which enables the owner of captive generating plant, who maintains
C and operates such plants shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use. Learned senior counsel sought to justify the impugned Regulation 9 placing strong reliance upon Section 61(h) of the Act of 2003, which
D provides that the appropriate Commission should promote generation and co-generation of electricity from renewable sources at the time of framing of tariff.

10. On the other hand, with regard to the contention of the
E appellants that the "Cross Subsidy Surcharge" is relevant for "open access" Consumer under Section 42 and the reference to Section 42(2) of the Act of 2003 in the present context is misconceived, the learned counsel on behalf of the RERC
F rebutted the same by contending that Section 42(2) has no relevance to the function of the State Regulatory Electricity Commission under Section 86(1) (e) of the Act of 2003. Sections 42 and 86 of the Act of 2003 operate in different fields, except proviso to clause (a) of Section 86(1) of the Act
G of 2003 which provides for determination of Tariff for wheeling charges and surcharge thereon in respect of the category of the consumers permitted open access under Section 42 of the Act of 2003. The word "only" in the proviso to clause (a) of Section 86(1) of the Act of 2003 has no relevance with the
H function of the State Commission as specified in clause (e) of

Section 86(1) of the Act of 2003. The renewable energy obligation as specified in the order/Regulation is in discharge of the function of the RERC and is not violative of Article 265 of the Constitution of India. A

11. The learned counsel for the RERC further contended that the impugned Regulations are made in exercise of power of Section 86(1)(e) of the Act of 2003, which provides for promotion & cogeneration of electricity from renewable sources of energy. It was stated that the impugned Regulatory provisions are also consistent with Para 4.2.2 of National Action Plan on Climate Change and Preamble of the Act of 2003 which emphasize upon promotion of efficient and environmentally benign policies and encourage generation and consumption of green energy to sub-serve the mandate of Article 21 read with Article 51 A(g) of the Constitution of India. Further, it is consistent with the international obligation of India to protect environment. It was argued that the impugned Regulation is in consonance with law, which impose reasonable restriction as provided under Article 19(6) of Constitution of India. It was stated that the captive power consumers and open access consumers are 'consumers of electricity in the area of distribution licensee' and they are connected to the network of the said distribution licensee and can also demand power as and when they require it and a distribution licensee is obligated to supply power to Captive Power Plant and open access consumers under Section 43 of the Act of 2003. It is therefore contended that in such circumstances it would be highly discriminatory to subject only the regular consumers of the distribution licensee to bear the cost of Renewable Purchase Obligation (RPO). They contended that the appellants have not disclosed to this Court that Captive Power Plants set up by them are Thermal Power Plants. Thermal Power Plants consume conventional source of energy and pollutes the environment. Further, as long as B C D E F G H

A consumer continues to take power from a distribution licensee, the obligation under Section 86(1)(e) of the Act of 2003 is fulfilled through the said licensee.

12. The learned counsel appearing on behalf of the RERC
B contended that the impugned Regulation 9 of 2010 is in conformity with Section 86(1)(e) read with Section 3 of the Act of 2003 as under the said provision the National Electricity Policy, 2005 is framed by the Central Government to achieve the relevant constitutional objective enshrined under Article 48A
C of the Directive Principles of the State Policy, which provides for protection and improvement of environment and safeguarding of forests and wild life and further it envisages that the State shall make an endeavour to protect and improve the environment and to safeguard the forests and wild life of
D the country. Learned counsel has strongly placed reliance upon Article 51A(g) under the Fundamental Duties-Chapter-IVA of the Constitution of India which states that it is a fundamental duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life and to
E have compassion for living creatures. The above said Articles of the Constitution of India are extracted hereunder:-

Article 48-A of the Constitution of India:

F **"Protection and improvement of environment and safeguarding of forests and wild life:**

The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of
G the Country."

Article 51-A(g) of the Constitution of India:

"Fundamental Duties :

H (g) to protect and improve the natural environment including

forests, lakes, rivers and wild life, to have compassion for living creatures..." A

13. Further, the learned counsel for the respondents have rebutted the contention of the appellants that the "Area of Distribution Licensee" does not bring them under the scope of the Regulations. It has been contended that the true import of Section 86(1)(e) of the Act of 2003 would mean that the area of distribution licensee has a geographical/territorial meaning and specifies that any person whether any consumer whosoever resides or has a place of business within a geographical area of distribution licensee which is limited by boundaries shall be under obligation to purchase electricity from renewable sources at a percentage of their total consumption as specified in the RPO Regulations. The contention of the respondents is that the use of the distribution line by the consumer is irrelevant since the use of line would only generate wheeling charges to be charged by the DISCOM. Therefore, if a captive consumer does not use the line of the DISCOM, the said licensee cannot charge the wheeling charges. However, this does not mean that the said consumer is not in the area of licensee. In line with Section 86(1) (e) of the Act of 2003, Para 5.12.2 of the Electricity Policy clearly provides that the Regulatory Commission will specify a percentage of the total consumption of Electricity in the area of a Distribution Licensee to be purchased from the non-conventional sources of energy which includes Renewable Sources. The wide language used by the Legislature in Section 86(1)(e) of the Act which has been incorporated in Para 5.12.2 of the Electricity Policy makes it evident that the emphasis is on the total consumption of energy in the area of Distribution Licensee. The mandate is not confined to the purchase and supply of Energy by the Distribution Licensee. The wide language used by the Legislature in Section 86(1)(e) of the Act and in Clause 5.12.2 of the Electricity Policy clearly shows B C D E F G H

A that the provision takes within its fold total consumption of energy in the area of the Distribution Licensee. This means that everyone consuming power in the area of Distribution Licensee including an Industry having Captive Power Plant will consume the specified percentage of energy from Renewable
B Sources.

14. We have carefully considered the rival contentions urged on behalf of the parties and perused the impugned judgment and materials on record.

C

With reference to the aforesaid rival legal contentions we are required to answer the same, considering whether the impugned Regulations imposing RE Obligation upon Captive Power Plants framed by the RERC in exercise of power under
D Section 86(1)(e) of the Act of 2003, which provides for promotion, co-generation of electricity from renewal source of energy are *ultra vires* the provisions of the Act or repugnant to Article 14 and 19(1)(g) of the Constitution. Para 4.2.2 of National Action Plan on Climate Change and Preamble of the
E Act of 2003, emphasise upon the promotion of efficient and environmentally benign policy of the State to encourage generation and consumption of green energy to subserve the mandate of Article 21 read with Article 51A(g) of the Constitution of India. Further, it is consistent with the
F international obligations of India ratified under Kyoto Protocol on 26.08.2002.

15. The said Regulations are framed by the RERC with a laudable objective of achieving Directive Principles of the State
G Policy as provided in Article 48A read with Fundamental Duties under Article 51A(g) of the Constitution, which mandate upon the State and its instrumentalities to protect the environment in the area with a view to see that the citizens/residents of the area to lead a healthy life. This is the laudable object of the
H State and to achieve the same it has framed the National

Electricity Policy, 2005 referred to supra.

16. Further, the impugned Regulations framed by the RERC which impose reasonable restriction as provided under Article 19(6) of the Constitution of India to achieve the Directive Principles of State Policy and to see that the State and its instrumentalities shall discharge their fundamental duties to protect and maintain environment in the area to facilitate the residents and living creatures to live peacefully. Reliance has rightly been placed upon the decision of the judgment of this Court in the case of ***Society For Unaided Pvt. Schools of Rajasthan*** *v.* ***U.O.I. & Anr.***[1] as under:

> "252. Rights protected under Article 19(1)(g) are fundamental in nature, inherent and are sacred and valuable rights of citizens which can be abridged only to the extent that is necessary to ensure public peace, health, morality etc. and to the extent of the constitutional limitation provided in that article.
>
> XXX XXX XXX
>
> 255. Parliament can enact a social legislation to give effect to the directive principles of State policy..."

17. The contention urged by learned senior counsel on behalf of the appellants/owners of captive generating plants is that the RERC does not have jurisdiction under Section 86(1)(e) read with Section 181 of the Act of 2003 to frame the impugned Regulation in respect of the industries running their own Captive Power Plants and it has the power only to frame Regulations with respect to the distribution licensees and, therefore, it was not open for the RERC to impose the RE obligation upon the appellants having captive power plants to make them

[1] (2012) 6 SCC 1

A compulsorily purchase energy from renewable source and to pay surcharge in the event of shortfall to fulfil the RE obligation.

18. In support of the aforesaid contention the appellants placed strong reliance upon the definitions of 'Captive
B Generating Plant' contained in Section 2(8), 'distribution licensee' mentioned in Section 2(17), 'licensee' appearing in Section 2(39), 'area of supply' contained in Section 2(3) of the Act of 2003. The appellants have also relied upon Section 86(4) of the Act of 2003 which provisions of the Act provide
C the power to the RERC to frame Regulations with a view to discharge its functions to give effect to the provisions of the Act of 2003.

19. The contention of the learned counsel for the appellants
D that 'the distribution licensees' stand on a different footing and the industries such as the appellants, who have independent Captive Power Plants and have been generating energy for their consumers cannot be treated alike distribution licensees as they are not required to obtain licences from the Licensing
E Authority for setting up Captive Power Plants and they have to be given free play and cannot be obligated to purchase energy from renewable sources. It is submitted that the RERC by framing the impugned Regulations could not have given direction to the captive power plants to compulsorily purchase
F energy from renewable sources, which is contrary to the object and the Scheme of the Act of 2003 and therefore, the impugned Regulations are liable to be struck down.

20. In support of the aforesaid contention, reliance was
G placed by the learned senior counsel on behalf of the appellants on the ratio of the judgment in the case of ***Tata Power Company Ltd.*** *v.* ***Reliance Energy Ltd. and Ors.***[2], the relevant portion of the observations made in the following

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H [2] (2009) 16 SCC 659

paragraphs read thus: A

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

76. The Act is a consolidating statute. It brings within its purview generation, transmission, distribution, trade and C use of electricity. Whereas generation of electricity has been brought outside the purview of the licensing regime, the transmission, distribution and trading are subject to grant of licence and are kept within the regulatory regime. The statute provides for measures to be taken which would D be conducive to development of electricity industry. Measures are also required to be taken for promoting competition which would also mean the development of electricity industry. It, indisputably, provides for measures relating to the protection of interest of consumers and E supply of electricity to all areas.

XXX XXX XXX

81. Delicensing of generation as also grant of free F permission for captive generation is one of the main features of the 2003 Act. It is clearly provided that only hydro-generating projects would need the approval of the State Commission and the Central Electricity Regulatory Authority. It recognised the need of prohibiting transmission G licensees. It also for the first time provided for open access in transmission from the outset. It even provides where the distribution licensee proposes to undertake distribution of electricity for a specified area within the area of supply through another person, that person shall not be H

A required to obtain separate licence.

XXX XXX XXX

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

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

XXX XXX XXX

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

21. Learned counsel for the appellants also placed reliance on ***Global Energy Ltd. and Anr.*** *v.* ***Central Electricity Regulatory Commission***[3], wherein, this Court has laid down that rule making power conferred upon the Regulatory Commission is only to see that Regulations are framed in exercise of its statutory power for carrying out the purpose of the Act of 2003, which is a general delegation and such a

[3] (2009) 15 SCC 570

general delegation may not be held to be laying down any guidelines and thus, by reason of such a provision alone, the regulation making power cannot be exercised by the Regulatory Commission so as to bring into existence substantive rights or obligations or disabilities upon the captive generating plants which are not contemplated in terms of the provisions of the Act of 2003. It would be necessary to extract the relevant portion from the said judgment.

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

26. We may, in this connection refer to a decision of this Court in *Kunj Behari Lal Butail* v. *State of H.P.* wherein a three-Judge Bench of this Court held as under:

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

[See also *State of Kerala* v. *Unni* and *A.P. Electricity Regulatory Commission* v. *R.V.K. Energy (P) Ltd.*]

27. The power of the regulation-making authority, thus, must be interpreted keeping in view the provisions of the Act. The Act is silent as regards conditions for grant of licence. It does not lay down any pre-qualifications therefor.

A Provisions for imposition of general conditions of licence or conditions laying down the pre-qualifications therefor and/or the conditions/qualifications for grant or revocation of licence, in absence of such a clear provision may be held to be laying down guidelines by necessary implication
B providing for conditions/qualifications for grant of licence also."

22. It is very vehemently contended by Mr. Raj Kumar Mehta, learned counsel on behalf of the RERC that none of
C the judgments cited supra on behalf of the appellants have any application to the fact situation of these appeals on hand, since the judgments upon which the reliance is placed by the learned counsel on behalf of the appellants are all distinguishable. In ***Tata Power Company Ltd.*** (supra), it was
D held that the Electricity Act having de-licensed generation, provisions for licensing cannot be brought back through the back door. The said judgment involved interpretation of Section 86(1)(b) read with Section 23 of the Act. The Regulations in the present case have been enacted pursuant to Section
E 86(1)(e) of the Act, which is independent of Section 86(1)(b) of the Act. Therefore, the reliance placed on Para 114 in the case of ***Tata Power Company Ltd***. referred to supra, by the learned counsel for the appellants has no application to the
F fact situation for the reason that this Court in the aforesaid decision was examining the provisions of Section 86(1)(b) of the Act of 2003.

23. Further, in support of the proposition of law as to whether directions could be issued by the RERC under Section
G 23 of the Act with Generating Company for equitable distribution of electricity, reliance was placed by the appellants on the decision in ***Tata Power Company Ltd.*** (supra) wherein, this Court held, while interpreting the provisions of the Act with
H regard to de-licensing that Courts should bear in mind that licensing provisions are not brought back through side door of

Regulations. However, the observations made in para 77 of the said judgment show that despite de-licensing, Generating Companies do not enjoy complete monopoly and are subject to Regulatory jurisdiction of the Forums under the Act of 2003. The impugned Regulations are clearly relatable to Section 86(1)(e) of the Act of 2003 read with both the National Electricity Policy and Tariff Policy, 2006 which are framed by the Union of India to achieve the laudable constitutional objective enshrined both in the directive principles of the State Policy and the fundamental duties enumerated upon the State particularly, Article 51-A(g) of the Constitution of India.

24. Yet another decision in the case of ***Dayal Singh & Ors. v. Union of India & Ors.***[4] upon which reliance was placed by the learned counsel on behalf of the appellants wherein in support of their proposition of law that this Court held that what cannot be done directly cannot be done indirectly by the Regulatory Commission. The said principle has no application to the present case, which is sought to be applied to the facts of the case of the appellants.

25. Further, strong reliance placed by the learned counsel on behalf of the appellants upon the decision in ***M. Chandru v. Member Secretary, Chennai Metropolitan Development Authority & Anr.***[5], wherein this Court has held that Infrastructure Development Charge was held to be in the nature of 'fee' and as such subject to principle of *'quid pro quo'*. The impugned Regulations do not fall in the realm of 'fee'. Therefore, the said decision has no application in support of the legal submission made by the appellants' learned senior counsel. The other decisions in the cases of ***Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawala & Ors.***[6] and ***Consumer Online Foundation v. Union of India***

[4] (2003) 2 SCC 593
[5] (2009) 4 SCC 72
[6] (1992) 3 SCC 285

A ***& Ors.***[7] upon which reliance was placed in support of the proposition of law that in the absence of express provision in the Statute, a delegated authority cannot impose a 'tax' or 'fee' upon the appellants, if they do not comply with the impugned Regulations. The said decisions have no application in support
B of the case of the appellants for the reason that the impugned Regulation is not in the nature of imposing either 'tax' or 'fee' upon them. Therefore, the above contention urged on behalf of the appellants is wholly untenable in law. Further, reliance was placed upon the case of ***Union of India & Ors. v. S.***
C ***Srinivasan***[8]***,*** wherein it was held that Regulation making power cannot be exercised by the RERC in the absence of substantive provisions in the Act of 2003. In the instant case, the substantive provision is as contained in Section 86(1)(e)
D of the Act of 2003 to frame the impugned Regulations and therefore, the above legal submissions by placing reliance upon the decision of this Court referred to supra is wholly untenable in law and misplaced.

E 26. The above said legal contentions urged by the learned senior counsel on behalf of the appellants are wholly untenable in law for the reason that the Parliament with an avowed object to encourage private sectors participation in power generation, transmission and distribution of electricity to the consumers
F and in order to distancing itself, the regulatory responsibilities from the Government has been conferred with the Regulatory Commissions in the country. The Electricity Act of 2003 being a self-contained comprehensive legislation in the matter of generation and the transmission and supply of energy to its
G consumers, the provisions of Section 82 of the Act of 2003 enjoin upon every State Government to constitute a Regulatory Commission in their respective State to regulate the implementation of the provisions of the Act of 2003 by framing

[7] (2011) 5 SCC 360

H [8] (2012) 7 SCC 683

suitable Regulations and Rules with reference to the matters/ entries enumerated in Section 181 of the Act of 2003 and accordingly the State of Rajasthan has constituted the RERC. The functions of the Regulatory Commission have been mentioned under Section 86 of the Act of 2003.

27. Reliance was placed by the learned counsel for the respondent on the decision of this Court in the case of ***PTC India Ltd. v. Central Electricity Regulatory Commission***[9], wherein this Court has categorically held that Regulations can be framed by the Commission under the Act of 2003 as long as two conditions are satisfied, namely, that the regulations which are framed must be consistent with the provisions of the Act and are made for carrying out the provisions of the Act. Further, the National Electricity Policy, 2005 and Tariff Policy, 2006 being the policies framed by the Union of India cannot supersede or override the principal Act of 2003. To support their contention, the appellants have placed reliance upon the judgments of this Court in the cases of ***ITW Signode India Ltd. v. Collector of Central Excise***[10] and ***Secretary, Ministry of Chemicals & Fertilizers, Government of India v. Cipla Ltd. And Ors.***[11]

28. Further, Mr. Ganesh, the learned senior counsel on behalf of some of the appellants has placed reliance on the decision of this Court in the case of ***J.K. Industries Ltd. & Anr. v. Union of India & Ors.***[12] and contended that the impugned regulation is a subordinate legislation which may be struck down as arbitrary, contrary to the Statute and Constitution of India on the ground that the subordinate legislation does not conform to the statutory or constitutional requirement as it offends Article 14 or 19 of the Constitution of

[9] (2010) 4 SCC 603
[10] (2004) 3 SCC 48
[11] (2003) 7 SCC 1
[12] (2007) 13 SCC 673

A India. It is further contended by him that such subordinate legislation, as in this case is the impugned Regulation famed by the RERC, does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature, therefore, the impugned regulation can be B questioned on any one of the grounds on which plenary legislation is questioned and also on the ground that it does not conform to the Statute under which it is made, which in this case is Section 86(1)(e) of the Act of 2003. It was contended by him in view of the above that the impugned Regulations C under which RE Obligation has been imposed on the appellants herein, the same is not in conformity with the provision made under Section 86(1)(e) of the Act of 2003.

The above contention of the learned senior counsel on D behalf of some of the appellants has been rightly rebutted by the learned senior counsel on behalf of the RERC by contending that in the case of ***J.K. Industries Ltd. & Anr.*** (supra), it was held that where the validity of subordinate legislation is challenged, question to be asked is whether power given to E the rule making authority has been exercised for the purpose for which it was given. The Court has to examine the nature, object and scheme of the legislation as a whole to consider what is the area over which powers are conferred upon the rule making authority. However, the Court has to start with the F presumption that the Rule is *intra-vires* and has to be read down only to save it from being declared *ultra-vires* in case the Court finds that the above presumptions stand rebutted and the impugned regulations are relatable to the specific G provision contained in Section 86(1)(e) of the Act.

29. Further, the impugned Regulation is framed by RERC in exercise of its power under Section 86(1)(e) read with Section 151 of the Act of 2003, which provides for promotion and co-generation of electricity from renewable H source of energy in the area. It has been rightly contended by

the learned senior counsel for the respondents that Para 4.2.2 of the National Action Plan on Climate Change and Preamble of the Act of 2003 emphasise upon promotion of efficient and environmentally benign policies to encourage generation and consumption of green energy to sub-serve the mandate of Article 21 read with Article 48A of the Directive Principles of the State Policy and Article 51A(g) of the Fundamental Duties enlisted under Chapter IVA of the Constitution of India. Further, the said Regulations are consistent with the International obligations of India, as India has ratified to the Kyoto Protocol on 26.08.2002. Further, the impugned Regulations which impose reasonable restrictions upon the captive generating plant owners are permissible under Article 19(6) of the Constitution of India. The respondents have rightly placed reliance upon the judgment of this Court in the case of ***Society For Unaided Pvt. Schools of Rajasthan*** (supra), wherein it was held thus:

> 25. In this connection, the first and foremost principle we have to keep in mind is that what is enjoined by the directive principles (in this case Articles 41, 45 and 46) must be upheld as a "reasonable restriction" under Articles 19(2) to 19(6). As far back as 1952, in State of Bihar v. Maharaja dhiraja Sir Kameshwar Singh of Darbhanga (1952) SCR 889, this Court has illustrated how a directive principle may guide the Court in determining crucial questions on which the validity of an important enactment may be hinged. Thus, when the courts are required to decide whether the impugned law infringes a fundamental right, the courts need to ask the question whether the impugned law infringes a fundamental right within the limits justified by the directive principles or whether it goes beyond them. For example, the scope of the right of equality of opportunity in matters relating to employment (Article 16) to any office in the State appears more fully

A defined when read with the obligation of the State to promote with special care the economic and other interests of the weaker sections (Article 46). Similarly, our understanding of the right "to practice any profession or occupation" (Article 19(1)(g)) is clarified when we read
B along with that right the obligation of the State to see that the health of the workers and the tender age of the children are not abused (Article 39). Thus, we need to interpret the fundamental rights in the light of the directive principles."

C 30. After adverting to the aforesaid legal provisions and interpreting the same and considering the reliance is placed by the parties on the decisions of this Court referred to supra in support of their respective claim and counter claim, we are of the view that the framing of Regulation No. 9 by the RERC
D is in exercise of its statutory power under Section 181 of the Act of 2003, the relevant entry to frame the impugned Regulation as provided under Section 86(1)(e) of the Act of 2003 is valid and legal, keeping in view the National Electricity Policy, 2005 and the Tariff Policy of 2006 which are framed by
E the Union of India, the International obligation under the Kyoto Protocol to which our Country is a signatory and also most importantly to discharge the constitutional obligations as mandated under Article 21 - Fundamental Right of the citizens and Article 48-A – the Directive Principles of State Policy and
F to discharge the Fundamental Duties by the respondents as envisaged under Article 51-A(g) of the Constitution of India. Therefore, the reliance placed upon the decisions of this Court in the case of ***Tata Power Company Ltd.*** (supra), as well as
G the ***Global Energy Ltd.*** (supra) and other decisions referred to supra by the learned senior counsel on behalf of the appellants have no relevance in support of the legal contentions urged by them to justify their contention that the impugned Regulations are *ultra vires* to the provisions of the Act of 2003
H in view of the statutory rights conferred upon them under the

provisions of the Act of 2003 and in view of the Fundamental Rights guaranteed to them under Part III of the Constitution of India.

31. Further, the learned senior counsel on behalf of the appellants have placed reliance on another decision in the case of ***Tatoba Bhau Savagave & Anr. v. Vasantrao Dhindiraj Deshpande & Ors.***[13], wherein this Court held in support of the proposition of law that the Directive Principles of State Policy cannot be extended in reading into the Act of 2003 for which the legislature has not either specifically or by necessary implication provided. In these appeals, Section 86(1)(e) of the Act of 2003 specifically provides for specifying a percentage of total consumption in the area of Distribution Licensee from renewable sources of energy. In this regard, it is necessary to deal with these contentions urged on behalf of the appellants' counsel. The contention urged on behalf of the appellants is that only distribution licensee is obligated towards RPO under the Act. The said contention is wholly untenable in law in view of the provisions referred to supra upon which strong reliance has been placed by the counsel on behalf of the RERC.

32. It is the contention of the learned senior counsel Mr. Jayant Bhushan on behalf of the appellants that under Section 86(1) (e) of the Act of 2003, the phrase-"the total consumption of electricity in the area of distribution licensee" refers only to the distribution licensee and not to captive gencos and that the captive gencos are generating power and not buying power, thus directions to them to purchase renewable energy cannot be sustained as no authority can compel a genco/generator of energy to become a purchaser of the electricity. It is therefore contended that by imposing such purchase of renewable energy on the Captive Gencos is surplusage and renders the

[13] (2001) 8 SCC 501

A last seven words of Section 86(1)(e) redundant as the National Electricity Policy and Tariff Policy (supra) cannot be stretched to this extent. It is vehemently contended that if Captive Gencos come under Section 86(1)(e) of the Act, then such interpretation of the Act goes beyond the intention of the Parliament by
B placing reliance on the 'Interpretation of Statutes' by Justice G.P. Singh, wherein at page 75 the case of ***J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P. & Ors.***[14] is discussed, the relevant portion of which is as hereunder:

C "....the courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the stature should have effect"

33. It is further contended that the focus of Section 86(1)(e)
D of the Act, is on the purchase and the classic difference between Discom and Genco is that the former purchase and must purchase since, it does not produce its own capacity and is a licensed activity unlike a genco and therefore, only a distribution licensee can be forced to purchase from renewable
E sources by Regulation under Section 86(1)(e) of the Act. It was submitted by the appellants that it is impermissible to add words or to fill in a gap or lacuna in the provisions of the Act, on the other hand effort should be made to give meaning to each and every word and phrase used by the legislature in the
F statute. In this regard reliance was placed by him upon the case of ***Aswini Kumar Ghose & Anr. v. Arabinda Bose & Anr.***[15] wherein it was held as under:-

"25. Much ado..... It is not a sound principle of construction
G to brush aside words in a statute as being inapposite surplusage, if they have appropriate application in circumstances conceivably within the contemplation of the

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[14] AIR 1961 SC 1170

H [15] AIR 1952 SC 369

statute." A

34. The above contention is rightly repelled by the learned counsel for the respondents that such an interpretation would render the words "percentage of total consumption of energy in the area of supply" redundant and nugatory is wholly B untenable in law. In case, the legislature intended such power of the Regulatory Commission to be confined to the Distribution Licensee, the said words and phrases of Section 86(1)(e) would have read "total electricity purchased and supplied by distribution licensee". The mere fact that no licence is required C for Establishment, Operation and Maintenance of a Captive Power Plant does not imply that the industries engaged in various commercial activities putting up such Captive Power Plants cannot be subjected to Regulatory Jurisdiction of the Commission and required to purchase certain quantum of D energy from Renewable Sources. The RE obligation has been imposed upon the consumption of electricity whether purchased from the Distribution Licensee or consumed from its own Captive Power Plant or through open access. The RE Obligation has not been imposed on the appellants in their E capacity as owners of the Captive Power Plants. It was contended that the 'distribution licensee' has a geographical/ territorial meaning and specifies that any person whether any consumer whosoever resides or has a place of business within F a geographical area of 'distribution licensee' shall be under an obligation to purchase electricity from renewable sources, a percentage of their total consumption, as specified in the RPO obligation. It was submitted by them that gencos are also connected to the network of the said distribution licensees and G therefore, it would be unfair to only subject the regular customers of the distribution licensees to bear the cost of RPO.

35. The above contentions urged on behalf of the appellants do not merit consideration of this Court for the H reason that the term 'in the area of distribution licensee' under

A the provisions has to be read along with definition of 'area of supply' as provided under Section 2(3) of the Act of 2003 which defines it as the area within which distribution licensee is authorized by his license to supply electricity. Further, proviso 6 to Section 14 of the Act of 2003 provides that Appropriate B Commission may grant a licence to two or more persons to supply electricity through their own distribution system within the same area and therefore, in case there are more than one distribution licensee within the same area of supply, the term 'total consumption in the area of distribution license' would C include the consumption by Captive Power Plant Consumers also and Open Access Consumers who fall in the 'area' of distribution licensee. The other phrase 'total consumption' has been used by the legislature in Section 86(1)(e) and total consumption in an area of a distribution licensee can be by D three ways either supply through distribution licensee or supply from Captive Power Plants by using lines and transmissions lines of distribution licensee or from any other source. The area would always be of distribution licensee as the transmission E lines and the system is of distribution licensee, the total consumption is very significant. The total consumption has to be seen by consumers of distribution licensee, Captive Power Plants and on supply through distribution licensee.

F 36. It has been rightly contended by Mr. Krishnan Venugopal, the learned senior counsel on behalf of the intervener-Wind Independent Power Producers Association, by placing reliance on Section 43(2) of the Act of 2003, which provides for open access and a bare perusal of the said G provision would show that open access consumers are also located/situated within the area of distribution licensees and are also connected to the distribution network of such licensees and therefore, the electricity consumed by such open access consumers shall also be necessarily included in the term *"Total* H *Consumption in the area of distribution licensee".* Similarly,

captive power consumers are also located/situated within area of distribution licensee and are connected to the Distribution Network of Distribution licensees either for wheeling electricity or for backup power, if needed. Therefore, the team for "*Total Consumption in the area of distribution licensee*" would also include such captive power consumers also and accordingly, Section 86(1)(e) grants the State Commission power to specify a minimum percentage of renewal energy to be purchased out of the total consumption of electricity in the area of distribution licensee which would include the distribution licensee/s, open access consumers and the captive power consumers. The High Court therefore, has rightly found that the total consumption is an area of a distribution licensee can be by three ways- (i) through supply by the distribution licensee; (ii) supply by captive power plants using lines and transmission lines of distribution licensee and (iii) from any other sources by using transmission lines of distribution licensee, and the total consumption has to be seen by consumers of distribution licensee, captive power plant and open access consumers.

37. Further, the contention of the appellants that the renewable energy purchase obligation can only be imposed upon total consumption of the distribution licensee and cannot include open access consumers or captive power consumers is also liable to be rejected as the said contention depends on an erroneous basic assumption that open access consumers and captive power consumers are not consumers of the distribution licensees. The cost of purchasing renewable energy by a distribution licensee in order to fulfil its renewable purchase obligation is passed on to the consumers of such distribution licensee, in case the contention of the appellants is accepted, then such open access consumers or captive power consumers, despite being connected to the distribution network of the distribution licensee and despite the fact that they can demand back up power from such distribution licensee

A any time they want, are not required to purchase/sharing the cost for purchase of renewable power. The said situation will clearly put the regular consumers of the distribution licensee in a disadvantageous situation vis-à-vis the captive power consumers and open access consumers who apart from getting
B cheaper power, will also not share the costs for more expensive renewable power.

38. Further, the contention urged on behalf of the appellants is that the captive gencos are specially carved out within the
C special category of the generating companies and the statutory intent of the Act of 2003 is to free the captive gencos and allow them to operate freely by minimizing the regulatory requirements, therefore, restricting them from operating to their fullest capacity would militate against the purpose for which
D they were permitted to set up the captive generating companies and to utilise the maximum power generated for their own use. In support of the said contention reliance is placed upon the decision of this Court in the case of ***Tatoba Bhau Savagave*** (supra), wherein it is held as under:-

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> "10. In regard to the second contention of Mr Lalit, there can be no gainsaying the fact that while interpreting a beneficial legislation like the Act under consideration, the directive principles of State policy contained in Article 38
F and clauses (*b*) and (*c*) of Article 39 of the Constitution should be uppermost in the mind of a Judge. But that principle cannot be extended to reading in the provisions of the Act that which the legislature has not provided either expressly or by necessary implication. (See: *Steel*
G *Authority of India Ltd.* v. *National Union Waterfront Workers...*"

39. The learned counsel on behalf of the respondents have countered the above contentions by submitting that a
H distribution licensee is obliged to supply power to Captive

Power Plants and Open Access Consumer under Section 43 of the Act of 2003, if there is a request to supply. In such view of the matter, it will be highly discriminatory to only subject the regular consumers of the distribution licensee to bear the cost of purchase of renewable energy and to exempt the gencos from the Open Access Consumers or Captive Power Plants from the obligation to purchase/share the cost for purchase of renewable power despite being connected to the distribution network of the distribution licensee and despite the fact that they can demand back up power from such licensee any time they want. Thus, in order to realize the attempt of reducing dependence on fossil fuels, it can be said that the impugned Regulations are imperative in the larger public interest and are just reasonable restrictions imposed upon the captive gencos as permissible under Article 19(6) of the Constitution of India.

40. The RERC has enacted 2007 and 2010 Regulations requiring the Captive Power Plants and Open Access Consumers to purchase a minimum quantum of Energy from Renewable Energy Sources, in order to effectuate the provisions of the Constitution of India, Electricity Act and the National Electricity Policy, since energy generated from Renewable Sources is pollution free. The Right to live with healthy life guaranteed under Article 21 of the Constitution of India, it has also been interpreted by this Court. It includes the Right to live in a pollution free environment and laid down the law in a catena of cases including ***Subhash Kumar v. State of Bihar & Ors.***[16], ***M.C. Mehta v. Union of India & Ors.***[17] and ***Municipal Corpn. of Greater Mumbai & Ors. v. Kohinoor CTNL Infrastructure Co (P) Ltd.***[18]. The impugned Regulations fall within the four corners of the Act of 2003 as

[16] (1991)1 SCC 598
[17] (2004) 12 SCC 118
[18] (2014) 4 SCC 538

well as Electricity Policy, 2005. The object of imposing RE Obligation is protection of environment and preventing pollution by utilising Renewable Energy Sources as much as possible in larger public interest.

41. Our attention was drawn to the annual report of 2003 of Central Electricity Authority of India (CEA). As per the report, the installed capacity is 107973 MW in the country, the break up of which is as under:-

Hydro Power Generation	Thermal Power Generation	Nuclear Power Generation	Wind Power Generation
26910 MW (24.9%)	76607MW (71%)	2720 MW (2.5%)	1736 MW (1.6%)

Out of thermal power generation, coal comprises 63801 MW, (gas-11633 MW) and (diesel-1173 MW) representing 59.1%, 10.8% and 1.1.% of the total installed capacity respectively. The Coal dominates the Thermal Power Generation which results in Green House Gases resulting in global warming. The said facts were brought to our notice that the same would certainly justify the case of the RERC in framing the impugned Regulation to achieve the object of the Act and the Constitution by imposing RE obligation on the captive gencos.

42. The learned senior counsel for the appellants vehemently made their submissions that payment of penalty in the event of non-compliance of the impugned Regulations is impermissible in law in the absence of specific provisions under the Statute to this effect and the same is in violation of the constitutional provision under Article 265 of the Constitution of India which specifically provides that "No tax shall be levied

or collected except by authority of law". The aforesaid submission is rightly countered by the learned counsel for the RERC inviting our attention that imposing such surcharge upon the generating companies if they commit default of the impugned Regulations has been purportedly in exercise of its power under Section 86(1)(g) of the Act of 2003, which empowers the State Commission to '*levy fee for the purposes of this Act*'. Further, the contention very strenuously urged on behalf of the appellants that the power to levy fee cannot be extended to impose surcharge in the form of penalty upon them for its failure to purchase the renewable energy fixed by RERC. Fee can only be imposed for service rendered and there should be an element of 'quid pro quo' therein. He further contended that surcharge could not have been validly imposed upon the appellants as stated earlier.

43. On the contrary, the counsel on behalf of the respondents refuted the above contentions of the appellants contending that the penalty under the Regulations amounts to surcharge. It is further averred by him that the penalty prescribed in the Regulation is by depositing RE surcharge in the separate fund which is compensatory in nature and not punitive as contended by the learned counsel on behalf of the appellants. It is submitted that it is based on the concept of Polluter's pay principle as laid down by this Court in the case of ***Chairman, SEBI v. Shriram Mutual Funds & Anr.***[19] :-

> "35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the

[19] (2006) 5 SCC 361

A nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further held that unless the language of the statute B indicates the need to establish the presence of *mens rea*, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15-D(*b*) and Section 15-E of the Act, there is nothing which requires that *mens rea* must be proved C before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow."

With reference to the above said rival legal contentions D urged by the parties we are of the view that in terms of impugned Regulation 9 of the Regulations, if a default is made in fulfilling RE obligation then, obligated entity has to deposit the Renewable Purchase Obligation (RPO) charge, as determined by the RERC and such amount will put in a E separate fund, created and maintained for the said purpose by obligated entity. This fund shall be utilized partly for (a) purchase of certificates through State agency and (b) for development of transmission and sub-transmission infrastructure for evacuation from generating stations based F on renewable energy sources. The deposit of the RPO charge is compensatory in nature. Sections 142 and 147 of the Act of 2003 provide the statutory back-up for penal consequences in contravention of the impugned Regulations framed under Section 181 r/w Section 86(1)(e) of the Act of G 2003. The penalty imposed by impugned Regulations is not in nature of 'tax' but to achieve the object and intendment of the Act of 2003. The penalty imposed by the impugned Regulations upon the Captive Generating Companies who H do not comply with the requirements as provided under

Regulation 9 of the impugned Regulations of 2010 are not in nature of 'tax' but it is a 'surcharge' levied under Section 39(2) of the Act but an alternative mode of enforcement of Regulation upon them for ensuring its compliance to achieve the laudable object of the Act, in case obligated entity make default in fulfilling the renewable purchase obligation as provided under the Regulation 9 of the impugned Regulations 2010. Regulation 9 reads as under:

"9.**Consequences of Default.**

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

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

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

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

Provided further that in case of genuine difficulty in

A complying with the renewable power purchase obligation because of non-availability of renewable energy and/or certificates, the obligated entity can approach the Commission to carry forward the compliance requirement to the next year or seek its waiver;

B

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

C invoked."

44. In view of the above provision, the obligated entity in case of genuine difficulty may seek to carry forward of RE obligation or also may seek waiver. Therefore, in view of the

D aforesaid reasons, the contentions urged on behalf of the appellants in this regard must fail. It is pertinent to note the submission made on behalf of the RERC that 21 States in the country have framed similar Regulations imposing such Renewable Purchase Obligation on both distribution

E licensees as well as captive gencos entities such as the appellants herein. The impugned Regulations have been enacted in order to effectuate the object of promotion of generation of electricity from renewable sources of energy as against the polluting sources of energy which principle is

F enshrined in the Act, the National Electricity Policy of 2005 and the Tariff Policy of 2006. The provisions requiring purchase of minimum percentage of energy from renewable sources of energy have been framed with an object of fulfilling the constitutional mandate with a view to protect environment

G and prevent pollution in the area by utilizing renewable energy sources as much as possible in larger public interest. The High Court has considered the submissions of the appellants and has rightly rejected the same on the ground that the RE

H obligation imposed on the captive gencos under the impugned Regulations is neither *ultra vires nor* violative of the provisions

of the Act of 2003 and cannot in any manner be regarded as a restriction on the fundamental rights guaranteed to the appellants under the Constitution.

45. The learned senior counsel on behalf of the appellants placing strong reliance upon paras 5.2.24 and 5.2.25 of the Electricity Policy framed by the Union of India in exercise of its power under Section 3 of the Act, contended that the issuance of any direction to captive plant to reduce its generation and insist purchase power from renewable energy is based on the erroneous premise that the impugned Regulations would result in curtailing the generation of electricity by the Captive Power Plants and its resultant effect is loss to them. The above said paras from the Electricity Policy on which the learned senior counsel on behalf of the appellants has placed reliance are extracted as hereunder:-

"**Captive Generation-**

5.2.2. The Government of India has initiated several reform measures to create a favourable environment for addition of new generating capacity in the country. The Electricity Act 2003 has put in place a highly liberal framework for generation. There is no requirement of licensing for generation. The requirement of techno-economic clearance of CEA for thermal generation project is no longer there. For hydroelectric generation also, the limit of capital expenditure, above which concurrence of CEA is required, would be raised suitable from the present level. Captive generation has been freed from all controls.

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

A employment opportunities through speedy and efficient growth of industry.

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

46. In this regard, Mr. S. B. Upadhyay, the senior learned counsel on behalf of the fourth respondent in SLP No. 39969 of 2012, contended that Regulation 5 of the impugned
D Regulations, 2010 which repealed the earlier 2007 Regulations, contains a mechanism of purchase of Renewable Energy Certificate, which certificates can be bought from energy exchanges by the consumers who have opted for a third party electricity source, including Open Access or captive
E generation. Thus, for the said consumers, instead of buying physical renewable energy for fulfilling the minimum energy percentage targets as per the impugned regulation, the renewable energy can be purchased through buying of the said certificates. In this manner there is no need to lower
F captive electricity generation by a captive consumer for fulfilling the minimum percentage target as provided in the impugned Regulation. Further, Para 6.4 of the Tariff Policy framed under Section 3 of the Act of 2003, was amended vide Resolution dated 31.3.2008 of the Ministry of Power and
G published in the Gazette of India, Extraordinary on 22.1.2011.

In view of the above, it is a matter of fact that the impugned Regulation does not have the effect of curtailing the power generation of the Captive Power Plant as the
H appellants have the right to supply surplus power to the grid.

47. The said paras from the Electricity Policy referred to supra are framed for giving effect to the objects and provisions of the Act and the same cannot be interpreted as restricting the ambit of specific provision contained in Section 86(1)(e) of the Act in any manner. The provision in the Electricity Policy cannot be read and interpreted as a statutory provision as held by this Court in the case of ***Secretary, Ministry of Chemicals and Fertilizer, Govt. of India*** *v.* ***Cipla Ltd. & Ors.***[20]. The relevant paragraph of the said case is extracted hereunder:-

> "4.1 It is axiomatic that the contents of a policy document cannot be read and interpreted as statutory provisions. Too much of legalism cannot be imported in understanding the scope and meaning of the clauses contained in policy formulations. At the same time, the Central Government which combines the dual role of policy-maker and the delegate of legislative power, cannot at its sweet will and pleasure give a go-bye to the policy guidelines evolved by itself in the matter of selection of drugs for price control. The Government itself stressed the need to evolve and adopt transparent criteria to be applied across the board so as to minimize the scope for subjective approach and therefore came forward with specific criteria. It is nobody's case that for any good reasons, the policy or norms have been changed or became impracticable of compliance. That being the case, the Government exercising its delegated legislative power should make a real and earnest attempt to apply the criteria laid down by itself. The delegated legislation that follows the policy formulation should be broadly and substantially in conformity with that policy; otherwise it would be vulnerable to attack on the ground of arbitrariness resulting in violation of Article 14."

[20] (2003) 7 SCC 1

A Therefore, the Regulations do not relate to determination of tariff, as such reliance placed by the appellants' learned senior counsel upon Section 62 of the Act, which deals with the determination of tariff is mis-conceived.

B 48. Further, the submission of the appellants that the impugned Regulations do not fall under Clause (a) to Clause (zp) of Section 181(2) of the Act of 2003, which give power to the State Commission to frame Regulations is devoid of any merit. The said contention has been rightly rebutted by C the learned counsel for the RERC that the said submission loses sight of Section 181 (1) of the Act of 2003 which provides that the State Commission may, by notification, make Regulations consistent with the Act and the Rules generally to carry out the provisions of the Act. The specific power under D the various clauses of Section 181(2) of the Act of 2003 is without prejudice to the general and wider power contained in Section 181(1) of the Act of 2003. The 2007/2010 Regulations have been framed by the RERC to effectuate the provisions of Section 86(1)(e) read with Section 86(4) of E the Act of 2003 and are covered by Section 181(1) of the Act. In support of the same, reliance was placed on the decision of this Court on the case of ***PTC India Limited*** (supra)that the Regulations can be made under the Act as long as two conditions are satisfied, namely, that they are F consistent with the Act of 2003 and are made for carrying out for provisions of the Act.

49. The purchase of nominal quantum of energy from renewable resources cannot adversely affect the cost G effectiveness of the Captive Power Plant. Moreover, the object being reduction of pollution by promoting renewable source of energy, larger public interest must prevail over the interest of the industry herein which will in any case pass on the extra burden, if any, will be as part of the cost of its products and H therefore, the same does not burden the appellants. The

reliance placed upon the aforesaid paras of the policies is mis-conceived as the same pertains to the Captive Power Plants to be set up by group of consumers namely, small and medium industries and other consumers who are not in a position to set up a Captive Power Plant of optimal in a cost effective manner. The aforesaid para in the context of Section 2 (8) of the Act has no application to the case of the appellants which are large industries having individual Captive Power Plants. The provision of RE surcharge in the Statute is only meant for ensuring compliance with the requirement of consumption of the specified quantum of energy from renewable sources and the same is to be used in case of shortfall in compliance of RE obligation. The said provision does not amount to imposition of a pecuniary liability.

50. Article 51A(g) of the Constitution of India cast a fundamental duty on the citizen to protect and improve the natural environment. Considering the global warming, mandate of Articles 21 and 51A(g) of the Constitution, provisions for the Act of 2003, the National Electricity Policy of 2005 and the Tariff Policy of 2006 is in the larger public interest, Regulations have been framed by RERC imposing obligation upon captive power plants and open access consumers to purchase electricity from renewable sources. The RE obligation imposed upon captive power plants and open consumers through impugned Regulation cannot in any manner be said to be restrictive or violative of the fundamental rights conferred on the appellants under Articles 14 and 19(1)(g) of the Constitution of India. Upon consideration of the rival submissions by the well-reasoned order, the High Court has rightly upheld the validity of the impugned Regulation and we do not find any reason to interfere with the impugned judgment. All the appeals are dismissed as the same are devoid of merit.

A I.A. No. 1 of 2013 in C.A. arising out of SLP (C) No.34063 of 2012 for impleadment of Wind Independent Power Producers Association is allowed. All other interlocutory applications for impleadment/ intervention/stay/ directions are disposed of.

B

Devika Gujral Appeals dismissed.
& I.As dispossed of.