

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL

Sub: Petition under Section 9 and 86(1)(f) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005.

ORDER

(Hearing through video conferencing)
(Date of Order: 20.02.2024)

M/s Syncom Formulation (India) Limited,
Corporate Office: 207, Saket Nagar,
Indore 452001, (MP)

- **Petitioner**

Vs.

(1) Managing Director,
MP Paschim Kshetra Vidyut Vitaran, Co. Ltd.,
GPH, Pologround, Indore, 452003

(2) Managing Director,
MP Power Management Co. Ltd.,
Block No. 3, Shakti Bhawan,
Vidyut Nagar, Jabalpur, 482008

- **Respondents**

Shri Raunak Choukse, Advocate, appeared on behalf of the petitioner.

Shri Shailendra Jain, Dy Director appeared on behalf of the respondent no. 1.

Shri Manoj Dubey, Advocate appeared on behalf of the respondent no. 2.

The subject petition is filed by Syncom Formulation, Indore under Section 9 and 86(1)(f) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005.

2. By affidavit dated 06 September' 2023, the petitioner broadly submitted the following in its petition:

- i. *The petitioner is a registered company incorporated under the provisions of the Companies Act and for raising the dispute, filing petition or to take any legal action/proceeding, it has authorized Shri Dinesh Naiwal, authorized representative, through the Board resolution dated 29.05.2023. Hence, the petition has been filed accordingly.*
- ii. *Petitioner is one of the leading pharmaceutical companies in India and for the purpose of meeting its power requirements the Petitioner, in pursuance of power purchase and wheeling agreement entered into with the respondents have set up in the State of Madhya Pradesh, solar energy based captive power plants (herein after referred to as CPP) of 0.75 MW capacity at Village Dhabla Sondhiya Dist. Agar (MP). That the plant is entirely*

owned by the petitioner only and 100% of electricity generated by the captive solar power plant is consumed by the petitioner only.

- iii. *The petitioner further submits that the petitioner has been paying all the duties and charges levied by the respondent from time to time as per the orders and sanction of this Hon'ble Commission.*
- iv. *Petitioner owns 100% of the CPP and consumes the entire power generated for its own use. It is submitted that the Petitioner has been a CPP in terms of Rule 3 of the Electricity Rules, 2005 and section 9 of the Electricity Act, 2003 and has not lost its status as a CPP. Petitioner's CPP has complied with the captive qualification criteria set out in Rule 3 of the Electricity Rules. In the present case Petitioner is entitled to receive all benefits of captive use including no levy of additional surcharge. However, respondent no. 1 has been levying additional surcharge in the electricity bills of the petitioner since November 2017 in spite of various representations and objections of the petitioner in the said regard. The petitioner under the apprehension of adverse action by the respondent has been making payment of the disputed charge under protest till the month of April-2023. The petitioner further submits that respondent no. 1 only from the electricity bill from the month of May-2023 of the petitioner company has started to first levy the charge of additional surcharge and then deduct the same in the said bill only.*
- v. *The petitioner submits that the Respondent has levied the additional surcharge contrary to the provisions of the Act and the legislative intent of promoting captive use of electricity. Section 42 (4) of the Act states that:*

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

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.”

The petitioner submits that from a plain reading of the aforesaid provision, it is clear Additional Surcharge is not leviable on a captive user who is receiving power from its CPP since:

- (i) *There is no element of supply/ 'sale' involved in captive generation and consumption. Consumption of power under a captive arrangement (i.e. in terms of Rule 3 of the Electricity Rules) does not amount to “supply of electricity” as contemplated under Section 42(4).*
- (ii) *Captive user is different from a consumer receiving supply of electricity on Open Access.*
- (iii) *Even if availing Open Access, a captive user's Open Access is right under Section 9(2) and is not subject to the Commission's discretion under Section 42(4). In other words, Section 42(4) is not applicable to captive users.*

- vi. *The petitioner further submits that levying of the additional surcharge by respondent no. 1 in the electricity bills of the petitioner till the month of April-2023 is in direct violation and contempt of the Hon'ble Supreme Court's judgment dated 10th December' 2021 (Civil Appeal Nos. 5074- 5075 of 2019) in the above matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors reported in AIR 2022 SC 89, wherein the Hon'ble Supreme Court has held as under:*

"11. Sub-section (4) of Section 42 shall be applicable only in a case 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 and only such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that as per the Scheme of the Act, there can be two classes of consumers, (i) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee / licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act, 2003.

12. The term ' consumer' is defined in Section 2(15), which reads as under:-

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

13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of 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. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under subsection (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature. However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person - distribution licensee of his area of supply. So far as captive consumers/captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and

distribution to captive users is permitted. Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003. In the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.

14. Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 42(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.

15. In view of the above and for the reasons stated above, the present appeals fail and deserve to be dismissed and are accordingly dismissed. However, in the facts and circumstances of the case there shall be no order as to costs.

16. It is reported that pursuant to the interim order passed by this Court dated 01.07.2019, staying the operation and implementation of the impugned order passed by the Appellate Tribunal, the appellant - distribution licensee has recovered the additional surcharge. Therefore, as such once it is held that the captive consumers/captive users are not liable to pay the additional surcharge leviable under Section 42(4) of the Act, 2003, the appellant - distribution licensee has to refund the same. However, considering the fact that there shall be huge liability on the appellant - distribution license if they have to now refund the amount of additional surcharge recovered at a stretch, we direct that the additional surcharge already recovered from the captive consumers/captive users shall be adjusted in the future wheeling charges bills.

17. Present appeals are accordingly dismissed with the above observations.

Appeal dismissed."

The Hon'ble Supreme Court in the aforesaid case has not only held that additional surcharge cannot be levied on captive generators like the petitioner but also has directed the distribution licensee to refund the amount collected by them by levying additional surcharge from captive generators.

vii. The petitioner further submits that the levying and recovery of additional surcharge by

the respondent from the captive generators like the petitioner is also in contravention of this Hon'ble Commission Regulation "The First Amendment To Madhya Pradesh Electricity Regulatory Commission (Cogeneration And Generation Of Electricity From Renewable Sources Of Energy (Revision-II) Regulations 2021" which provides as under:-

"5. In 3rd line of clause (d) of the Regulation 11.2 of the Principal Regulation, the words "additional surcharge" are omitted."

The petitioner submits that the additional surcharge was levied by the respondent relying on Clause 11.2(d) of the MPERC (Co-Generation & Generation of Electricity from Renewable Sources of Energy), (Revision II), Regulation, 2021 which provided as under:-

"d) The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under.

The petitioner submits that this Hon'ble Commission by the aforesaid 1st amendment dated 20.01.2023 has altogether deleted the word 'additional surcharge' from the aforesaid clause 11.2(d) and therefore the levying of additional surcharge was completely illegal, arbitrary, and in complete violation of not only the Regulations of this Hon'ble Commission but also the subsequent orders of this Commission.

- viii. *That the petitioner along with the petition is also annexing its LTOA that was granted to it by the respondents with regards to its captive power plant.*

Grounds:

- ix. *The impugned action of the respondent in levying of additional surcharge on the petitioner's electricity bills till the month of April-2023 is arbitrary, illegal, discriminatory, and contrary to the provisions of Electricity Act, 2003 and Electricity Rules, 2005.*
- x. *The respondent erroneously and falsely levied additional surcharge in the present petitioner's electricity bills till the month of April-2023 in complete violation of the Hon'ble Supreme Court's judgment dated 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019) in the matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors reported in AIR 2022 SC 89. That the refusal of respondent no. 1 to refund the wrongly collected additional surcharge from the petitioner for FY 2017-18 to FY 2022-23 is also in complete violation of the aforesaid judgment of the Hon'ble Supreme Court and the respondent no. 1 is liable to refund the same to the petitioner.*
- xi. *The respondent no. 1 illegal and arbitrary action of levying additional surcharge is also against the regulations and orders of this Hon'ble Commission as stated above.*
- xii. *The levy of additional surcharge on solar captive power generators is contrary to the*

scheme and object of the Electricity Act, 2003 and in particular Section 42, Section 61 (h) and Section 86(1)(e) of the said Act which mandates that the State Commission shall promote the renewable energy producers. The said mandate is with the objective of environmental protection and promotion of environmentally friendly generation and to ensure that such generators are provided a preference over conventional generators. One of the primary measures for such promotion is by way of non levy of additional charges for the supply of electricity by renewable energy generators.

- xiii. *The Petitioner has invested a huge amount of Capital based on the representation made by the government (through policy) and regulations framed by the Commission which are also in consonance with the Electricity Act, 2003. That by imposing additional surcharge mid-way upon the petitioner, the right of legitimate expectation of the petitioner is being violated as the petitioner's captive power plant project is becoming less and less profitable by imposition of such charges.*
- xiv. *Other grounds would be raised at the time of argument.*

3. With the aforesaid submissions the petitioner prayed the following:

- i. *The Hon'ble Commission may be pleased to admit the present Petition.*
- ii. *Direct the respondent not to levy additional surcharge in future invoices of the petitioner.*
- iii. *For order/ direction to Respondent No. 1 to refund Additional Surcharge of Rs 17,12,915/- (Rupees Seventeen Lakhs Twenty One Thousand Nine Hundred and Fifteen Only) with interest @18% per annum from December 2021 to April 2023 recovered from the petitioner after the order of Hon'ble Apex Court cited above;*
- iv. *For an order directing the respondent No. 1 to adjust additional surcharge of Rs. 33,27,828/- (Rupees Thirty Three Lakhs Twenty Seven Thousand Eight Hundred and Twenty Eight only) recovered from the petitioner towards additional surcharge by the respondent during the period November 2017 to November 2021 in the future electricity Bills of the petitioner.*
- v. *Issue any other direction or order as may deems fit, in the larger interest of justice.*

4. At the motion hearing held on 05.12.2023, the petition was admitted. Petitioner was directed to serve copy of petition to the respondents within 7 days, respondents to file their responses within 15 days from the date of receipt of petition. Petitioner might file rejoinder, if any, within next 7 days.

The case was fixed for hearing on 9th January 2023.

5. By Affidavit, dt. 08th January' 2024, Respondent No. 1 i.e. MP Paschim Kshetra Vidyut Vitaran Co. Ltd., Indore, submitted following in their response:

- i. *The petitioner has filed present petition in Oct-Nov, 23 (actual date of filing note known)*

challenging the levy of additional surcharge being billed by the respondent and paid by petitioner since Nov 2017. Petitioner has prayed for the following two reliefs:

- (i) Not to levy additional surcharge in future bills.*
 - (ii) Refund of already billed & paid amount since Nov 2017.*
- ii. At the outset, the respondent denies and disputes each and every allegation, averment and contention made in the petition, which is contrary to or inconsistent with what is stated herein, as if the same has been traversed in seriatim, save and except what has been specifically and expressly admitted hereinafter in writing. Any omission on the part of the answering respondent to deal with any specific contention or averment of the petitioner should not be construed as an admission of the same by the answering respondent. Further, all the submission made herein are without prejudice to one another and are to be treated in alternate to one another in case of conflict or contradiction.*

Re: BILLING OF ADDITIONAL SURCHARGE HAS BEEN STOPPED IN ACCORDANCE WITH THE REGULATIONS :

- iii. With regard to the first kind of relief, i.e non levy of additional surcharge on the future bills, it is submitted that answering respondent has already stopped billing of additional surcharge as per Provisions of Regulations issued by this Hon'ble Commission and amended from time to time.*
- iv. It is submitted that this Hon'ble Commission has issued the MPERC (Terms and Conditions for Intra -State Open Access in Madhya Pradesh) Regulations, 2005 ('OA Regulations 2005'). The relevant provisions of the said Regulations are reproduced as under:*

"Open Access Customer" means a person permitted under these regulations to receive supply of electricity from another person other than the distribution licensee of his area of supply, or a generating company (including captive generating plant) or a licensee, who has availed of or intends to avail of open access.

3: ELIGIBILITY FOR OPEN ACCESS AND CONDITIONS TO BE SATISFIED

3.1 Subject to the provisions of these regulations, open access customers shall be eligible for open access to the intra state transmission system of the State Transmission Utility (STU) or any other transmission licensee and intra state distribution system of the state distribution licensees or any other distribution licensee.

3.2 Such open access shall be available for use by an open access customer on payment of such charges as may be determined by the Commission in accordance with the regulations framed for the purpose.

3.3 Subject to operational constraints and other relevant factors, open access shall be allowed in the following phases:

- i. For Non-Conventional Energy Sources:*

The non-conventional energy generators and users shall be provided with open access with immediate effect and they shall be governed by the existing policy of State Government. The non-conventional energy generators shall be provided access to the transmission and sub-transmission system in the same manner as had been provided to them by the erstwhile integrated Madhya Pradesh State Electricity Board in accordance with State Government Policy in this regard on the same terms and conditions.

ii. For Captive Generating Plants of Conventional Energy:

Open access for the captive power plants shall be provided with immediate effect.

iii. For all other open access customers:

Open access to users other than at Sl. No. 3.3(i) and 3.3(ii) shall be provided as per the time table below

<i>Sr. No</i>	<i>Phases</i>	<i>Customer with contracted power under open access for transmission and wheeling and at voltage</i>	<i>Date from which open access is to be granted</i>
<i>7</i>	<i>VII</i>	<i>Users requiring 1 MW and above and situated anywhere in the State</i>	<i>October 1, 2007</i>

13: CHARGES FOR OPEN ACCESS

13.1 The licensee providing open access shall levy only such fees or open access charges as may be specified by the Commission from time to time. The principles of determination of the charges are elaborated hereunder.

a. Transmission Charges –The transmission charges for use of the transmission system of the transmission licensee for intra-state transmission shall be regulated as under, namely:-

b. Wheeling Charges –. The Wheeling charges for use of the distribution system of a licensee shall be regulated as under, namely: -

f. Surcharge – The Commission shall specify the cross subsidy surcharge for individual categories of consumers separately.

g. Additional Surcharge – The Commission shall determine the additional surcharge on a yearly basis.

Similar provisions are there in the subsequent Regulations i.e MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2021 (OA Regulations 2021).

- v. Petitioner has availed the open access in accordance with the aforesaid 'OA Regulations 2005' by obtaining permission to avail Long Term Open Access (LTOA) dated 30.06.2017 for solar plant of 0.75 MW (Ref Annexure P/6). Answering Respondent crave leave of this*

Hon'ble Commission to refer to and rely upon these documents at the time of hearing.

vi. At this juncture it would be appropriate to refer the relevant provisions of MPERC (Co-generation and Generation of electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010 (Co-generation Regulations, 2010). Regulation 12.2 of Co-generation Regulations 2010 after 7th amendment and prior to 7th amendment is reproduced below:

(a) Prior to the 7th Amendment, the said Regulation provided 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 procured from Renewable Sources of Energy.**”*

(b) After 7th amendment amended Regulation 12.2 (w.e.f 17.11.2017) provides as under:

“12.2 Wheeling charges, Cross Subsidy charge, 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 in its retail supply tariff order.”

vii. It is explicitly clear from the above mentioned seventh amendment to MPERC Co-generation Regulations, 2010 that the exemption from payment of open access charges provided to Captive and Open Access Consumers prior to the said amendment has been withdrawn and it has been provided in the seventh amendment that the open access charges shall be applicable in terms of retail supply tariff order issued by this Commission. The validity and legality of aforesaid amendment (Writ Petition No.9870/2018) was challenged before the Hon'ble High Court of MP but the same has been upheld by the Hon'ble High Court. Thus, after notification of the 7th amendment answering respondent has started the billing of additional surcharge on the consumption being done from the renewable sources.

viii. It is relevant to mention that subsequently, Hon'ble MPERC has notified the Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of electricity from renewable sources of energy) Regulations 2021 (Co-generation Regulations 2021). The Regulation 1.2(d) of the said Co-generation Regulations 2021 is reproduced as under:

*“The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, **but it shall be liable to pay** wheeling charges, **additional surcharge**, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under.”*

- ix. *Later on this Hon'ble Commission has issued the following amendments:*
- (i) *Vide 1st amendment (notified on dated 20.01.2023) to the Cogeneration Regulations, 2021 the words "additional surcharge" are omitted from the Regulation 11.2(d) of the Principle Regulation.*
 - (ii) *2nd amendment (notified on dated 07.04.23) to the OA Regulations, 2021 provides that additional surcharge shall not be levied in case a person is availing power from the plant established as captive generation plant for his own use.*
- x. *In view of above amendments, levy of additional surcharge on the consumed units has already been stopped from the monthly energy bills from May-23. In the month of May-23 the West Discom has stopped levy of additional surcharge manually without waiting amendment in the billing software, and therefore the bill for the month of May-23 depicts first levy of additional surcharge and then deduction of the same in the said bill.*
- xi. *Thus, relief sought with regard to the non levy of additional surcharge in the future invoices has already been granted. Petitioner is neither entitled for any further relief nor there is any prayer in this regard.*

RE: ANSWERING RESPONDENT HAS BILLED ADDITIONAL SURCHARGE AS PER PROVISIONS OF REGULATIONS AS AMENDED FROM TIME TO TIME. THUS, QUESTION OF REFUND DOES NOT ARISE:

- xii. *It is submitted that answering respondent has billed additional surcharge as per Provisions of Regulations as amended from time to time. Further as already stated that in line with the amendments in Regulations billing has already been stopped. Thus, question of refund does not arise.*
- xiii. *It is submitted that, at the one hand petitioner is relying on The First amendment to the MPERC (Cogeneration and Generation of Electricity From Renewable Source of Energy (Revision-II) Regulation 2021 notified on dated 20.01.2023 (ref Para 7 of the Petition) and at the same time petitioner is claiming refund for the period before effective date of such amendment. It is settled principle that the law does not permit a person to both approbate & reprobate'.*
- xiv. *The issue of effective date of applicability of Regulations came before consideration of Hon'ble Appellate Tribunal of Electricity in Appeal No. 179 of 2009 in the matter of North Eastern Electric Power Corporation Ltd. Vs Tripura State Electricity Corporation Ltd. Vide order dated 12.07.2017 Hon'ble Tribunal observed as under:*

"15. The dispute which has arisen in this Appeal involves the adjudication about the date of applicability of Regulation 5A. While considering the merits of the matter it would be appropriate to refer to the principle which has been laid down by the Hon'ble Supreme Court in regard to retrospective effect. It is held in the case of State of Madhya Pradesh V/s Tikamdas (1975) 2 SCC 100 that subordinate legislation cannot be given retrospective effect unless specifically so authorized under the parent statute. The relevant observation made by the Hon'ble Supreme Court is as follows:

“There is no doubt that unlike legislation made by a sovereign legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the Rule-making power in the concerned statute expressly or by necessary implication confers power in this behalf”

16. *In the light of the dictum laid by the Hon’ble Supreme Court, if we look at the Electricity Act, 2003, it is evident that this Act, under which the Regulations on the terms of conditions of tariff are notified, does not authorize the Commission to make the Regulations which may apply retrospectively. Keeping in view of the above, let us discuss the relevant facts to analyse the issue.”*

Re: REFUND CAN NOT BE CLAIMED BASED ON THE JUDGMENT OF HON’BLE SUPREME COURT IN ANOTHER PERSON’S CASE I.E JUDGMENT DATED 10.12.2021 IN “MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED VS. JSW STEEL LIMITED AND OTHERS” [(2022) 2 SCC 742]:

- xv. *Petitioner is solely relying, on the judgment of the Hon’ble Supreme Court dated 10.12.2021 in “Maharashtra State Electricity Distribution Company Limited Vs. JSW Steel Limited and Others” (2022) 2 SCC 742, in support of its claim of refund. This submission of the petitioner is devoid of merit as the direction for refund of additional surcharge in the case of M/s JSW Steels case supra is applicable only for the parties to the civil appeals no. 5074-5075/2019 and cannot be made applicable universally. In this regard answering respondent rely upon the 9 Judge Constitution bench judgement of Hon’ble Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India [1997 (89) E.L.T. 247 (S.C.) Para 18,70, 99(iv)]. In Mafatlal Industries Ltd. supra Hon’ble Supreme Court while dealing with almost identical aspect held and observed by Majority [Judgment per: B.P. Jeevan Reddy, J. for himself and on behalf of J.S. Verma, S.C. Agrawal, A.S. Anand and B.N. Kirpal, JJ.] that it is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person.*
- xvi. *This, Hon’ble Commission in the case of M/s Vippy Industries Limited Vs MPPKVCL, Indore (Petition No. 32 of 2023 Judgment dated 16.11.2023) relying upon the judgment of Hon’ble Supreme Court in Mafatlal Industries Ltd supra rejected the similar prayer of refund.*
- xvii. *Thus, petitioner is not entitled for refund as claimed in the petition.*

RE: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY PRINCIPLE OF UNJUST ENRICHMENT:

- xviii. *It is submitted that, as far as the refund is concerned, the Principle of Unjust Enrichment is also applies to the facts of present case and petitioner consumers who have paid additional surcharge, would have passed on the same to the end users. Therefore, petitioner is not entitled to seek any refund in this regard.*
- xix. *This, Hon’ble Commission in the case of M/s Vippy Industries Limited Vs MPPKVCL, Indore (Petition No. 32 of 2023 Judgment dated 16.11.2023 Re Para 22) relying upon the*

judgment of Hon'ble Supreme Court in Mafatlal Industries Ltd supra has applied Principle of Unjust Enrichment.

Re: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY LAW OF LIMITATION:

- xx. *Without prejudice the foregoing submission against the prayer of refund, it is submitted that the petitioner's claim of refund of already paid amount is barred by Law of Limitation. The present petition has filed before this Hon'ble Commission only in Oct-Nov 23 (Actual date of filing not known) whereas the Petitioner is claiming recovery/refund of additional surcharge billed since November, 2017. It is further submitted that respondent is not able to verify the claim amount as no documentary evidence in this regard submitted.*
- xxi. *That, as per Section 3 of the Limitation Act, 1963 any suit instituted after the prescribed period shall be dismissed. Article 113 of the Schedule of the Limitation Act, 1963 provides a limitation of 3 years from the date when right to sue accrues. In the instant case, the right to initiate legal proceedings arose at the time when the answering respondent issued the monthly energy bills incorporating the additional surcharge. Applying this test of limitation Petitioner is not entitled to claim refund and prayer of refund ought to be rejected by this Hon'ble Commission. As such, the Petitioner's claim is barred by the law of limitation for not having taken out appropriate proceedings for recovery/refund within the prescribed time period. In fact the law goes so far as to say that it is the duty of the Court to consider limitation even if not set up as a defence as held in Noharlal Verma v. Distt. Coop. Central Bank Ltd.[2008 (14) SCC 445]. Further, in this regard and in the very context of Electricity Act, 2003 answering Respondent rely on the following judicial pronouncements:*
- (i) *Judgments of the Hon'ble Supreme Court in A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., (Civil Appeal No. 6036 Of 2012 Order dated October 16, 2015 Para 29-30) .*
- (ii) *This Hon'ble Commission's order dated 30.11.2018 in the matter MP Paschim KVVCL, Indore. (West Discom) V/s M/s Sunil Oil Mills (Petition No. 26/2017 Para 12(vi)).*
- xxii. *Petitioner has placed reliance upon the representation (Para 4 of the Petition although detail of such representation not given) submitted to the Discom. In this regard it is submitted that Hon'ble Supreme Court in the Judgment dated 28.02.2022 in the matter of Surjeet Singh Sahni Vs State of U.P. and Ors. (SLP (C) NO. 3008 OF 2022), has held that mere submission of representations does not extend the period of limitation.*
- xxiii. *In M/s. Rup Diamonds and others Petitioners v. Union of India & Ors (AIR 1989 SUPREME COURT 674 (ref Para 7-9)) Hon'ble Supreme Court denied relief on the basis of inordinate delay in preferring the refund claim.*
- xxiv. *In view of above submission, the recovery/refund claim preferred by the Petitioner against the Respondents is time barred as per the Limitations Act, 1963 and thus refund as prayed for cannot be granted.*

- xxv. *Therefore, no refund can be granted as prayed by the petitioner.*
- xxvi. *It is settled principle that the law does not permit a person to both approbate & reprobate'. The petitioner cannot claim that it is not liable to pay the additional surcharge but the distribution licensee has an obligation to provide them with supply. Thus, if there is no levy of additional surcharge under Section 42(4) distribution licensee shall also not be under obligation to provide supply on demand under Section 43. As such Hon'ble Commission is requested to make a declaration in this regard.*
- xxvii. *That, in view of the submissions made in the instant reply, parawise reply has not been submitted. The answering respondent crave leave of this Hon'ble Commission to submit parawise reply, additional reply as and when need arises / directed by Hon'ble Commission for proper adjudication of present petition.*
- xxviii. *Therefore, this Hon'ble Commission is requested to dismiss the petition and render justice.*

6. With the aforesaid submissions, the Respondent prayed the following:

- i. *Petition filed by the petitioner is devoid of merit; therefore same may please be dismissed.*
- ii. *Declare that if there is no levy of additional surcharge under Section 42(4), distribution licensee shall also not be under obligation to provide supply on demand under Section 43.*
- iii. *Condone any inadvertent omissions/ errors/ shortcomings/ delay and permit the answering respondent to add/ change/ modify/ alter this filing and make further submissions as may be required at later stage.*
- iv. *Pass such other and further orders as are deemed fit and proper in the facts and circumstances of the case.*

7. Respondent No. 1, dt. 12.01.2024, submitted a memo of adoption of reply filed by themselves and stated that:

"The answering Respondent MPPMCL is in receipt of copy of aforesaid reply and has gone through and adopts the same as its reply also in instant petition. The answering Respondent does not wish to file a separate reply in the present case."

8. At the hearing held on 16.01.2024, petitioner was heard. Petitioner sought time of 1 week for rejoinder in the matter which was granted. Petitioner might provide a copy of rejoinder to respondents also.

Matter was listed for arguments on 06 February 2024.

9. By Affidavit dt. 22.01.2024, the petitioner filed a rejoinder and stated that:

- i. *That the Petitioner has filed the present petition before this Hon'ble Commission on*

06.10.2023 challenging the illegal levy of additional surcharge by respondent no.1 in the monthly electricity bills of the petitioner who is a captive power plant owner and the petitioner itself consumes the entire electricity produced by the said captive power plant. The petitioner has prayed before this Hon'ble Commission to direct respondent no.1 to not levy additional surcharge in the future bills of the petitioner and to adjust the amount of additional surcharge collected by respondent no.1 from the petitioner during the period November 2017 to November 2021 in the future bills of the petitioner and also to refund the amount collected towards additional surcharge during the period from December 2021 to April 2023 to the petitioner with interest in the light of the judgment of the Hon'ble Supreme Court's judgment dated 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019) in the matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors reported in AIR 2022 SC 89 (Annexure P-4) which is squarely applicable to the facts of the present case wherein the Hon'ble Supreme Court has held that the additional surcharge is not leviable on captive power plant consumers like the present petitioner and also has directed the respondent therein to adjust the amount deposited towards additional surcharge in the future electricity bills of the captive consumer.

- ii. The respondent no.1 filed reply dated 07.01.2024 before the Hon'ble Commission raising various issues challenging the petition including the claim of the petitioner being barred by limitation and also the issue of unjust enrichment. The petitioner in rebuttal of the said reply is filing the present rejoinder before the Hon'ble Commission.*
- iii. That at the outset, the Petitioner denies the statements and contentions in the Reply, that is contrary to and/or inconsistent with what is set out in the Petition and what is stated hereinafter in the present Rejoinder. The petitioner also submits that the paras of the reply are wrongly numbered as in after para 19, the next para is again Para 10-18, therefore, the petitioner is making its submissions in this rejoinder accordingly.*
- iv. The Petitioner adopts all the statements and submissions made in the Petition and submits that nothing in the Reply shall be deemed to be admitted by the Petitioner, unless so expressly admitted by the petitioner hereinafter.*
- v. That the petitioner humbly submits before this Hon'ble Commission, that the respondent's reply is devoid of any merits and substance and that the respondent has not even replied to or countered the grounds raised by the petitioner in its petition specifically with regards to the judgment of the Hon'ble Supreme Court's judgment dated 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019) in the matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors reported in AIR 2022 SC89 which is squarely applicable to the facts of the present case.*
- vi. That with regards to para 1 of the reply, the petitioner submits that the same relates to the contents of the petition of the petitioner and are admitted.*
- vii. That with regards to para 2 of the reply, the petitioner submits that the contents of the same are false for the reasons stated hereinafter.*
- viii. That with regards to Paras 3 to 11 of the reply, which are under the heading 'A. Re: BILLING OF ADDITIONAL SURCHARGE HAS BEEN STOPPED IN ACCORDANCE WITH THE REGULATIONS:'*

the petitioner submits, that the contents of the same are denied by the petitioner as false except the fact that the respondent has stopped levying additional surcharge completely in the bills of the petitioner from the month of June-2023. The petitioner contends that the respondent was levying additional surcharge on the electricity bills of the petitioner till April-2023 and only in the month of May-2023, the respondent first levied the amount of additional surcharge and then under the same bill deducted the same even though the regulation regarding non levy of additional surcharge was notified in the month of January-2023.

*The petitioner further submits that the respondent in its reply dated 07.01.24, for the reasons best known to the respondent only, **has not mentioned about this Hon'ble Commission's order dated 31.07.2023 passed in petition no. 05 of 2023 (Rama Phosphates Ltd. Vs M.P.P. K.V.V.Co. Ltd.)**, wherein this Hon'ble Commission in a similar case involving levy of additional surcharge has held as under:-*

"16. Commission in light of the binding judgement of Hon'ble Supreme Court dated 10.12.2021 mentioned in Para 15 above holds that the additional surcharge under Section 42(4) of the Electricity Act 2003 is not leviable on the quantum of power consumed by Petitioner from its onsite 2250 kVA Steam Turbine Captive Power Plant. Respondent shall refund the amount deposited by Petitioner along with consequential surcharge and withdraw the demand of balance amount if any on account of additional surcharge on captive use of electricity within a period of 1 month from the date of this order. With the aforesaid observations and findings, the subject petition stands disposed of.

Thus, the petitioner submits that the petition of the petitioner is covered by the aforesaid matter wherein the Hon'ble Commission has held that the additional surcharge is not leviable on captive consumers and also has directed the respondent to refund the amount deposited towards additional surcharge and further withdraw any demand within one month from the order of the Hon'ble Commission. The petitioner further submits that all the contentions raised by the respondent in this rejoinder were also raised in the aforesaid case of Re Rama Phosphates and the same have been dealt with by this Hon'ble Commission in the said order.

- ix. *That with regards to Paras 10 to 18 of the reply, which are under the heading 'B. Re: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY LAW OF LIMITATION:;', the petitioner submits, that the contents of the same are denied by the petitioner as false and baseless. The petitioner submits that in the present case, there is a continuous cause of action as the additional surcharge was wrongly collected by the respondent from November 2017 to April 2023 and the petitioner made the payment under protest to the respondent. Furthermore, the issue of levy of additional surcharge on captive consumers was pending before the Hon'ble High Court in the case of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors and was decided only on 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019). The petitioner further submits that this Hon'ble Commission in the case of Rama Phosphates Ltd. Vs M.P.P. K.V.V.Co. Ltd.(Petition no. 5 of 2023) vide order dated 31.07.2023 and in other matters of captive consumers following the judgment of the Hon'ble Supreme Court in Re JSW Steel Case and has directed the respondent to refund the amount so collected towards additional surcharge and therefore, on the ground of parity also, the petitioner deserves the same relief. The petitioner also submits that the Hon'ble Apex Court in Various rulings has held that public authorities/entities like the present respondent ought*

not to take technical plea of Limitation to defeat the legitimate claims of the citizens

- x. *The petitioner further submits that the respondent in its reply under the heading 'Re: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY LAW OF LIMITATION' has further submitted that as per Section 3 of the Limitation Act, 1963 any suit instituted after the prescribed period shall be dismissed. Furthermore, respondent no.1 contended that in the present case Article 113 of the Schedule of the Limitation Act, 1963 is applicable which provides a Limitation of (3) three years from the date when the right to sue accrues in cases for any suit where limitation is not provided under any other schedule. Thus, it is evident that respondent no.1 is only challenging the refund of the additional surcharge that was collected by respondent no.1 from the petitioner before 06.10.2020 which is three years from the date of filing of the present petition by the petitioner on 06.10.2023 as allegedly time-barred and therefore, the claim of the refund with interest of additional surcharge by the petitioner collected by respondent no.1 after 06.10.2020 till April 2023 is not disputed by respondent no.1*

However, the petitioner without prejudice to its other submissions submits that in the present case, the limitation will start running from the date of the judgment of the Supreme Court in the case of Maharashtra State Electricity Distribution Co. Ltd . Vs. M/s. JSW Steel Limited i.e. 10.12.2021 as on the said date only, the law was laid down by the Supreme Court that Captive Consumers/captive users are not liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003. The petitioner contends that in the present case Section 17 (1)(c) of the Limitation Act is applicable which provides as under :-

17. Effect of fraud or mistake.–(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,–

(c) the suit or application is for relief from the consequences of a mistake; or the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it;

*The Petitioner submits that the Hon'ble Supreme Court in the case of **Mahabir Kishore Vs State of MP reported in AIR 1990 SC 313** has held as under :-*

"27. It is thus a settled law that in a suit for refund of money paid by mistake of law, S.72 of the Contract Act is applicable and the period of limitation is three years as prescribed by Article 113 of the Schedule to the Indian Limitation Act, 1963 and the provisions of S. 17(1)(c) of that Act will be applicable so that the period will begin to run from the date of knowledge of the particular law, whereunder the money was paid, being declared void; and this could be the date of the judgment of a competent Court declaring that law void."

- xi. *Furthermore, the Hon'ble Supreme Court in the case of **Union of India Vs West Cost Paper Mills Ltd. reported in AIR 2004 SC 1596** has held as under :-*

20. A distinction furthermore, which is required to be noticed is that whereas in terms of Article 58 the period of three years is to be counted from the date when

the right to sue first accrues; in terms of Article 113 thereof, the period of limitation would be counted from the date when the right to sue accrues. The distinction between Article 58 and Article 113 is, thus, apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time and, thus, whereas in terms of Article 58 the period of limitation would be reckoned from the date on which the cause of action arose first whereas, in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefore arose.

21. The fact that the suit was not filed by plaintiff-respondent claiming existence of any legal right in itself is not disputed. The suit for recovery of money was based on the declaration made by 'The Tribunal' to the effect that the amount of freight charged by the appellant was unreasonable. It will bear repetition to state that a plaintiff filed a suit for refund and a cause of action therefore arose only when its right was finally determined by this Court and not prior thereto. This Court not only granted special leave but also considered the decision of the Tribunal on merit.

The Hon'ble Supreme Court has recently only reiterated the aforesaid proposition in case of Shakti Bhog Foods Vs Central Bank of India reported in AIR 2020 SC 2721. The petitioner thus submits that in the case of the petitioner also as per Article 113 of the Limitation Act, the right to sue accrue on the date of the judgment of the Supreme Court in the case of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited i.e. 10.12.2021 as on the said date only, the law was laid down by the Supreme Court that Captive Consumers/captive users are not liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003 and the petition has been filed within three years from the said date on 22.06.2023 and is thus within limitation.

- xii. *The petitioner without prejudice to its other submissions and without admitting or conceding anything and only for argument's sake submits that if the contention of respondent no.1 (para 10-18 of the reply filed by respondent no.1) is to be accepted that the limitation would start running from the date of electricity bill of the petitioner dated 28.12.2017 when respondent no.1 first levied the additional surcharge even then also the entire claim of the petitioner for the period from 28.12.2017 to 22.06.2020 will not be time-barred in light of the order of the Hon'ble Supreme Court dated 10.01.2022 reported in **AIRONUNE 2022 SC 55 (in RE.- Cognizance for Extension of Limitation)** wherein the Hon'ble Supreme Court has held that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings and consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.*
- xiii. *The Petitioner submits that a public authority or state instrumentality like respondent no.1 ought not to take the technical plea of Limitation to defeat the legitimate claims of the citizens. The petitioner submits that the Hon'ble Supreme Court in the case of **Madras Port Vs Hymanshu International reported in AIR 1979 SC 1144** has held as under:-*
“ The plea of limitation based on this section is one which the court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the

citizen. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. "

*The petitioner further submits that the Hon'ble Supreme Court in the case of **Dilbagh Rai Vs UOI reported in 1974 SC 130** has held as under:-*

"The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for, the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. "

- xiv. *That the petitioner on the ground of parity and also the principle that a state instrumentality like respondent no.1 or this Hon'ble Commission cannot treat equal person unequally which is in violation of the Constitution of India submits that claim of the petitioner should be allowed in toto as this Hon'ble Commission vide order dated 31.07.2023 passed in petition no. 05 of 2023 (Rama Phosphates Ltd. Vs M.P.P.K.V.Co. Ltd.), has held as under:-*

"16. Commission in light of the binding judgement of Hon'ble Supreme Court dated 10.12.2021 mentioned in Para 15 above holds that the additional surcharge under Section 42(4) of the Electricity Act 2003 is not leviable on the quantum of power consumed by Petitioner from its onsite 2250 kVA Steam Turbine Captive Power Plant. Respondent shall refund the amount deposited by Petitioner along with consequential surcharge and withdraw the demand of balance amount if any on account of additional surcharge on captive use of electricity within a period of 1 month from the date of this order. With the aforesaid observations and findings, the subject petition stands disposed of."

Thus the petitioner submits that the petition of the petitioner is covered by the aforesaid matter wherein the Hon'ble Commission has held that the additional surcharge is not leviable on captive consumers and also has directed the respondent to refund the amount deposited towards additional surcharge and further withdraw any demand within one month from the order of the Hon'ble Commission. The petitioner submits that in addition to the aforesaid petition, this Hon'ble Commission in the case of Tirupati Starch and Chemicals Ltd Vs M.P.P.K.V.Co Ltd vide order dated 11.09.2023 also has allowed the petition of captive users and directed respondent no.1 to refund the amount collected towards additional surcharge. Thus, the petitioner also on the ground of parity deserves the same relief from this Hon'ble Commission.

- xv. *The petitioner further submits that the judgment of the Hon'ble Supreme Court's judgment*

dated 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019) in the matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors reported in AIR 2022 SC 89 is binding on respondent no.1 and the respondent no.1 should have on its own stopped levying additional surcharge and refunded the amount of additional surcharge so collected, However, respondent inspite of knowledge of the Supreme Court judgment did not do so and on the contrary continued to levy additional surcharge on the petitioner. **The petitioner submits that the Hon'ble Supreme Court in the case of Re JSW Steel has declared the very act of levying additional surcharge from captive generators as illegal and contrary to the provisions of the Electricity Act'2003, therefore, the submission of the respondent no.1 that the benefit of the said judgment does not extend to other captive generators who were not party in the said case does not hold good.**

The petitioner submits that the Hon'ble Supreme Court in the case of **Shenoy and Co. v. Commercial Tax Officer, Circle II, Bangalore and Ors. reported in AIR 1985 SC 621**, it has been held that when the Supreme Court declares a law and holds either a particular levy as valid or invalid and illegal, it is idle to contend that the law laid down by this Court in that judgment would bind only those parties who are before the Court and not others in respect of whom appeal had not been filed. To do so is to ignore the binding nature of a judgment of this Court under Article 141 of the Constitution.

- xvi. That with regards to ground of unjust enrichment taken by respondent no.1 in its reply ' Re: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY PRINCIPLE OF UNJUST ENRICHMENT:', the petitioner submits, that the contents of the same are denied by the petitioner in toto as false and completely baseless. The petitioner submits that the respondent before raising the aforesaid false ground has completely ignored and lost sight of the admitted fact that the solar plant is entirely owned by the petitioner only and 100% of electricity generated by the captive solar power plant is also consumed by the petitioner only, therefore, there can be no question of any unjust enrichment and in the present case the generator and end use are one and the same entity who has paid the additional surcharge to the respondent. Therefore, the judgement relied upon by respondent no.1 passed in the case of Mafatlal Industries Vs Union of India has no application in the present case.
- xvii. That with regards to para 18 to 20 of the reply, the petitioner submits that the contents of the same are false and are therefore denied by the petitioner. The petitioner submits that the controversy involved in the present matter has already been decided by this Hon'ble Commission in the case of Rama Phosphates Ltd. Vs M.P.P.K.V.V.Co. Ltd.(Petition no. 5 of 2023) vide order dated 31.07.2023 and in other matters of captive consumers following the judgment of the Hon'ble Supreme Court in Re JSW Steel Case and has already directed the respondent to refund the amount so collected towards additional surcharge from captive power plant owners. Furthermore, this Hon'ble Commission in the case of M/s Vippy Industries Limited vs MPPKVCL (Petition no. 32 of 2023) vide order dated 16.11.2023 has directed the refund of the amount of additional surcharge collected by the respondent no.1 with effect from the date of the order of Hon'ble Supreme Court in the case of Re JSW Steel dated 10.12.2021 by way of monthly adjustments in the electricity bills of the petitioner therein. Furthermore, the relief sought by the respondent no.1 in its reply cannot be granted by this Hon'ble Commission in a petition filed by the petitioner for refund of additional surcharge. The respondent no.1 ought to have filed a separate petition for that.

10. With the aforesaid submissions, the Petitioner prayed the following:

It is, therefore, humbly prayed that the petition should be allowed and the reliefs sought therein be granted in favor of the petitioner.

11. The last hearing in the subject matter was held on 06.02.2024 when the arguments were completed by the parties and case was reserved for orders.

Commission's observations and findings:

12. The Commission noted the following from the submission made by petitioner in this matter:

(i) Respondent No. 1 was levying additional surcharge on the captive power consumption of the petitioner from Nov 2017 till April 23. Respondent No.1 stopped levying additional surcharge on captive consumption since May 2023 onwards.

(ii) Petitioner has submitted that Hon'ble Supreme Court in its order dated 10.12.2021 passed in Civil Appeal Nos. 5074-5075 of 2019 in the matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors has held that captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003. The Respondent No. 1 has however, continued to bill additional surcharge on petitioners' captive consumption beyond Dec 21 till April 23.

(iii) The Petitioner further submitted that additional surcharge was levied by the respondent relying on the said clause 11.2(d) of MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy (Revision-II) Regulations 2021 which provided as under:

"d) The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under."

Since the Commission through 1st amendment dated 20.01.2023 in aforesaid regulations has altogether deleted the word 'additional surcharge' from the aforesaid clause 11.2(d), therefore the levying of additional surcharge was completely illegal, arbitrary, and in complete violation of not only the Regulations of this Commission but also the subsequent orders of this Commission.

(iv) The petitioner further submitted in its rejoinder that this Commission in a similar petition no. 05 of 2023(Rama Phosphates Ltd. Vs M.P.P.K.V.V.Co. Ltd.), vide order dated 31.07.2023 has held as under: -

“16. Commission in light of the binding judgement of Hon’ble Supreme Court dated 10.12.2021 mentioned in Para 15 above holds that the additional surcharge under Section 42(4) of the Electricity Act 2003 is not leviable on the quantum of power consumed by Petitioner from its onsite 2250 kVA Steam Turbine Captive Power Plant. Respondent shall refund the amount deposited by Petitioner along with consequential surcharge and withdraw the demand of balance amount if any on account of additional surcharge on captive use of electricity within a period of 1 month from the date of this order. With the aforesaid observations and findings, the subject petition stands disposed of.”

Petitioner submitted that their case is covered by the aforesaid matter wherein the Commission has held that the additional surcharge is not leviable on captive consumers and also has directed the respondent to refund the amount deposited towards additional surcharge and further withdraw any demand within one month from the order of the Hon’ble Commission.

(v) On the limitation issue of claiming refund of already paid amount of additional surcharge, petitioner has submitted that in the present case, there is a continuous cause of action as the additional surcharge was wrongly collected by the respondent from November 2017 and the petitioner made the payment under protest to the respondent till April 2023. Furthermore, the issue of levy of additional surcharge on captive consumers was pending before the Hon’ble Supreme Court in the case of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors and was decided only on 10th December’ 2021 (Civil Appeal Nos. 5074-5075 of 2019). On this issue, petitioner further submitted that this Commission in the case of Rama Phosphates Ltd. Vs M.P.P.K.V.V.Co. Ltd. (Petition no. 5 of 2023) vide order dated 31.07.2023 has directed the respondent to refund the amount so collected towards additional surcharge and therefore, on the ground of parity also, the petitioner deserves the same relief.

(vi) Petitioner further submitted that in the present case, the limitation will start running from the date of the judgment of the Supreme Court in the case of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited i.e. 10.12.2021 as on the said date only, the law was laid down by the Supreme Court that Captive Consumers/captive users are not liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003. The petitioner contends that in the present case, Section 17 (1)(c) of the Limitation Act is applicable which provides as under: -

17. Effect of fraud or mistake. — (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act, —

.....
(c) the suit or application is for relief from the consequences of a mistake; or

.....
the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it;

(vii) Petitioner also submitted that if the contention of respondent no.1 is to be accepted that the limitation would start running from the date of electricity bill of the petitioner dated 28.12.2017 when respondent no.1 first levied the additional surcharge even then also the entire claim of the petitioner for the period from 28.12.2017 to 22.06.2020 will not be time-barred in light of the order of the Hon'ble Supreme Court dated 10.01.2022 reported in AIR ONLINE 2022 SC 55 (In RE:- Cognizance for Extension of Limitation) wherein the Hon'ble Supreme Court has held that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings and consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

(viii) Petitioner further submitted that a public authority or state instrumentality like respondent no.1 ought not to take the technical plea of Limitation to defeat the legitimate claims of the citizens. Hon'ble Supreme Court in the case of Madras Port Vs Hymanshu International reported in AIR 1979 SC 1144 has held as under: -

“ The plea of limitation based on this section is one which the court always looks upon with disfavor and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens.”

Hon'ble Supreme Court in the case of Dilbagh Rai Vs UOI reported in 1974 SC 130 has held as under: -

“The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for, the State's interest is to meet honest claims, vindicate a substantial defense and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court.”

13. The Commission noted the following from the submission made by respondent no. 1 in this matter:

(i) Respondent no. 1 has submitted that additional surcharge on captive power consumption was being levied only after the 7th amendment in MPERC Co-generation and Generation of electricity from renewable sources of energy)

Regulations 2010 was notified by the Commission 17.11.2017 which provides as under: -

“12.2 Wheeling charges, Cross Subsidy charge, 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 in its retail supply tariff order.”

(ii) As submitted by the respondent, Commission subsequently notified MPERC (Co-generation and Generation of electricity from renewable sources of energy) Regulations 2021. The Regulation 11.2(d) of the said Co-generation Regulations 2021 is reproduced as under:

“The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under.”

(iii) Respondent further submitted that later on, this Hon'ble Commission has issued the following amendments:

(a) Vide 1st amendment (notified on dated 20.01.2023) to the Cogeneration Regulations, 2021 the words “additional surcharge” is omitted from Regulation 11.2(d) of the Principle Regulation.

(b) 2nd amendment (notified on dated 07.04.23) to the OA Regulations, 2021 provides that additional surcharge shall not be levied in case a person is availing power from the plant established as captive generation plant for his own use.

(iv) In view of above amendments, levy of additional surcharge on the consumed units has already been stopped from the monthly energy bills.

(v) Respondent No. 1 has disputed refund of already paid amount of additional surcharge. It is submitted by Respondent No. 1 that answering respondent has billed additional surcharge as per Provisions of Regulations as amended from time to time. Thus, question of refund does not arise. Even otherwise the petitioner's claim of refund of already paid amount is barred by limitation. The present petition was filed before this Hon'ble Commission only in Oct-Nov 2023 whereas the petitioner is claiming recovery/refund of additional surcharge billed since November 2017. It is further submitted that respondent is not able to verify the claim amount as no documentary evidence in this regard submitted.

(vi) Respondent no. 1 further submitted that, as per Section 3 of the Limitation Act, 1963, any suit instituted after the prescribed period shall be dismissed. Article

113 of the Schedule of the Limitation Act, 1963 provides a limitation of 3 years from the date when right to sue accrues. In the instant case, the right to initiate legal proceedings arose at the time when the answering respondent issued the monthly energy bills incorporating the additional surcharge. Applying this test of limitation Petitioner is not entitled to claim refund and prayer of refund ought to be rejected by this Hon'ble Commission. As such, the Petitioner's claim is barred by the law of limitation for not having taken out appropriate proceedings for recovery/refund within the prescribed time period. Answering Respondent crave leave of this Hon'ble Commission to refer to and rely upon various judicial pronouncement in this regard at the time of hearing. In view of above submission, the recovery/refund claim preferred by the Petitioner against the Respondents is time barred as per the Limitations Act, 1963 and thus refund as prayed for cannot be granted.

(vii) Respondent No. 1 also submitted that Petitioner is solely relying on the judgment of the Hon'ble Supreme Court dated 10.12.2021 in "Maharashtra State Electricity Distribution Company Limited Vs. JSW Steel Limited and Others" (2022) 2 SCC 742, in support of its claim of refund. This submission of the petitioner is devoid of merit as the direction for refund of additional surcharge in the case of M/s JSW Steels case supra is applicable only for the parties to the civil appeals no. 5074-5075/2019 and cannot be made applicable universally. Respondent relied upon the 9 Judge Constitution bench judgement of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India [1997 (89) E.L.T. 247 (S.C.) Para 18,70, 99(iv)] in which according to the respondent no. 1, Hon'ble Supreme Court while dealing with almost identical aspect held and observed by Majority that it is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. This, Hon'ble Commission in the case of M/s Vippy Industries Limited Vs MPPKVVCL, Indore (Petition No. 32 of 2023 Judgment dated 16.11.2023) relying upon the judgment of Hon'ble Supreme Court in Mafatlal Industries Ltd supra has already rejected the similar prayer of refund. Thus, petitioner is not entitled for refund as claimed in the petition.

14. From the submissions of the parties, Commission has noted that there is no dispute on the fact that respondent No. 1 has stopped levying additional surcharge on captive power consumption of petitioner with effect from May 2023. There is dispute on levying additional surcharge on captive consumption prior to May 2023 and also in respect of refund/adjustment of amount being claimed by petitioner from Nov 2017 onwards.
15. Let us discuss the validity of levying additional surcharge on captive power consumption by respondent no. 1 prior to May 2023. The specific issue regarding applicability of additional surcharge on captive use of power has been dealt with by Hon'ble APTEL in its Judgment dated 27.03.2019 passed in Appeal No. 311 & 315 of 2018 in the matter of M/s JSW Steel Ltd. & Ors. v. MERC & Anr. This order was stayed by Hon'ble Supreme Court initially on 01.07.2019. Subsequently, Hon'ble Supreme Court vide Order dt. 10.12.2021 in Civil Appeal No. 5074-5075/ 2019 upheld the order dated 27.03.2019 of Hon'ble APTEL. As such the matter of applicability of additional surcharge on captive power consumption attained finality on 10.12.2021. We have already decided similar petitions of levying additional surcharge on

captive consumption of power based on aforesaid Judgment whereby it was held that additional surcharge is not applicable in case of captive consumption by a consumer from its captive generating plant. The operating paras of order dated 10.12.2021 of Hon'ble Supreme Court passed in Civil Appeal No. 5074-5075/ 2019 are reproduced as under: -

- “11. *Sub-section (4) of Section 42 shall be applicable only in a case 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 and only such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that as per the Scheme of the Act, there can be two classes of consumers, (i) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee/ licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act, 2003.*
12. *The term “consumer” is defined in Section 2(15), which reads as under:*
- “(15) “consumer” means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of licensee, the Government or such other person, as the case may be;”*
13. *Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of 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. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/ or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature. However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person – distribution licensee of his area of supply. **So far as captive consumers/ captive users are concerned, no such permission of the***

State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers/ captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003. In the case of the captive consumers, captive users, they have also to incur the expenditure and/ or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/ captive user, they have also to incur the expenditure and/ or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/ captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.

14. *Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/ invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/ or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 41(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/ captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/ or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.*
15. *In view of the above and for the reasons stated above, the present appeals fail and deserve to be dismissed and are accordingly dismissed.....”*

(Emphasis Supplied)”

16. **Conclusion**

- i) Commission through 1st amendment in Madhya Pradesh Electricity Regulatory Commission (Co Generation and Generation of Electricity from Renewable Sources of Energy (Revision-II) Regulations 2021 notified on 20th Jan 2023 has omitted applicability of additional surcharge in respect of renewable energy-based captive generating plants from clause (d) of the Regulation 11.2 of the Principal Regulations. Commission has also specified in Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, (Revision-I) 2021 (Second Amendment) {ARG-24(I)(ii) of 2023} notified on 05.04.2023 that additional surcharge shall not be leviable in case a person is availing supply from the plant established as

captive generation plant for his own use. As such, additional surcharge is not applicable in respect of captive generating plants. Therefore, as per the provisions of MPERC (Co Generation and Generation of Electricity from Renewable Sources of Energy (Revision-II) Regulations 2021 notified on 20th Jan 2023, additional surcharge on the captive consumption from renewable source captive generating plant was not leviable since 20th Jan 2023.

ii) However, in light of the final verdict of Hon'ble Supreme Court in the matter in Civil Appeal no. 5074-5075/2019 and in view of the foregoing observations, it is held that the additional surcharge under Section 42(4) of the Electricity Act 2003 is not leviable on the quantum of power consumed by Petitioner from its captive power plant.

17. Now the question crops up for consideration, whether petitioner is entitled for refund of additional surcharge collected by West Discom? If yes, from which month?

Petitioner sought relief of refund additional surcharge from Nov. 2017 which is 33,27,828/- Commission has observed that Hon'ble Supreme Court in case of M/s JSW Steel Vs MERC, Hon'ble Apex Court held that the additional surcharge under section 42(4) of the Electricity Act, 2003 (36 of 2003), is not leviable in case of captive power plants. Commission is of considered view that order dated 10.12.2021 of Hon'ble Supreme Court in M/s JSW Steel Ltd case becomes law of land with effect from 10.12.2021, therefore additional surcharge is not leviable on captive consumption of the consumers from 10.12.2021 onwards.

Let us now deal with the question of refund of additional surcharge from November 2017 till 10.12.2021. Commission would rely on the judgement passed by Nine Judges Constitutional Bench of Hon'ble Apex Court in case of **Mafatlal Industries Ltd. vs. Union of India, (1997) 5 SCC 536**, Hon'ble Apex Court has observed that,

"Para 99-

iii. *A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has*

ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition. The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

- iv. *It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. -----"*

Commission noted that petitioner has not established that burden of additional surcharge recovered from them has not been passed on and whether petitioner actually suffered a real loss which could not be recovered from the end users.

Lastly, Commission is also of the considered view that the directions for refund of additional surcharge for past period in the case of M/s JSW Steels were issued in the specific situation applicable in that case. Refund of levy of additional surcharge is however applicable only for the parties to the civil appeals no. 5074-5075/2019 and cannot be made applicable universally without taking into account judgement of Hon'ble Supreme Court in case of ***Mafatlal Industries Ltd. vs. Union of India, (1997) 5 SCC 536.***

18. Petitioner is entitled for relief of injunction to the effect that the respondent is restrained from recovering additional surcharge in future and refund the amount from 10.12.2021, i.e. the date on which Supreme Court passed that under sec 42(4) of the Electricity Act, additional surcharge is not applicable to captive consumers.

Hence, petition is partially allowed, and following order is passed: -

- a. So far prayer related to refund from Nov. 2017 before 10.12.2021 is concerned, same is

devoid of merit, therefore, dismissed.

- b. It is directed that respondent shall refund the amount which petitioner had deposited on account of additional surcharge on captive consumption with effect from 10.12.2021 onwards by way of monthly adjustment.
- c. Respondent is directed not to recover additional surcharge from petitioner in future in terms of decision of Hon'ble Supreme Court in case of CA 5074-5075 of 2019 dated 10.12.2021.

(Prashant Chaturvedi)

Member

(Gopal Srivastava)

Member(Law)

(S.P.S. Parihar)

Chairman