

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: Petition under Rule 9 and 10 of the Madhya Pradesh Electricity Regulatory Commission (Rules of Business) Regulations, 2016 For Quashing and Setting aside of the Impugned letters dated 18-01-2020, 23-01-2020, 15-02-2020 and 06-06-2020 as issued by Respondent No.1 .

Petition No. 52 of 2020

ORDER

(Date of Order: 22nd September' 2021)

1. M/s. Shriniwas Board And Paper Pvt. Ltd

42-44, Industrial Area, No. 1, A.B. Road,
Dewas – 455 001 (M.P.)

- Petitioners

2. M/s. Shree Balaji Enterprises

101, Gold Star Building, M.G. Road,
Indore (M.P.)

Vs

1. Madhya Pradesh Paschim Kshetra Vidyut Vitran Co. Ltd,

GPH Campus Polo Ground,
Indore – 452015 (M.P.)

- Respondents

2. Madhya Pradesh Power Management Co. Ltd.

Shakti Bhawan, Rampur,
Jabalpur – 482008 (M.P.)

Shri Gautam Gupta, Advocate and Shri Dhruv Verma, Advocate appeared on behalf of the Petitioners.

Shri Shailendra Jain, Deputy Director appeared on behalf of the Respondent No.1.

The petitioners M/s. Shriniwas Board And Paper Pvt. Ltd and M/s. Shree Balaji Enterprises filed the subject petition under Rule 9 and 10 of the Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2016 with the prayer to quash and set aside various impugned letters issued by the Respondent No.1 raising invoices for open access charges to the petitioner No.1.

2. The petitioners broadly submitted the following in the subject petition:

- (i) *That the Petitioner No. 2 is Partnership Firm incorporated under the relevant provisions of The Indian Partnership Act, 1932 vide partnership deed 29.03.2013, having its registered office at 101, Gold Star Building, M.G. Road, Indore that is engaged in the business inter alia to carry on in India, or elsewhere, to generate, receive, produce, improve, buy, sell resell, acquire, use, transmit, accumulate, employ, distribute, develop, handle, protect, supply and to act as agent, representative, consultants, collaborators, or otherwise to deal in electricity power or any other energy from conventional/non-conventional energy sources on a commercial basis in all its branches at such place or places as may be permitted by appropriate authorities by establishment of Biomass power plants, thermal*

power plants, hydraulic power plants, atomic power plants, hydraulic power plants, atomic power plants, wind power plants, solar power plants and other power plants based on any source of energy as may be developed or invented in future and to construct, lay down, establish, promote, erect, build, install, commission, carry out and run all necessary power substations, work shops repair shops, wires, cables, transmission lines.

- (ii) That the Petitioner No. 1 is a Company Incorporated under the relevant provisions of the Company Act, 1956. Petitioner No. 1 is a partner in the Petitioner No. 2 Firm vide the Deed of Addition of Partner in Partnership of M/s Shree Balaji Enterprises, Indore dated 31.10.2014.
- (iii) Respondent No. 1 is an electricity supply company in MP looking after supply in western region of the State and respondent No. 2 has been made holding company for all the DISCOMS of MP and acts as Nodal Agency.
- (iv) That the Petitioner No. 2 requested/applied before Respondent No. 2 for Long Term Open Access (LTOA) under MPERC (Terms & Conditions for the intra-state in Madhya Pradesh) Regulation, 2005 for grant of the permission to avail Intra-State Long term Open Access for 2 MW Solar Power Project installed at Village Rojhani, Teh-Barod, District Shajapur for third party sale of power to one M/s Jaideep Glass Works Pvt. Ltd., which was considered by the respondent no. 2 and thereby grant the aforesaid permission to Petitioner No. 2.
- (v) Further, pursuant to the aforesaid, a Power Purchase and Wheeling Agreement dated 10.01.2014 for Solar P.V. based power plant (PP&WA) was executed between the Petitioner No. 2 and Respondent No. 1, Respondent No. 2 and one M/s M and B Switchgears Limited, (now known as M/s Ujaas Energy Ltd.) being the developer, wherein the Respondents herein have agreed to the proposal of Petitioner No. 2 to wheel the power generation through Distribution/Transmission system for Third Party Sale, on payment of Wheeling charges and other charges as decided by the MPERC.
- (vi) That pursuant to the aforesaid the Petitioner No. 2 Firm on 31.10.2014 executed a Deed of Addition of Partner in Partnership of M/s Shree Balaji Enterprises (Hereinafter referred to as "Amended Partnership Deed") in its already continuing Partnership Deed dated 29.03.2013, wherein Petitioner No. 2 firm admitted Petitioner No. 1 as one of the partners w.e.f. 31.10.2014. Further, as per the aforesaid Amended Partnership Deed, it was agreed that the profit and loss of the Petitioner No. 2 firm shall be divided or borne by the partners in the following proportion:

01.	Shri Anand Bangur	37.00%
02.	Smt. Shilpi Agrawal	37.00%
03.	M/s Shrinivas Board and Paper Pvt. Ltd.	26.00%

- (vii) *That consequently, the Petitioner No. 2 Firm requested Respondent No. 1 vide its Application for Grant of LTOA permission to change in Third Party customer to Captive use at its own premises in favour of Petitioner No. 1. vide its application dated 09.01.2015 by furnishing a notarised photocopy of amended Partnership Deed stating that Petitioner No. 1 is having a share of 26% in profit and loss. The same for was forwarded by Respondent No. 1 to Respondent No. 2*
- (viii) *Respondent No. 2 vide its letter bearing no. 04-02/PS/LS/OA-/Shree Balaji/630 dated 12.03.2015, having considered the submissions of Petitioner No. 2 and feasibility report of Respondent No.1, allowed the aforesaid Application by Petitioner No. 2 for change of Third Party Customer to Captive use of power at its own premises i.e. in favour of Petitioner No. 1, having contract demand 1000KVA as per the Clause 17.1 of MPERC (Terms and Conditioned for Intra State Open Access in Madhya Pradesh) Regulation 2005, for a period of Plant life.*
- (ix) *Subsequently, Petitioner No. 2 executed a Supplementary Power Purchase and Wheeling Agreement for Solar PV based power plants under REC Mechanism dated 25.03.2015 with Respondent No. 1, 2 and one M/s Ujaas Energy Ltd., being the developer; whereby the erstwhile Third Party consumer i.e. M/s Jaideep Glass Works Pvt. Ltd., Indore was changed by virtue of Petitioner No. 2 obtaining Long Term Open Access (LTOA) permission from Respondent No. 2 vide letter bearing no. 04.-02/PS/LS/OA-/Shree Balaji/630 dated 12.03.2015 for captive consumption at their HT premises M/s Shree Niwasan Board & Paper Pvt. Ltd., the Petitioner No. 1 herein, which is situated in the jurisdiction of Respondent No. 1, which shall deem to be a part of the agreement. Further, all the terms and conditions of the PP&WA executed on 10.01.2014 shall remain effective till the entire period of the agreement. As such, the Petitioner No. 1 Company being partner of Petitioner No. 2 Firm had started to use Captive Powers as provided under Rule 3(1)(a) of the Electricity Rules, 2005.*
- (x) *Thereafter, another Supplementary Deed of Partnership of Petitioner No. 2 dated 30.03.2016 was executed by Petitioner No. 1 and the other partners of the firm, being Sh. Anand Bangur and Smt. Shipli Agrawal, whereby the partners decided that the principal place of business of the petitioner no. 2 firm shall be situated at 116, Mahashweta Nagar, Ujjain, Madhya Pradesh.*
- (xi) *A circular dated 16.02.2019 was issued by Respondent No. 1 whereby guidelines were issued in the matter of assessing Captive Status of Consumers, as per the provisions of Indian Electricity Act 2003 r/w Electricity Rules, 2005. Accordingly, Respondent No. 1 requesting the Petitioner No. 1 regarding its certification of captive status, and further*

requested the latter to furnish documents in order to ascertain the Captive Status. The same were subsequently provided by Petitioner No. 1, mentioning therein specifically that the Petitioner No. 1 is operating a captive generating plant within the meaning of Section 2(8) & Section 9 of the Indian Electricity Act, 2003 read with Rule 3(1)(a) of the Electricity Rules, 2005 by virtue of it being the partner of Petitioner No. 2 Firm. Further, it has been categorically specified that the Petitioner No. 1 Company has 26% ownership in the Captive Generating Plant of Petitioner No. 2 Firm and the necessary declaration has been made by the Authorised representative of Petitioner No. 2 Firm in this regard on 27.07.2019.

- (xii) Respondent No. 1 also sought the certificate for total generation and consumption of captive users and non-captive users of the Captive Generating Plant for the FY 2017-18 from Petitioner No. 1 Company. Accordingly, vide its reply dated 08.09.2019, Petitioner No. 1 furnished the certificate of total generation and consumption of captive users as for the FY 2017-18, along with a certificate by Chartered Accountant. Thereafter Respondent No. 1 Requested Petitioner No. 1 to furnish certain additional documents for further scrutinise and verify the eligibility of Petitioner No. 1 as captive user. Accordingly, Petitioner No. 1, furnished the additional information/documents in respect of Petitioner no. 1 and 2 as requested by Respondent No. 1.
- (xiii) To the shock of the Petitioners herein, the Respondent No. 1 vide its letter bearing No. MD/WZ/05/COM/HT/992 dated 18.01.2020 informed Petitioner No. 1 that on observing and scrutinizing the documents as provided by Petitioner No. 1, it was alleged that the consumer, Petitioner No. 1 Company could not prove 26% ownership in the Captive Generating Plant i.e. SPV Petitioner No. 2 Firm, and hence the applicable open access charges would be levied upon Petitioner No. 1 Company for FY 2017-2018 and 2018-19 on consumer ID 5015904000. Further, vide another letter bearing No. 1627 dated 23.01.2020 (in Hindi), it was alleged that the Petitioner No. 1 Company could not meet the conditions of Captive Status for the for FY 2017-2018 and 2018-19 and accordingly it was alleged that exemption is granted to the Petitioner No. 1 as captive status for the years 2017-18, 2018-19 and therefore after calculating the deductions of the cos subsidy given to the Petitioner No. 1 till the month of December, 2019, allegedly a supplementary amount of Rs. 85,07,966/- (Rupees Eighty Five Lakhs Seven Thousand Nine Hundred and Sixty Six Only) was demanded by Respondent No. 1 from Petitioner No. 1. Further, it was alleged that the Petitioner No. 1 Company shall make the said payment within 15 days of receipt of the said letter dated 23.01.2020, failure of which, appropriate action shall be initiated against Petitioner No. 1 company.
- (xiv) Aggrieved by and in response to the said letter bearing No. MD/WZ/05/COM/HT/992 dated 18.01.2020 as issued by Respondent No.

- 1, Petitioner No. 1 company issued a letter dated 28.01.2020 titled as "Clarification of ownership and to remove charges to the applicant as per your letter No. MD/WZ/05/COM/HT/992 Indore dated 18.01.2020", wherein the Petitioner No. 1 inter alia categorically denied the averments as put forth by the Respondent No. 1 regarding the status of Captive User of Petitioner No. 1. While denying the aforesaid, it was xiv) stated therein that share of the proprietary interest of Petitioner No. 1 in the partnership firm of Petitioner No. 2 Firm is 26% and documents pertaining to the partnership as well as the balance sheet along with the other documents related to partnership were provided to Respondent No. 1. Further, it was stated that the gain and loss of Petitioner No. 1, i.e. proprietary interest with the partnership of Petitioner No. 2 Firm for 2 years Balance Sheet was also furnished before Respondent no. 1.
- (xv) Pursuant to the aforesaid, Respondent No. 1 sent its reply to the Petitioner letter vide its letter bearing No.MD/WZ/05/COM/HT/2667 dated 15.02.2020, wherein it was alleged inter alia that the documents submitted by Petitioner No. 1 company do not establish the ownership in the Captive Generative Plant i.e. Petitioner No. 2 Firm and concluded that Petitioner No. 1 is not having any proprietary interest and control over captive generating solar plant, as the partnership deed is silent on this issue, and accordingly it was alleged that petitioner no. 1 does not satisfy the criterion of ownership (26% or more) as provided under Electricity Rules, 2005 as a partner in the Petitioner No. 2 Firm and further directed the petitioner no. 1 to make the open access payment immediately.
- (xvi) That to the further shock of the Petitioner No. 1, the Respondent No. 1 disconnected the electricity connection on 23.07.2020 date at the premises of Petitioner No. 1. Therefore the Petitioner No. 1 issued a letter dated 24.07.2020 stating therein that Petitioner No. 1 requested to restart the supply of electricity as its plant by depositing the amount in instalments, but the same was deposited in protest. It is pertinent to note that amidst the ongoing nation-wide lockdown due to the COVID-19 Pandemic, the Respondents had no authority to cut off the electricity supply. Yet, the Respondent No. 1 arbitrarily have cut off the petitioner no. 1's electricity supply. This shows the mala-fide illegal, unlawful, contrary to law and arbitrary conduct of the Respondent no. 1 towards the Petitioner No. 1. However, in order to restore the electricity connection in its premises, the Petitioner No. 1 was left with no option but to pay to the Respondent No. 1 in protest the part open access charges in part, though it is pertinent to mention that the same has only been paid in protest (emphasis supplied).
- (xvii) Aggrieved by the impugned letters dated 18-01-2020, 23-01-2020, 15-02-2020 and 06-06-2020, the Petitioners herein are left with no option but to approach this Hon'ble Commission to quash and set aside the impugned letters as issued by the Respondent No. 1.

3. With the foregoing submissions, the petitioners prayed the following in the subject petition:
- a. *Direct the Respondent No. 1 not to initiate any coercive action against the Petitioners.*
 - b. *Hold that no open access charges are leviable upon the Petitioner No. 1 being Captive User for the Captive Generating Solar Plant under the provisions of Section 2(8) Indian Electricity Act, 2003 r/w Rule 3(1)(a) of the Electricity Rules, 2005.*
 - c. *To Quash and set aside the Impugned letters dated 18.01.2020, 23.01.2020, 15.02.2020 and 06.06.2020 as issued by Respondent No.1 to the Petitioner No. 1 and the invoices whereby Respondent No. 1 has unilaterally and illegally made a demand of open access charges on the Petitioner for the FY 2017-19 and FY 2018-19, as the same are illegal, unlawful, contrary to law and arbitrary;*
 - d. *Direct Respondent No. 1 to withdraw the impugned letters dated 18.01.2020, 23.01.2020, 15.02.2020 and 06.06.2020 and the invoices for demand of open access charges on power sourced by Petitioner No. 1 Company from its Captive Generating Plant, i.e. Petitioner No. 1 Firm.;*
 - e. *Restrain the Respondent No. 1 from charging open access charges on power sourced by Petitioner No. 1 company from its Captive Generating Plant, i.e. Petitioner No. 2 firm.;*
 - f. *Direct the Respondent No. 1 to refund to the Petitioner No. 1 the part open access charges already been paid in protest by the Petitioner No. 1.*
 - g. *Pass any other or further order(s) as this Hon'ble Commission may deem fit and proper in favour of the petitioners and against the respondents.*

4. The petition was admitted on 02.11.2020. Ld. Counsel who appeared for the petitioner requested to grant ex-parte interim stay on levy and collection of open access charges during pendency of the petition. Having heard the petitioner, ex-parte interim stay was not considered without hearing the Respondent. The petitioner was directed to serve copy of the petition to the Respondent at the earliest and report compliance to the Commission. The petitioner was at liberty to file a formal application under order 39 Rule (1) & (2) of CPC 1908 and in such case, a copy of the same must be served/provided to the Respondents, along with copy of the subject petition. The Respondents were asked to file their replies to the petition within two weeks, thereafter.

5. At the next hearing held on 04.12.2020, the Commission observed the following:
- (i) The Respondents had sought time to file reply.
 - (ii) Ld. Counsel for the petitioner pressed again for granting interim stay in the matter, and further pleaded that the application for ad-interim ex-party stay filed earlier may be treated as as application under order 39 Rule (1) & (2) of CPC 1908.
 - (iii) The Commission observed that there is no such provision to revive the application which was already rejected on merit under relevant provisions of law namely Code of Civil Procedure. It was mentioned in Commission's daily order that the matter regarding interim relief can be taken up only

after the petitioners file a fresh petition for interim relief under order 39 Rule (1) & (2) of CPC 1908.

- (iv) The Respondents were directed to file reply within ten days. The petitioners were directed to file rejoinder within a week, thereafter.

6. At the hearing held on 19.01.21, Ld. Counsel for petitioners had sought adjournment due to some personal difficulty which was considered by the Commission and the hearing on the case was deferred and fixed for hearing on 09.02.2021.

7. At the hearing held on 09.02.2021, the Commission observed the following:

- (i) By affidavit dated 08.12.2020, the Respondent No. 1 filed reply to the subject petition.
- (ii) The petitioner filed fresh application under Order 39 Rule 1 and 2 of CPC 1908 seeking following orders during pendency of the subject petition:
- (a) *“Direct the Respondent No. 1 not to disconnect the electricity connection of the Petitioner No. 1.*
- (b) *Grant ad-interim stay of operation of the impugned letters dated 18.1.2020, 23.01.2020, 15.02.2020 and 06.06.2020 as passed by Respondent No.1.*
- (c) *Direct the Respondent No. 1 to refund to the petitioner No. 1, the part open access charges already paid in protest by petitioner no. 1,”*

8. At the hearing held on 09.02.2021, Ld. Counsel who appeared for the Petitioners and the representative who appeared for the Respondent No. 1 placed their arguments on the issue of the interim relief under order 39 Rule (1) & (2) of CPC 1908. Ld. Counsel for the Petitioners stated that the Respondent No. 1 in the past disconnected the supply of the Petitioner No. 1 on non-payment of the open access charges however the supply was reconnected on part payment made under protest towards open access charges by Petitioner No. 1. On the other side, the representative for the Respondent No. 1 stated that the Petitioner No. 1 had requested the Respondent No. 1, in writing, for sanction of instalments for payment towards open access charges and the Petitioner No. 1 has been allowed by the Respondent No. 1 to make payment in 12 equal instalments. He further stated that the Petitioner No. 1 is depositing the amount in instalments since July’ 2020 and balance instalments shall be completed by June’ 2021. With the aforesaid submission, the Respondent No. 1 stated that having allowed the Petitioner No. 1 to pay in 12 instalments, there is no prima facie case or balance of convenience in favour of the petitioners to grant any interim relief sought in the instant application. Ld. Counsel for the petitioners in his response stated that the Petitioner No. 1 is making payments in instalments under protest and the electricity connection of the Petitioner No. 1 be not disconnected by the Respondent No. 1.

9. Having heard both the parties on the issue of interim relief, the Commission observed that Petitioner No. 1 has already been allowed by the Respondent No. 1 to make the payment in 12 instalments and the Petitioner No. 1 had been making payments towards open access charges since July’ 2020 although under protest. This arrangement which is mutually agreed has been in practice since July’ 2020 and the payment of

instalments shall be completed by June' 2021. The Commission directed that no coercive action be taken against the Petitioner No. 1 so long the payment of instalments as mutually agreed continued. With the aforesaid observation and direction, the application filed by the petitioners in the subject petition under Order 39 rule 1 and 2 of CPC 1908 was disposed of. The petitioners were directed to file rejoinder within 10 days to the reply filed by both the Respondents in the matter. The case was fixed for arguments on 23.03.2021.

10. At the hearing held on 23.03.2021, it was observed that the petitioners had not filed their rejoinder to the reply filed by both the Respondents. Ld. Counsel who appeared for the Petitioners stated that he did not intend to file Rejoinder and requested to allow hear him in final arguments in the matter. The case was fixed for final arguments on 20th April 2021.

11. Due to outbreak of covid 19 and on the request of the petitioners that their Counsel was suffering from Covid pneumonia, the case was fixed for final arguments on 20.07.2021.

12. At the hearing held on 20.07.2021, Ld. Counsel for the petitioner and the representative who appeared for the Respondent No.1 concluded their arguments. The parties were directed to file their written submissions on arguments within two weeks. The petitioners were directed to file a copy of Registered Partnership Deed also along with written submission. The case was reserved for order on compliance of the aforesaid directives within stipulated time.

13. The Respondent No. 1 (M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.) on affidavit broadly submitted the following in its reply to the petition:

“(i) That, from perusal of averment made in the petition along with relief claimed, it is apparent that, the petitioners have filed present petition challenging the legality and validity of demand of cross subsidy surcharge raised upon failure to establish the captive status of power generating plant of petitioner No. 2.

(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: Applicable statutory provisions governing Open Access

(iii) That, Section 42 of the Electricity Act 2003 (The Act) governs the distribution open access. The relevant part of the Section 42 of the Act is

reproduced as under for ease of reference:

“Section 42: Duties of Distribution licensees and Open Access:

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

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

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

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

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

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

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003), by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

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

- (4) *Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall*

be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply. xxx xxx xxx”.

Emphasis supplied

- (iv) *From the bare perusal of the aforesaid provision it is clear that open access is available upon the payment of open access charges prescribed by this Hon'ble Commission. Further a statutory exemption is available to a person who has established a captive generating plant only to the extent of payment of cross subsidy surcharge.*
- (v) *That, while fixing the tariff of electricity, the tariff to be recovered from the subsidizing category i.e industrial consumers, non-domestic consumers etc., is being fixed at a rate more than the cost of supply. On the other hand, tariff to be recovered from the subsidised category i.e. agriculture consumer and other weaker section of the society, is being fixed at the rate below the cost of supply. This additional tariff on the subsidizing category is referred as cross subsidy. Whenever the consumer of the subsidizing category avail supply from a source other than the distribution licensee of the area, licensee loses element of cross subsidy. This element of cross subsidy is recovered from the person who is availing supply from another source. The recovery of cross subsidy is known as cross subsidy surcharge payable by the subsidizing category i.e., industrial consumers to the distribution licensee. The levy of cross subsidy surcharge is for balancing the cost of supply as between the subsidizing consumers and subsidized consumers of the licensee and the said levy is used for compensating the tariff recovered from the subsidized category below the cost of supply. If in any case distribution licensee not recovered the cross-subsidy surcharge, the tariff of such weaker section of the society shall be increased to that extant.*

RE: Status of Solar Power Generating Plant of Petitioner No.2:

- (vi) *That, section 2(8) to the Act' read with Rule 3 of Electricity Rules 2005 (Rules of 2005) lays down the requirement of a captive generating plant. The relevant part of these provisions is reproduced as under:*
- (vii) *Electricity Act 2003*
2(8) "Captive Generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association."

Electricity Rules 2005:

"3. Requirements of Captive Generating Plant.

- (1) *No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless*

- (a) *in case of a power plant*
- (i) *not less than twenty six percent of the ownership is held by the captive user(s), and*
- (ii) *not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:*

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

- (b) *in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy (s) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including -*

Explanation :- (1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and (2) the equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustration: In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

3(2) It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

Explanation.- (1) For the purpose of this rule.-

- a. "Annual Basis" shall be determined based on a financial year;*
- b. "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;*
- c. "Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;*
- d. "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity.*

(viii) Similar provision is also provided in the Madhya Pradesh Electricity Regulation Commission (Power Purchase and other matters with respect to conventional fuel based captive power plants) Regulations, (Revision-I) 2009.

(ix) That, aforesaid Rule-3 of the Rules of 2005 provides for the criteria to qualify as a captive generating plant. There are following two requirements to be satisfied by the power Generating Plant to qualify as a captive generating plant:

- (a) Ownership i.e., 26% of the ownership;*
- (b) Consumption of 51% of the units generated annually.*

Rule-3 specifically prescribes the conditions to be satisfied by the Power Plant to be qualified as captive power plant. Therefore, a power plant will be qualified as a captive power plant only when it satisfies both the conditions. Even if any one of the conditions is not fulfilled, the power plant shall not eligible for its captive status.

(x) That, with regard to ownership Explanation 1 below the Rule 3 of the Electricity Rules 2005 provides as under:

- c. "Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases, ownership shall mean proprietary interest and control over the generating station or power plant;*

(xi) It may be seen that there are following two possible modes to have ownership over the captive generating plant

- a. In case of power plant set up by a Company: By way of holding of Equity Share capital with voting rights.*
- b. In case power plant set up by any entity other than Company: By way of proprietary interest and control over captive generating plant.*

- (xii) *That, in the present case power plant is set up by petitioner No. 2, which is a partnership firm. Therefore, to be qualified as captive generating plant captive user should have at least 26% proprietary interest and control over the captive generating plant.*
- (xiii) *That, petitioner No. 1 is one of the partner in the petitioner No. 2. As per partnership deed (Annexure-P/2 at page 58 to the petition) petitioner No.1 has the share of 26% in the profit or loss of said partnership firm. Here, it is noteworthy to mention that as per above quoted provisions of the Rules of 2005, to be qualified as captive generating plant petitioner No.1 should have proprietary interest (i.e. title over generating plant on his own) and control (i.e. right to deal with the generating plant as per his own wish) to the extent of 26%. It is submitted that merely share of 26% in the profit/loss of partnership firm is not sufficient to establish the ownership over the captive status.*
- (xiv) *It is undisputed fact that power generating plant in question is setup by the petitioner No. 2 & title of the said plant also belongs to the petitioner No. 2 and not to the petitioner No.1 which is separate legal entity. This fact is also admitted by the petitioners in the petition itself. The relevant part is reproduced is as under:*

14. With the above submissions, the Respondent No.1 prayed the following in its reply to the subject petition:

- i) Petitioners are failed to establish any prima facie case, balance of convenience or irreparable loss/injury, hence prayer of interim relief may please be rejected.*
- ii) Petition filed by the petitioners is devoid of merit; therefore same may please be dismissed.*
- iii) Condone any inadvertent omissions/errors/shortcomings 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.*

15. The Petitioners by affidavit dated 01.02.2021 submitted the following in their written submission: -

- “1. The Petitioners have filed the titled Petition which is pending adjudication before this Hon’ble Commission and which was fixed for final hearing on 20.07.2021. The contents of the petition may be treated as part and parcel of these Written Submissions. Arguments on merits were heard and concluded by parties vide the said date of hearing. Furthermore, vide the said hearing, this Hon’ble Commission was most pleased to direct the parties to file their written submissions. It is submitted that the order was uploaded on the MPERC website only on 26.07.2021, hence the written submissions are being filed now.*

SUBMISSIONS ADVANCED:

- A. *That the impugned letters dated 18-01-2020, 15-02-2020 and 06-06-2020 issued by respondent no.1 is totally arbitrary, illegal and vague in nature and same is issued without application of mind and hence liable to be quashed and set aside.*
- B. *That the petitioner no. 2 is a partnership firm and the petitioner no.1 is one of the partners of the firm. That the matter of fact remains that the petitioner no.1 has the proprietary interest in the captive generating plant of Petitioner no 2 Firm.*
- C. *That petitioner no.1 is a partner in the petitioner no.2 firm to the extent of 26% share and has proprietary interest to the extent of 26% on all the assets of the partnership firm i.e. petitioner no.2 and on this short ground alone the impugned letters dated 18-01-2020, 23-01-2020, 15-02-2020 and 06-06-2020 are liable to be quashed and set aside by this Hon'ble Commission.*
- D. *For that the Electricity Rules, 2005 provide for the minimum criteria in relation to ownership, and consumption of a power plant to qualify as a Captive Generation Plant. The twin criteria prescribed under the Rules requires that in case of a power plant (i) not less that 26% of the ownership is held by captive users and (ii) not less that 51% of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for captive use. The aforesaid twin criteria prescribed in the Rules are met in the present case as the same falls within the category of Rule 3(2) Explanation (1)(c) of Electricity Rules 2005 – “..In other cases ownership shall mean proprietary interest and control over the generating station or power plant.”.*
- E. *It is not a dispute that as regards the Captive Generation Plant, Petitioner No. 2, in terms of Rule 3, it is reiterated the Captive user Petitioner No. 1 owns a proprietary interest and ownership to the extent of 26% on all the assets of the partnership firm i.e. petitioner no. 2. It is also without any dispute that the said Captive user also consumers more than 51% of the aggregate electricity generated by the Captive Generation Plant, Petitioner No. 2.*
- F. *That the fact of the matter remains the petitioner no. 2 has set up 2 MW capacity SPV based power plant at village Rojhani Tehsil Barod, District Agar (MP) and obtained permission vide letter dated 26.09.2013 for providing connectivity to company's plant with the system network of the DISCOM/TRANSCO. Thus, the petitioner no.2 is using the 2 MW capacity SPV based power plant since 2013. After 7 years of permission granted, the Respondent No. 1 issued the impugned letters dated 18-01-2020, 23-01-2020, 15-02-2020 and 06-06-2020 giving the vague findings therein.*

- G. *That the findings in letter dated 18-01-2020, 15-02-2020 and 06-06-2020 issued by respondent no.1 is that petitioner no.1 does not satisfy the criteria of ownership (26%or more) as provided under Electricity Rules 2005, as a partner in the partnership firm M/s Shree Balaji Enterprises. However, the respondent no.1 ignored the fact that the actual ownership of the 2 MW SPV is with the partnership firm namely M/s Shree Balaji Enterprises wherein petitioner no.1 is a partner. Therefore, the open access charges have been wrongly imposed upon the petitioner no.1 as the petitioner no.1 is using the electricity in the capacity of a partner in the petitioner no.2 Firm.*
- H. *That without prejudice, even if it is assumed that a partner is using the asset of partnership firm for personal use, then in terms of Section 15 of the Partnership Act, that there is no objection by other partners of the partnership firm i.e. petitioner no.2. and therefore, the petitioner no.1 is duly authorized to consume the electricity without having to prove its ownership of SPV. Needless to mention, that the petitioner no.1 has 26% share in the partnership firm i.e. petitioner no.2. Therefore, the impugned letter should be quashed on this ground alone.*
- I. *That the petitioner no.1 was added to partnership firm i.e. petitioner no.2 vide amended partnership deed dated 31-10-2014. The aforesaid amended partnership deed dated 31-10-2014 wherein the petitioner no.1 was also added as a third partner with 26% share in the partnership firm was submitted to respondent no. 1 and thereafter, the supplementary agreement has also been executed on 25-03-2015 wherein the respondent no.1 and 2 are the parties. Therefore, the fact that petitioner no. 1 was added as partner in petitioner no. 2 firm was appreciated by the respondent no.1 and 2 and the supplementary agreement dated 25-03-2015 is binding upon the respondent no. 1 and 2.*
- J. *That the respondent no.1 and 2 failed to appreciate that the partnership is the relation between the persons who have agreed to share the profit of business carried out by all or any of them acting for all. Therefore, on this ground itself the impugned letters is liable to be quashed and open access charges is liable to be set aside.*
- K. *That as per the provisions of section 2 (31) of M.P. General Clauses Act 1957, the term 'persons' includes any company whether incorporated or not. In the present case the company is incorporated and is a partner in the petitioner no.2 firm; having 26% share in the petitioner no.2 and therefore it cannot be said that the petitioner no.1 is not having proprietary rights in the partnership firm.*
- L. *That it must be appreciated that a partner in the firm is not termed as shareholder and therefore, petitioner no.1 has ownership rights to the extent of 26% share in all the assets of the partnership firm. At the time of*

dissolution, the petitioner no.1 shall be entitled to 26% share in the ownership of the 2 MW capacity plant. The same was not born in mind and arbitrarily ignored at the time of issuance of impugned letters and therefore same is liable to be quashed and set aside.

- M. That since respondent by executing the supplementary agreement with petitioner no.1 and 2 considered petitioner no.1 and 2 as owners of the power plant, the principle of “estoppel” and “waiver” is applicable against the respondent no.1 and 2. Also, as once the proprietary status of the company in the firm has been accepted in feasibility reports as submitted to respondent no.1 and 2 then at a subsequent stage, the respondents cannot go back from the agreement executed between them.
- N. That ownership in relation to a generating station or power plant shall mean proprietary interest and control over the generating station or power plant. Thus, the petitioner no.1 is holding the ownership/proprietary rights in the aforesaid firm as defined u/rule 3 (2) explanation 1 (b) of the Electricity Rules 2005 read with section 5 of the Indian Electricity Act 2003.
- O. That it is for the first time that the Respondent no. 1 through its letter dated 23.01.2020 requested the Petitioner No. 1 to pay open access charges after 7 years of usage by petitioner no. 1 as captive user. Thus impugned letters issued by respondents are liable to be quashed and set aside as same are barred by limitation under the provisions of section 56 of the Indian Electricity Act, 2003 due to the fact that the demand raised by the respondents are after 7 years of captive usage by petitioner no. 1 and 2.
- P. That the Respondent No. 1 has not justified and failed to furnish a detailed and well-reasoned judgment as to on what grounds they concluded that Petitioner No. 1 does not have any proprietary interest and control over captive generating solar plant. The Respondent No. 1 while issuing the impugned letters have failed to apply the principles of equity and natural justice while arriving at its conclusion and as such Respondent No. 1 has unilaterally and illegally issued the impugned letters dated 18.01.2020, 15.02.2020 and 06.06.2020 and made a demand of open access charges on the Petitioner no.1 for the FY 2017-19 and FY 2018-19, as the same are illegal, unlawful, contrary to law and arbitrary.
- Q. Further, amidst the ongoing nation-wide lockdown due to the COVID-19 Pandemic, the Respondents had no authority to cut off the electricity supply. Yet, the Respondent No. 1 arbitrarily have cut off the petitioner no. 1's electricity supply. This shows the mala-fide illegal, unlawful, contrary to law and arbitrary conduct of the Respondent no. 1 towards the Petitioner No. 1. However, in order to restore the electricity connection in its premises, the Petitioner No. 1 was left with no option but to pay to the Respondent No. 1 in protest the part open access charges in part, though it is pertinent to mention that the same has only been paid in protest.

For that the Respondents being a State entity, Petitioners are deemed to be protected under the Doctrine of “Legitimate Expectations”. That under the protection of legitimate expectation, which is the root of the constitutional principle of Rule of Law, which requires regularly, predictability, and certainty of Government’s dealing with the public. It is a settled principle of law that for legitimate expectation to arise, the decision of the Government/ Administrative authority must affect such other person if inter alia by depriving him or some benefit or advantage with either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do so until some rational ground for withdrawing it has been communicated to him and he has been given an opportunity to comment thereon or (ii) he has received assurance from the decision maker that they will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should be withdrawn. In the present case, the Respondent No. 1 has in past appreciated the status of Petitioner No. 1 as a Captive user in its Captive Generation Plant SPV i.e. Petitioner No. 2 Firm by executing the supplementary agreement with petitioner no.1 and 2, thereby considered petitioner no.1 and 2 as owners of the power plant, and has now arrived at a mala-fide decision in this manner despite due cooperation by the Petitioner No. 1 in this regard by answering to each and every correspondence in relation to its status of a captive user, and therefore shows the arbitrariness of the Respondent No. 1 in this regard, which is liable to be subjected to judicial scrutiny. That the impugned letters as issued by Respondent No. 1 are liable to be quashed and set aside on this short ground alone.

2. *In this regard, it is submitted that because the Respondent No. 1 arbitrarily cut-off the electricity supply of the Petitioner herein which rendered the labour force of the petitioner jobless, the Petitioner was left with no option but to make the part payment as referred in letter dated 24.07.2020 (Annexure “P-20”) in duress so that the Respondent No. 1 may restore the electricity supply at its premises.*
3. *It is reiterated that amidst the nation-wide lockdown due to the COVID-19 Pandemic, the Respondents had no authority to cut off the electricity supply. Yet, the Respondent No. 1 had arbitrarily cut off the petitioner no. 1’s electricity supply. This shows the mala-fide illegal, unlawful, contrary to law and arbitrary conduct of the Respondent no. 1 towards the Petitioner No. 1. However, in order to restore the electricity connection in its premises, the Petitioner No. 1 was left with no option but to pay to the Respondent No. 1 in protest the part open access charges in part, though it is pertinent to mention that the same has only been paid in protest.*
4. *It is most humbly submitted that unless the operation of the impugned orders are stayed, the Petitioners will suffer irreparable loss and injury.*

That the balance of convenience is in favour of the Petitioners and against the Respondents. It is therefore, expedient in the interest of justice that this Hon'ble Commission may be pleased to stay the operation of the impugned letters.

In the above premises, it is most respectfully prayed that the Hon'ble Commission may be pleased to:

- a. Direct the Respondent No. 1 not to initiate any coercive action against the Petitioners.*
- b. Hold that no open access charges are leviable upon the Petitioner No. 1 being Captive User for the Captive Generating Solar Plant under the provisions of Section 2(8) Indian Electricity Act, 2003 r/w Rule 3(1)(a) of the Electricity Rules, 2005.*
- c. To Quash and set aside the Impugned letters dated 18.01.2020, 23.01.2020, 15.02.2020 and 06.06.2020 as issued by Respondent No. 1 to the Petitioner No. 1 and the invoices whereby Respondent No. 1 has unilaterally and illegally made a demand of open access charges on the Petitioner for the FY 2017-19 and FY 2018-19, as the same are illegal, unlawful, contrary to law and arbitrary;*
- d. Direct Respondent No. 1 to withdraw the impugned letters dated 18.01.2020, 23.01.2020, 15.02.2020 and 06.06.2020 and the invoices for demand of open access charges on power sourced by Petitioner No. 1 Company from its Captive Generating Plant, i.e. Petitioner No. 1 Firm.;*
- e. Restrain the Respondent No. 1 from charging open access charges on power sourced by Petitioner No. 1 company from its Captive Generating Plant, i.e. Petitioner No. 2 firm.;*
- f. Direct the Respondent No. 1 to refund to the Petitioner No. 1 the part open access charges already been paid in protest by the Petitioner No. 1.*
- g. Pass any other or further order(s) as this Hon'ble Commission may deem fit and proper in favour of the petitioners and against the respondents.*

16. The Respondent No. 1 broadly submitted the following in its written submission on arguments:

- 1. That, from perusal of averment made in the petition along with relief claimed, it is apparent that, the petitioners have filed present petition challenging the legality and validity of demand of cross subsidy surcharge raised upon failure to establish the captive status of power generating plant setup by petitioner No. 2.*

RE: Relevant statutory provisions:

- 2. That, section 2(8) to the Electricity Act 2003 (the Act)' read with Rule 3 of Electricity Rules 2005 (Rules of 2005) lays down the requirement of a captive generating plant. The relevant part of these provisions are reproduced as under:*

Electricity Act 2003

“Section 42: (Duties of Distribution licensees and Open Access):

- (1)
- (2) *The State Commission shall introduce open access in such phases and subject to such conditions (including the cross-subsidy and the operational constraints) as may be specified within the one year from the appointed date and in specifying the extent of open access in successive phases and in determining the charges of wheeling, it shall have due regard to all relevant facts including such cross-subsidies, and other operational constrains:*

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

.....

.....

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

xxx xxx xxx”.

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

Emphasis supplied

- 2(8) *“Captive Generating plant” means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association.”*

Electricity Rules 2005 :

“3. Requirements of Captive Generating Plant.

- (1) *No power plant shall qualify as a ‘captive generating plant’ under section 9 read with clause (8) of section 2 of the Act unless*
- (a) *in case of a power plant*
- (i) *not less than twenty six percent of the ownership is held by the captive user(s), and*
- (ii) *not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the*

captive use:

3. *It may be seen that as per fourth proviso to Section 42 (2) a consumer consuming power from its own captive generating plant is exempted from payment of cross subsidy surcharge (CSS). Apart from CSS, all open access charges are payable by a captive consumer similar to a non captive consumer.*
4. *That, aforesaid Rule-3 of the Rules of 2005 provides for the following criteria to classify a power plant as a captive generating plant:*
 - (a) *26% of the ownership of the captive user*
 - (b) *Consumption of 51% of the units generated annually by captive user.**Present issue pertains to the ownership criteria*

RE: How to ascertain the ownership over 'Captive Generating Plant':

5. *That, with regard to ownership Explanation 1 below the Rule 3 of the Electricity Rules 2005 provides as under:*
 - c. *"Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases, ownership shall mean proprietary interest and control over the generating station or power plant;*
6. *It may be seen that there are following two possible mode to have ownership over the captive generating plant*
 - a. *In case of power plant set up by a Company: By way of holding of Equity Share capital with voting rights.*
 - b. *In case power plant set up by any entity other than Company: By way of proprietary interest and control over captive generating plant.*
7. *The instant case comes within the second criteria, as Petitioner No. 2 who has setup the CGP is a partnership firm and not a company. Therefore, to fulfil the statutory requirement 'proprietary interest and control' of Petitioner No.1 consumer is necessary over the plant.*

RE: Proprietary interest:

8. *Term 'proprietary interest' is not defined in Rules of 2005. Black law dictionary (revised fourth edition) defines term 'Proprietary interest' (at page 1384) as under:*

PROPRIETARY, A proprietor or owner; one who has the exclusive title to a thing; one who possesses or holds the title to a thing in his own right.....

9. *Factual position in the instant matter:*
 - i. *Petitioner No. 2 M/s Shree Balaji Enterprises formed as partnership firm vide partnership dated 29/03/2013 (ref page 46 of the petition) having two partners with various objectives i.e to carry out business of trading in real estate, generation & supply of power and to act as agent/consultants to deal in electricity e.t.c.*

- ii. *Petitioner No. 2 has setup the generating plant on dated 30/09/2013 (ref page 102 of the petition) and started supply of power to a beneficiary M/s Jaideep Ispat vide PPWA dated 10/01/2014 through open access (ref page 65 of the petition). Since, petitioner No. 2 has setup the power plant, ownership of the same is vested with the petitioner No. 2.*
 - iii. *Petitioner No. 1 became partner in the said partnership firm on dated 31.10.2014 (ref page 54 of the petition) however object of the firm remain unchanged. Further, as per amended partnership deed (Point 10 Annexure-P/2 at page 58 to the petition) petitioner No.1 has the share of 26% in the profit or loss of said partnership firm.*
 - iv. *Beneficiary of power generated from plant has been changed w.e.f 12.03.2015 from M/s Jaideep Isapt to Petitioner No. 1 vide supplementary PPWA dated 25/03/2015 (ref page 124 of the petition).*
 - v. *Petitioner No. 2 has setup the power plant and ownership of the same is vested with the petitioner No. 2. Accordingly, subsequent admission of petitioner No. 1 as partner in the petitioner No. 2 with 26 % share in profit or loss of the firm makes no difference as far as ownership of the power plant is concerned. In other word as per Rule of 2005 ownership is defined with reference to the 'proprietary interest and control' and not in terms of share in profit and loss.*
 - vi. *As per Rules of 2005 exclusive title (proprietary interest) of consumer over the plant is necessary to become a captive user/captive generating plant. It is the petitioner No. 2 (a partnership firm) which has ownership over the plant and petitioner No. 1 who is consuming the power generated from the said plant has no exclusive title (proprietary interest) over the plant.*
 - vii. *In view of above, since petitioner No.1 who is the end user of the power, is not posses 26% ownership, plant is not qualified as Captive Generating Plant.*
10. *The fact, that actual owner of the plant is the partnership firm and not the petitioner No. 1 (partner of the firm) has also admitted by the petitioners in the petition itself. The relevant part (page 18 of the petition) is reproduced is as under:*

GROUNDS FOR CHALLENGE

That the findings in letter dated 18-01-2020, 15-02-2020 and 06-06-2020 issued by respondent no.1 is that petitioner no.1 does not satisfy the criteria of ownership (26%or more) as provided under Electricity Rules 2005, as a partner in the partnership firm M/s Shree Balaji Enterprises. However, the respondent no.1 ignored the fact that the actual ownership of the 2 MW SPV is with the partnership firm namely M/s Shree Balaji Enterprises wherein petitioner no.1 is a partner. Therefore, the open access charges have been wrongly imposed upon the petitioner no.1 as the petitioner no.1 is using the electricity in the capacity of a partner in the

petitioner no.2 Firm.

It may be seen that petitioner itself admitted that actual ownership of the plant is with partnership firm. It is the submission of the answering respondent that owner of 2 MW power is partnership and not the petitioner No.1. Hence petitioner No. 1 cannot be treated as captive user and plan is not qualified as captive generating plant.

11. *Without prejudice to the aforesaid submission it is stated that as per Partnership Act 1932 also a partner cannot be considered as owner of the asset. Issue of a partner's ownership over the asset of a partnership firm came under consideration of the Hon'ble High Court of Gujarat in Rajnikant Hasmukhlal Golwala and others vs Natraj Theatre and others. (A.I.R. 11 2000 GUJARAT 80). Considering the various provisions of the Partnership Act 1932 Hon'ble High Court laid down the law in this regard as under:*

25. *Looking to the provisions of the Act, it is very clear that no partner can sell any part of the assets of the partnership firm as belonging to him and this being the position, no partner can ever validly sell or dispose of any of the partnership property as his own property. Partnership property vests in the firm and it does not vest in any of the partners and therefore it would not be possible for any partner to pinpoint any portion of the partnership property as his own property.*

26. *A partner cannot deal with any portion of the partnership property as his own property for the reason that he is not like a co-owner of the property. A co-owner, without the consent of other co-owners, can transfer his interest to a third party and in that event, the third party shall have the same rights which the transferor had and the transferor shall be put in the same position as regards the other co-owners as the transferor himself was before the transfer. By virtue of the provisions of Section 29 of the Act, position of a transferee of a partners interest would not be the same as a transferee of a co-owner's interest. Thus, there being a difference in the partnership and co-ownership, defendant No. 12 shall not have any right which his transferee (transferor) partners had in the partnership property."*

12. *It may be seen that petitioner No. 2 who has setup the power plant is a partnership firm and petitioner No. 1 who is actually consuming power generated from the said plant is one of the partner in the petitioner No. 2. As held by Hon'ble High Court as per provisions of the Indian Partnership Act 1932 a partner cannot be treated as the owner of the assets of the partnership firm. Since consumer of the power has no ownership over the plant, as per Rules of 2005 said plant is not a captive generating plant.*

13. *That, with regard to exemption from cross subsidy surcharge kind attention is drawn towards the following judgment of Hon'ble APTEL in the matter of M/s. Godawari Power & Ispat Ltd V.s The Chhattisgarh State Electricity Regulatory Commission Appal No. 33 of 2012 dated 18/02/2013. The relevant part of the said judgment is reproduced as under:*

19. *The above decision lays down the following dictums:*

(a) *One who is unable to fulfil the twin requirements of Rule-3, is not permitted under the law to have exemption from payment of cross subsidy surcharge.*

.....
(c) *This rule cannot be deviated based on equity.
This decision would squarely apply to the present case.*

20. *The Power of the State Commission to decide about whether the requirements have been satisfied is one thing. At the same time, the power of the State Commission to relax mandates relating to the norms fixed for those requirements fixed by the Rules and the Act is a different thing.*

21. *The Appellant instead of satisfying the mandatory requirements cannot ask the State Commission for deviation from these Rules framed under the Central Act based upon equity which is not permissible under the law.....”*

It may be seen that as per judgment of the Hon’ble APTEL no exemption from cross subsidy surcharge can be provided unless both criteria of Rules of 2005 are fulfilled.

RE: There can be no estoppels against the statute:

14. *That, petitioner is trying to invoke doctrine of promissory estoppel. It is submitted that answering respondent never made any declaration/promise to the petitioner regarding exemption from levy of cross subsidy surcharge as sought to be claimed by the petitioner.*

15. *Power Purchase and Wheeling Agreement dated 10/01/2014 (Annexure P-5 at page-68, 71, 73) read with supplementary agreement dated 25/03/2015 (Annexure P8 to the petition at page 121) specifically provides for the liability of CSS:*

i. *Clause 06 of the PPA dated 10/01/2014 (page 73 to the Petition)specifically provided for liability of applicable cross subsidy surcharge:*

06. WHEELING AND OTHER CHARGES

6.4 Applicable cross subsidy charges as and when decided by the MPERC shall be payable by the Company/developer to the DISCOMS where the energy is consumed irrespective of the point of injection.

ii. *It may be seen PPWA specifically provides for the levy of cross subsidy surcharge. Thus, it is clear that respondent has never granted any exemption to the petitioner.*

iii. *Even otherwise the preamble of PPA specifically provides that statutory provisions would prevail over PPA. The relevant part is reproduced as under (ref page 68 and 71 of the petition):*

Preamble

“And whereas, this agreement shall be governed by the provisions of relevant codes, regulations, orders, etc. Of the CEA/ CERC/ MPERC including their amendments from time to time and as per

the terms and conditions of the Union / State Govt. Policies. ”

.....

In case of any inconsistency between provision of this PPA and provisions of the code or regulations of the CEA/CERC/MPERC, the provision of later will prevail.

16. *Permission of Long Term Open Access dated 12/03/2015 (Annexure-P7 at page 116 to the petition) also provides that open access shall govern by prevailing statutory provisions*
- (iii) The Regulation & Acts relating to open Access is complied with as laid down by Hon'ble MPERC and State Government.*
 - (xiii) The transmission and wheeling of power shall be governed by the provisions of law to be made applicable from time to time.*
 - (xiv) The applicant shall comply with the provisions of the Madhya Pradesh Vidyut Sudhar Adhinyam, 2000, Electricity Act, 2003 and other applicable laws, the regulation of the Hon'ble MPERC, technical codes and standards of performance or any other guidelines issued by the Commission from time to time.*
17. *Petitioner No.1 vide its letter dated 27.07.2019 submitted an undertaking asserting the liability of open access charges upon failure to prove captive status (Annexure R1/1 at page 24 of reply):*

The relevant part of the said undertaking is reproduced as under:

- “11. We undertake and confirm that, failure to provide such information/ documents within the prescribed time limit or failure to establish captive status in accordance with the Captive rule & other applicable law/ rule/ regulation, shall lead to immediate rescission of the Captive status. We Further undertakes that consequent upon such rescission we will be liable to pay all applicable open access charges (including but not limited to Cross Subsidy Surcharge) which would have been levied from appropriate date had such approval not been granted.*
- 12. We undertake and confirm that in the event if MPPKVVCL discovers anything contrary to our above mentioned declarations, the MPPKVVCL shall have rights to forthwith decline our proposal, and if such proposal has already been accepted, to rescind the approval and recover all applicable charges which would have been levied from appropriate date, had such approval not been granted.*
- 13. We indemnify MPPKVVCL for loss, damages and expenses of whatever kind and nature arising out of any breach of this undertaking, or failure to prove or maintain the Captive Status of the CGP.”*
18. *Tariff order issued by the Hon'ble Commission from time to time specifically provides that provision of tariff order (which includes levy of open access charges) shall be applicable notwithstanding any contrary agreement with*

consumer:

The relevant extract of tariff Order 2020-21 reproduced as under:

1.30 All conditions prescribed herein shall be applicable notwithstanding if any contrary provisions, exist in the agreement entered into by the consumer with the licensee.

It may be seen that a levy of open access charges including cross subsidy surcharge is a statutory requirement and distribution licensee has no right to charge any tariff other than the approved by the Hon'ble Commission. Charging of tariff lower than the approved by the Hon'ble Commission shall affect public at large adversely. Thus, plea of waiver, promissory estoppels and legitimate expectation has no application in the instant case.

19. *That, the levy of cross subsidy surcharge is statutory requirement and governed by the Electricity Act 2003 read with Regulations/Tariff orders issued by the State Commission from time to time. In the case of M/s. Mathra Prashad and Sons Vs State of Punjab 1962 AIR 745 five judge bench of Hon'ble Supreme Court held that there can be no estoppels against the statute. The relevant para of the said judgment is reproduced as under:*

“..... There can be no estoppel against a statute. If the law requires that a certain tax be collected, it cannot be given up, and any assurance that it would not be collected, would not bind the State Government, whenever it choose to collect it.

Further, Hon'ble Supreme Court in the case of Shree Sidhali Steels Limited (2011) 3 SCC 193 held as under:

“33.....However, it is well settled that taking cue from this doctrine, the authority cannot be compelled to do something which is not allowed by law or prohibited by law. There is no promissory estoppel against the settled proposition of law. Doctrine of promissory estoppel cannot be invoked for enforcement of a promise made contrary to law, because none can be compelled to act against the statute. Thus, the government or public authority cannot be compelled to make a provision which contrary to law.”

20. *It may be seen that Hon'ble Supreme Court clearly held that there can be no estoppel against a statute. In view of above petitioners cannot take shelter of doctrine of promissory estoppels or any other similar doctrines to avoid the statutory liability of cross subsidy surcharge/open access charges.*
21. *Petitioner is relying upon the letter dated 02/03/2015 (Annexure-P-6 at page 111 to the petition) issued by answering respondent. That, the said letter is issued only with respect to feasibility of change in third party and the said letter does not deals with the levy or exemption from open access*

charges. This fact may also be confirmed from subject of the said letter. As stated above levy of open access charges is a statutory requirement & governs in accordance with the prevailing statutory provisions. Explicit provisions have been made regarding levy of Cross subsidy surcharge in the PPWA itself. Therefore, question of any exemption without fulfilling statutory requirement does not arise. Even otherwise as per above quoted judgment of Hon'ble Supreme Court a authority cannot be compelled to do something which is not allowed by law.

22. In view of above particularly after submitting undertaking petitioners cannot deny liability to pay applicable open access charges upon failure to prove captive status of the power plant in accordance with the prevailing statutory provisions.

RE: Bar of Limitation on recovery of legitimate dues of the licensee:

- A. **There is no bar of limitation as demand is raised just after the determination of captive status without any delay:**

23. Petitioners have raised the plea of bar under section 56(2) of the Electricity Act 2003. Before imparting the contentions of the petitioners it is submitted that this Hon'ble Commission has notified the 7th amendment to the MPERC (Cogeneration and generation of electricity from renewable sources of energy) Regulations 2010 on dated 17/11/2017 withdrawing the exemption from open access charges for the renewable sources. Prior to 7th amendment exemption was available to all open access consumer consuming electricity from renewable sources, irrespective of status i.e captive or otherwise. Therefore obligation of payment of open access charges has been arised only after 7th amendment. The relevant part of the amended and un-amended 'regulation of 2010' is reproduced as under:

Clause 12.2 before 2017 amendment

"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.

Clause 12.2 after 2017 amendment

"12.2 Wheeling charges, Cross subsidy surcharge, 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 Commission in its retail Supply tariff order."

24. It is submitted that answering respondent ascertained the status of the plant for the FY 2017-18 and FY 2018-19 on dated 18.01.2020 (ref page 38 to the petition) as per applicable statutory provisions and documents submitted by the petitioners on dated 27.07.2019 (ref page 141 to the petition) read with other submissions from time to time.

25. Upon failure to prove captive status, demand of cross subsidy surcharge has been raised on dated 23.01.20 (page 39 to the petition) for the FY 2017-18 (from Nov 17 onwards), FY 2018-19 and FY 2019-20 (upto Dec 19).

26. Thus, there is no delay on the part of answering respondent.

B. Sum become 'first due' only when bill raised not earlier:

27. That, petitioner has raised the plea of bar under section 56(2) of the Electricity Act 2003. Section 56 of the Act is reproduced as under:

Section 56. (Disconnection of supply in default of payment): -- (1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:

Provided that the supply of electricity shall not be cut off if such person deposits, under protest, -

- (a) an amount equal to the sum claimed from him, or
- b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months, whichever is less, pending disposal of any dispute between him and the licensee.

(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity.

28. It may be seen that section 56 provides an additional right of recovery of dues through disconnection of supply of electricity apart from other rights available to the licensee i.e. suit e.t.c. In other words Section 56(2) only bars recovery of dues through disconnection. Further this bar is applicable only after two year from the date when the amount becomes 'first due'. Section 56(2) has no applicability on supplementary billing of escaped billing as the said demand become first due only when demand notice/ supplementary bill in this regard issued by the licensee. Unless any demand is raised (in the present case on dated 23/01/2020 ref page 39 of

the petition) specifying the time limit for payment no such demand can be said as 'due' and person consuming electricity cannot be termed as neglectful of their responsibilities of payment. Thus, aforesaid section has no application in making supplementary demand for escaped billing. It is now a settled legal position through various judicial pronouncements that there is no limitation for making the demand by way of supplementary bill.

29. The issue of limitation on demand of earlier escaped billing came for consideration before Hon'ble Supreme Court in the M/S. Swastic Industries vs Maharashtra State Electricity (1997) 9 SCC 465. The relevant part of the said judgment is reproduced as under:

"The admitted position is that the respondent- Electricity Board had issued a supplementary bill to the petitioner on February 5, 1993 demanding payment of Rs. 3,17,659/-. The petitioner objected to the bill by his letter dated February 16, 1993, However, when letter was issued for payment of the said amount, the petitioner paid it under protest and filed the complaint paid it under protest and filed the complaint before the State Consumers Disputes Redressal Commission. The Commission by order dated May 24, 1995 allowed the complaint and held that the claim was barred by limitation of 3 years. Feeling aggrieved, the Electricity Board filed an appeal. The National Commission relying upon the judgment of a Division Bench of the Bombay High Court in M/s. Bharat Barrel & Drum Manufacturing Co. Pvt. Ltd. Vs. The Municipal Corporation of Greater Bombay & Anr. (Air 1978 Bom. 369) has held that there is no limitation for making the demand by way of supplementary bill. Section 24 of the Indian Electricity Act, 1910 gives power to the Board to issue such demand and to discontinue the supply to a consumer wh neglects to pay the charges. It is contended by the learned counsel for the petitioner that Section 60-A of the Electricity (supply) Act, 1948 prescribes a limitation of 3 years for the Board to institute any suit, after its constitution , for recovery of the arrears. Thereby the limitation of 3 years is required to be observed. The Board in negation of Section 60A of Supply Act cannot be permitted to exercise the power under Section 24 of the Electricity Act, 1910. We find no force in the contention.

.....
This is an enabling provision by way of suit. Despite the fact that Section 24 of the Indian Electricity Act clearly empowers the Board to demand and collect any charge from the Consumer and collect the same towards the electrical energy supplied by the Board in the following terms:

"Where any person neglect to pay any charge for energy or any sum, other than a charge for energy, due from him to a licensee in respect of the supply of energy, to him, the licensee may, after, giving not less than seven clear days' notice in writing to such person and without prejudice to his right to recover such charge of other sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply-line or other works, being the property of the licensee, through which energy may be supplied, and may discontinue the supply until such charge other sum, together with

any expenses incurred by him in cutting off and reconnecting the supply, are paid, but longer."

It would, thus, be clear that the right to recover the charges is one part of it and right to discontinue supply of electrical energy to the consumer who neglects to pay charges is another part of it. The right to file a suit is a matter of option given to the licensee, the Electricity Board. Therefore, the mere fact that there is a right given to the Board to file the suit and the limitation has been prescribed to file the suit, it does not take away the right conferred on the Board under Section 24 to make demand for payment of the charges and on neglecting to pay the same. They have the power to discontinue the supply or cut-off the supply, as the case may be, when the consumer neglects to pay the charges. The intendment appears to be that the obligation are actual. The board would supply electrical energy and the consumer is under corresponding duty to pay the sum due toward the electricity consumed. Thus the Electricity Board, having exercised that power, since admittedly the petitioner had neglect to pay the bill for additional sum, was right in disconnecting the supply without recourse to filing of the suit to recover the same. The National Commission, therefore, was right in following the judgment of the Bombay High Court and allowing the appeal setting aside the order of the State Commission. Moreover, there is no deficiency of service in making supplementary demand for escaped billing. Therefore may be negligence or collusion by subordinate staff in not properly recording the reading or allowing pilferage to the consumers. That would be deficiency of service under the Consumer Protection Act. We do not find any illegality warranting interference. The Special Leave Petition is accordingly dismissed.

30. *From the bare perusal of the aforesaid judgment of the Hon'ble Supreme Court it is clear that :*
- 30.1. *There is no limitation for making the demand by way of supplementary bill.*
- 30.2. *Right of disconnection is an additional right provided to licensees apart from other option available for recovery i.e filing of suit e.t.c.*
31. *Issue of applicability of section 56(2) in case of escaped billing came under consideration of Hon'ble Appellate tribunal of Electricity in Appeal Nos. 202 & 203 of 2006 in the case of Ajmer Vidyut Vitran Nigam Limited vs M/s Sisodia Marble & Granites Pvt. Ltd. & Ors. Vide order dated 14/11/2006 Hon'ble APTEL held as under:*
- "14. We have heard the learned counsel for the parties. The basic question for determination is what is the meaning of the words 'first due' occurring in Section 56(2) of the Electricity Act 2003; Regulation 39(1) of the Regulations, 2004 and condition No. 49 of the Terms and Conditions for supply of Electricity, 2004. In case the words 'first due' is construed as meaning consumption, it would imply that the electricity charges would become due and payable, the moment electricity is consumed. In that case failure to pay charges will entail consequences leading to disconnection of*

electricity to consumers even though the consumer will only know the units consumed by him and will not know the exact amount payable by him as per the approved tariff as the actual computation depends upon different parameters such as peaking/non-peaking rates; HT/LT rates etc. The responsibility to determine the amount payable by the consumer is that of the licensee. The consumer cannot be expected to discharge the duties of the distributor or the supplier of electricity. Moreover, it will create an anomalous situation as it would be difficult to determine the last date by which the payment is to be made by the consumer and in case last date is not known, it will be difficult to levy surcharge for delayed payment. Besides there will be problem in issuing notice for disconnection for failure to pay the charges on consumption. It appears to us that it could never be the intention of the legislature to equate the words 'first due' with consumption. The consumption of electricity will certainly create a liability to pay but the amount will become due and payable only after a bill or demand is raised by the licensee for consumption of electricity by the consumer in accordance with the Tariff Order. Such a bill/demand will notify a date by which the dues are to be paid without surcharge.

15. It is to be noted that a meter records the consumption of energy uninterruptedly on a continuous basis by the consumer and for such consumption the liability for payment of corresponding amount of charges by the consumer is continuously created but will not be due for payment unless the amount is raised through bill or a demand notice.
16. In *H.D. Shourie vs. Municipal Corporation of Delhi*, AIR 1987 Delhi 219, the Delhi High Court has ruled that electricity charges become first due after the bill is sent to the consumer and not earlier thereto. In this regard the High Court held as under:
"A bill for consumption of electricity can be sent even three years after the electricity has been consumed. The electricity charges become due after the bill is sent and not earlier. This being so, the proviso to S. 455 of Act (66 of 1957) will apply only when the bill has been sent and the remedy available with the licensee for filing a suit to recover the said amount would come to an end after three years elapse after the electricity charges have become due and payable. To put it differently, the provisions of S. 455 would come into play after the submission of the bill for electricity charges and not earlier".

The judgement further holds that,

"The amount of charges would become due and payable only with the submission of the bill and not earlier. It is the bill which stipulates the period within which the charges are to be paid. The period which is provided is not less than 15 days after the receipt of the bill. If the word "due" in S. 24 is to mean consumption of electricity, it would mean that electricity charges would become due and payable the moment electricity is consumed and if charges in respect thereof are not paid then even without a bill being issued a notice of disconnection would be liable to be issued under S. 24. This certainly could not have been the intention of the Legislature. Section 24 gives a right to the licensee to issue not less than 7 days' notice if charges due to it are not paid. The word "due" in this

context must mean due and payable after a valid bill has been sent to the consumer. It cannot mean 7 days notice after consumption of the electricity and without submission of the bill. Even though the liability to pay may arise when the electricity is consumed by the consumer, nevertheless it becomes due and payable only when the liability is quantified and a bill is raised. Till after the issue and receipt of the bill the authority has no power or jurisdiction to threaten disconnection of the electricity which has already been consumed but for which no bill has been sent”.

The same judgement further provides that the arrear of charges in case of a defective meter cannot be more than six months irrespective of period of defect in the meter. It reads thus;

“The maximum period for which a bill can be raised in respect of a defective meter under S. 26 (6) is six months and no more. Therefore, even if a meter has been defective for, say, a period of five years, the revised charges can be for a period not exceeding six months. The reason for this is obvious. It is the duty and obligation of the licensee to maintain and check the meter. If there is a default committed in this behalf by the licensee and the defective meter is not replaced, then it is obvious that the consumer should not be unduly penalized at a later point of time and a large bill raised. The provision for a bill not to exceed six months would possibly ensure better checking and maintenance by the licensee”.

17. *Thus, in our opinion, the liability to pay electricity charges is created on the date electricity is consumed or the date the meter reading is recorded or the date meter is found defective or the date theft of electricity is detected but the charges would become first due for payment only after a bill or demand notice for payment is sent by the licensee to the consumer. The date of the first bill/demand notice for payment, therefore, shall be the date when the amount shall become due and it is from that date the period of limitation of two years as provided in Section 56(2) of the Electricity Act, 2003 shall start running. In the instant case, the meter was tested on 03.03.2003 and it was allegedly found that the meter was recording energy consumption less than the actual by 27.63%. Joint inspection report was signed by the consumer and licensee and thereafter, the defective meter was replaced on 05.03.2003. The revised notice of demand was raised for a sum of Rs. 4, 28,034/- on 19.03.2005. Though the liability may have been created on 03.03.2003, when the error in recording of consumption was detected, the amount become payable only on 19.03.2005, the day when the notice of demand was raised. Time period of two years, prescribed by Section 56(2), for recovery of the amount started running only on 19.03.2005. Thus, the first respondent cannot plead that the period of limitation for recovery of the amount has expired.”*

32. *That, the aforesaid order of the Hon’ble APTEL has been challenged by the consumers before Hon’ble Supreme Court in Civil Appeal no. (D.No.13164/2007). Vide order dated 17/05/2007, Hon’ble Supreme Court has dismissed the civil appeal confirming the order of Hon’ble APTEL.*

33. *Issue of applicability of section 56(2) of the Act in case of supplementary billing also came under consideration of Hon'ble High Court of Madhya Pradesh Bench at Gwalior in the case of Kapoor Saw Manufacturing Co. MPSEB and others (2006 SCC Online MP 612). Vide judgment dated 13/07/2006 Hon'ble High Court have upheld the supplementary bill raised on account of error in the matter of calculating tariff. The relevant para is reproduced as under:*

“(12.) AS far as bar contained in sub-section (2) of Section 56 for recovery of the entire amount of arrears for more than 4 years is concerned, Section 56 of the Indian Electricity Act contemplates a procedure for disconnection of electricity for default of payment where a consumer neglects to pay any electricity dues or charge to a Electric Company. The said provision and the bar created under sub-section (2) of Section 56 will apply to cases where recovery of amount is being made on the ground of negligence on the part of the consumer to pay the electricity dues. It is in such cases that recovery beyond the period of 2 years is prohibited. Present is not a case where action is taken due to default or negligence on the part of the consumer. Present is a case where error in the matter of calculating tariff by the Board is being corrected when the error came to the notice of the Board on 18-9-00. The provision of Section 56 will not apply in the facts and circumstances of the present case.”

It may be seen that Hon'ble jurisdictional High Court clearly held that cases of billing after noticing the error is not covered under Section 56(2).

34. *That, in view of aforesaid judicial pronouncement, amount becomes first due only when the notice of demand was raised. If these principles apply in the instant case, the amount become first due only when demand notice issued after assessment of captive status i.e 23.01.2020. Time period of two years, prescribed by Section 56(2), for recovery of the amount started running only on 23.01.2020.*
35. *Thus, petitioner cannot plead that recovery is time bared under section 56(2). Even otherwise answering respondent can recover the amount due as per other available mode of recovery and law of limitation does not wipe off the dues of licensees.*

RE: Status of Petitioner 2 as a 'Special Purpose Vehicle':

36. *Rules of 2005 defines the term special purpose vehicle as under:*
- “3. Requirements of Captive Generating Plant.*
- Explanation.- (1) For the purpose of this rule.-*
- d. “Special Purpose Vehicle” shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity.*

37. *In the present case, it is observed that petitioner No.2 partnership firm has been to carry our various businesses. The relevant part of the partnership deed dated 31/10/2014 (Annexure-P/2 at page 56 & 57 to the petition) is reproduced as under:*

“3. That the business of the firm shall be:

- a. Trading in real estate, buying/selling of plots, land, agriculture land, and/or developing colonies and selling plots and/or construction of house/flat etc. and/or*
- b. To carry on in India or elsewhere, the business to generate, receive, produce, improve, buy, sell, resell, acquire, use, transmit, accumulate, employ, distribute, develop, handle, protect, supply and to act as agent, representative, consultants, collaborators, or otherwise to deal in electricity power or any other energy from conventional/non-conventional energy sources on a commercial basis in all its branches at such place or places as may be permitted by appropriate authorities by establishment of Biomass power plants, thermal power plants, hydraulic power plants, atomic power plants, wind power plants, solar power plants and other power plants based on any source of energy as may be developed or invented in future and to construct, lay down, establish, promote, erect, build, install, commission, carry out and run all necessary power sub-stations, work shops, repair shops, wires, cables, transmission lines, accumulators, street light for the purpose of conservation, distribution, and supply of electricity to participating industries, state electricity boards and other boards for industrial, commercial, domestic, public and other purposes and also to provide regular services for repairing and maintenance of all distribution and supply lines and to deal in all kinds of the energy systems and products, such as compressed natural gas, cooking gas, coal, petroleum, diesel, kerosene, including energy saving of solar energy and/or*
- c. Any other such business as partners may decide mutually
The partners may amend above clause from time to time as per their mutual consent.”*

Similar provisions also contained in the original partnership deed dated 29/03/2013 (Annexure P-2 to the petition at page 46)

38. *It may be seen that as per aforesaid provisions, SPV cannot engaged any business activity except operating and maintaining a generating station. Based on the aforesaid extract of partnership deed it can be safely concluded that partnership firm which has setup power generating plant is not a special purpose vehicle as defined in the Rules of 2005 but a separate commercial entity engaged in the various business or activities. Accordingly, members of such entity (i.e partners of the firm) cannot be treated as owner of the plant and captive user. Therefore, plant cannot be treated as captive generating plant.*

39. *In view of above submission, it is requested to the Hon'ble Commission to dismiss the petition and grant the relief sought by the answering respondent in the reply dated 08/12/2020 to the petition."*

Commission's Observations and Findings:

17. The Commission has observed the following from the petition and the submissions of the petitioner and Respondents in this matter:

- (i) The petitioner No. 2 i.e., M/s. Shree Balaji Enterprises is a partnership firm incorporated under the provisions of the Indian Partnership Act, 1932 vide partnership deed 29.03.2013. The petitioner No. 2 has installed and operating a 2 MW Solar power project at Village Rojhani, Teh-Barod, District Shajapur. The aforesaid solar power project was commissioned on 30.09.2013.
- (ii) The petitioner No.1 (M/s. Shriniwas Board and Paper Pvt. Ltd) is a HT consumer of the Respondent No.1 (MPPKVVCL) having contract demand of 1000 KVA.
- (iii) On the application of petitioner No. 2, the Respondent No. 2 granted Long Term Open Access (LTOA) permission to avail Intra-State Long term Open Access for 2 MW Solar Power Project installed at Village Rojhani, Teh-Barod, District Shajapur for third party sale of its power to M/s Jaideep Glass Works Pvt. Ltd. A Power Purchase and Wheeling Agreement was executed on 10.01.2014 between all necessary parties. The aforesaid agreement was made to wheel power for third party sale on payment of wheeling charges and other charges as decided by the Commission.
- (iv) Subsequently, on 31.10.2014, the petitioner No. 2 executed a Deed of addition of Partner in Partnership of M/s Shree Balaji Enterprises in its already above-mentioned Partnership Deed dated 29.03.2013, wherein petitioner No. 2 firm admitted petitioner No. 1 as one of the partners w.e.f. 31.10.2014. Thereafter, another Supplementary Deed of Partnership of Petitioner No. 2 dated 30.03.2016 was executed by Petitioner No. 1 and the other partners of the firm, being Sh. Anand Bangur and Smt. Shilpi Agrawal, whereby the partners decided that the principal place of business of the petitioner no. 2 firm shall be situated at 116, Mahashweta Nagar, Ujjain, Madhya Pradesh. As per the aforesaid Amended Partnership Deed, it was agreed that the profit and loss of the Petitioner No. 2 firm shall be divided or borne by the partners in the following proportion:

01. Shri Anand Bangur	37.00%
02. Smt. Shilpi Agrawal	37.00%
03. M/s Shriniwas Board and Paper Pvt. Ltd.	26.00%
Total	100%

From the above, it is observed that the petitioner No.1 has the share of 26% in the profit or loss of said partnership firm.

- (v) Subsequently, the Petitioner No. 2 requested Respondent No. 1 for grant of LTOA

permission to change in Third Party customer to its own premises in favour of Petitioner No. 1. The same was forwarded by Respondent No. 1 to Respondent No. 2. The Respondent No. 2 vide its letter dated 12.03.2015 allowed the aforesaid application of petitioner No. 2 for change of third-party customer to the petitioner No. 1 for the period of plant life.

(vi) Pursuant to above, the petitioner No. 2 executed a Supplementary Power Purchase and Wheeling Agreement for Solar PV based power plants on 25.03.2015 with Respondent No. 1, 2 and one M/s Ujaas Energy Ltd., being the developer; whereby the erstwhile third-party consumer i.e. M/s Jaideep Glass Works Pvt. Ltd., Indore was changed to the Petitioner No. 2. All the terms and conditions of earlier PP&WA executed on 10.01.2014 remained effective till the entire period of the agreement.

(vii) Seventh Amendment to MPERC (Cogeneration and generation of electricity from Renewable sources of energy) Regulations 2010 was notified on 17.11.2017. The relevant part of the amended and un-amended 'regulation of 2010' is reproduced as under:

(a) Amended Regulation 12.2 of MPERC cogeneration Regulations, 2010 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.”

(b) 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.”

(Emphasis Supplied)

(viii) As per the above mentioned seventh amendment to MPERC Co-generation Regulations, 2010 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 if any, under Section 42 of the Electricity Act 2003 shall be applicable in terms of retail supply tariff order issued by the Commission.

(ix) Pursuant to the above amendment in Regulations, the Respondent No. 1 in order to assess the Captive Status as per provisions under Electricity Act 2003 r/w Electricity Rules, 2005 asked petitioner No. 1 for its certification of captive status and sought documents to ascertain the Captive Status in this matter. The

Respondent No. 1 also sought the certificates for total generation and consumption of captive users of the Captive Generating Plant from FY 2017-18. The petitioner No.1 vide its reply dated 08.09.2019, furnished the certificate of total generation and consumption of captive users as for the FY 2017-18, along with a certificate by Chartered Accountant. Thereafter, the Respondent No. 1 asked petitioner No. 1 to furnish certain additional documents for further scrutinise and verify the eligibility of petitioner No. 1 as captive user. Accordingly, Petitioner No. 1, furnished the additional information/documents in respect of petitioners as requested by Respondent No. 1.

- (x) After examination of above documents, the Respondent No. 1 informed petitioner No. 1 that on scrutiny of the documents, the petitioner No. 1 company could not prove 26% ownership in the Captive Generating Plant and hence the applicable open access charges would be levied upon petitioner No. 1 for FY 2017-2018 and 2018-19. Therefore, the Respondent No. 1 (MPPKVVCL Indore) vide letters dated 18.01.2020, 23.01.2020, 15.02.2020 and 06.06.2020 and the invoices made a demand of open access charges on the Petitioner for FY 2017-18 and FY 2018-19. The aforesaid levy of open access charges by the Respondent No. 1 is the matter of dispute in the subject petition.
- (xi) The permission of long term open access issued by MP Power Transmission Company Ltd and Power Purchase & Wheeling agreement entered with the petitioner No. 2 specifically provides that applicable statutory provisions need to be complied. The relevant parts of these documents are reproduced as under:

(a) Long Term Open Access

- (i) *The Regulation & Acts relating to open Access is complied with as laid down by Hon'ble MPERC and State Government.*
- (ii) *The transmission and wheeling of power shall be governed by the provisions of law to be made applicable from time to time.*
- (iii) *The applicant shall comply with the provisions of the Madhya Pradesh Vidyut Sudhar Adhinyam, 2000, Electricity Act, 2003 and other applicable laws, the regulation of the Hon'ble MPERC, technical codes and standards of performance or any other guidelines issued by the Commission from time to time.*

(b) Power Purchase and Wheeling Agreement

Preamble

"And whereas, this agreement shall be governed by the provisions of relevant codes, regulations, orders, etc. Of the CEA /CERC/MPERC including their amendments from time to time and as per the terms and conditions of the Union / State Govt. Policies. "

In case of any inconsistency between provision of this PPA and provisions of the code or regulations of the CEA/CERC/MPERC, the provision of later will prevail.

(xii) The Respondent No.1 submitted that the petitioner No.1 submitted an undertaking (Annexure R1/1) vide its letter dated 27.07.2019 claiming itself as captive user. In the said undertaking it is specifically admitted by the petitioner No. 1 that in the case of failure to prove captive status answering respondent is entitled to recover all applicable charges. The relevant part of the said undertaking is reproduced as under:

- “11. We undertake and confirm that, failure to provide such information/ documents within the prescribed time limit or failure to establish captive status in accordance with the Captive rule & other applicable law/rule/regulation, shall lead to immediate rescission of the Captive status. We Further undertakes that consequent upon such rescission we will be liable to pay all applicable open access charges (including but not limited to Cross Subsidy Surcharge) which would have been levied from appropriate date had such approval not been granted.
12. We undertake and confirm that in the event if MPPKVVCL discovers anything contrary to our above mentioned declarations, the MPPKVVCL shall have rights to forthwith decline our proposal, and if such proposal has already been accepted, to rescind the approval and recover all applicable charges which would have been levied from appropriate date, had such approval not been granted.
13. We indemnify MPPKVVCL for loss, damages and expenses of whatever kind and nature arising out of any breach of this undertaking, or failure to prove or maintain the Captive Status of the CGP.”

18. The term “captive generating plant” is defined under Section 2(8) of the Act of 2003 as below: -

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

19. The Central Government in exercise of powers conferred under Section 176 of the Electricity Act, 2003 has made Rules called ‘The Electricity Rules, 2005’). The relevant provisions under Rule 3 of the aforesaid Rules are as given below:

- “3. **Requirements of Captive Generating Plant** – (1) No power plant shall qualify as a ‘Captive Generating Plant’ under section 9 read with clause (8) of section 2 of the Act unless –
- (a) in case of a power plant –
- (i) not less than twenty six per cent of the ownership is held by the captive user(s), and
- (ii) not less than fifty one per cent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered co-

operative society, the conditions mentioned under paragraphs (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one per cent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

- (b) In case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including -

Explanation - (1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and

(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustration

In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen per cent of the equity shares in the company (being the twenty six per cent proportionate to Unit A of 50 MW) and not less than fifty one per cent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

(2) It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. Explanation – (1) For the purpose of this rule –

- (a) “annual basis” shall be determined based on a financial year;
- (b) “captive user” shall mean the end user of the electricity generated in a Captive Generating Plant and the term “captive use” shall be construed accordingly;
- (c) “ownership” in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean

proprietary interest and control over the generating station or power plant;

- (d) “Special Purpose Vehicle” shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity”.

20. As per Rule 3(1)(a), the power plant in order to be considered as captive generating plant is required to satisfy the following twin test:-

- (i) not less than twenty six percent of the ownership must be held by the captive user (s), and
- (ii) not less than fifty one per cent of the aggregate total electricity generated in the plant, determined on an annual basis, is consumed for the captive use.

21. The term ‘ownership’ is explained under illustration of Rule 3 of the Rules 2005. as under:-

“ownership” in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant”.

22. First part of the above explanation applies to a company or any other body corporate which has set up a generating station. As per documents and statements on record, the petitioner No. 2 on 31.10.2014 executed a Deed of Addition of Partner in Partnership in its already continuing Partnership Deed dated 29.03.2013, wherein petitioner No. 2 firm admitted petitioner No. 1 as one of the partners w.e.f. 31.10.2014. Further, as per the aforesaid Amended Partnership Deed, it was agreed that the profit and loss of the Petitioner No. 2 firm shall be divided or borne by the partners in the following proportion:

01.	Shri Anand Bangur	37.00%
02.	Smt. Shilpi Agrawal	37.00%
03.	M/s Shriniwas Board and Paper Pvt. Ltd.	26.00%
	Total	100%

A partnership firm is a legal entity, separate and independent of its shareholders. It owns hundred percent ownership of its assets. This being so, Solar power plant in question is owned by the petitioner No. 2 firm. Besides, the petitioner No. 1 is a user of the generating plant. Though the ownership of the Solar power plant is that of the partnership firm but for the purpose of Rule 3(1)(a) read with explanation under aforesaid Rules, ownership in relation to the CPP will mean the equity share capital with voting rights of captive users. As noted from the above, the share of profit and loss of the petitioner No. 1 is 26%. However, its ownership/voting rights for the purposes of Rule 3 could not be established. The other criteria laid down in Rule 3(1)(a)(ii) which requires not less than fifty-one per cent of the aggregate electricity generated in such plant, determined on an annual basis is not under dispute as per the averments made in the petition and submissions on record.

23. As per Rule "ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other case ownership shall mean proprietary interest and control over generating station or power plant.

24. In the present case, power plant is setup by a partnership firm and not a company. Accordingly, ownership is tested in terms of the proprietary interest which means ownership with his own name. Hon'ble High Court of Gujarat in the matter of **Rajnikant Hasmukhlal Golwala and others V/s Natraj Theatre, Navsari and others (AIR 2000 GUJARAT 80)** held the following in para Nos. 24, 25 and 26 of the judgment:

"24. Looking to the legal position incorporated in Sec.19 of the Act, it is very clear that defendantsNos.1 to 11 who are partners of plaintiff No.1 firm could not have sold the property of the firm to defendant No.12 in pursuance of the implied authority. Normally, only with consent of all the partners, immovable property of the firm can be sold. In the instant case, some of the partners, without consent of the other partners, have disposed of immovable property of the firm in favour of defendant No.12.

The said transaction is definitely hit by the provisions of Sec.19 of the Act. In the circumstances, it is very clear that defendants Nos.1 to 11 could not have sold the property of the firm to defendant No.12.

Section 15 of the Act reads as under: -

"15. Application of the property of the firm.- Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business".

Thus, Sec.15 of the Act declares that subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of partnership business. This legal position precludes the possibility of any property of the firm being shown as separate property of any partner so long as the partnership subsists.

25. *Looking to the provisions of the Act, it is very clear that no partner can sell any part of the assets of the partnership firm as belonging to him and this being the position, no partner can ever validly sell or dispose of any of the partnership property as his own property. Partnership property vests in the firm and it does not vest in any of the partners and therefore it would not be possible for any partner to pinpoint any portion of the partnership property as his own property.*

26. *A partner cannot deal with any portion of the partnership property as his own property for the reason that he is not like a co-owner of the property. A co-owner, without the consent of other co-owners, can transfer his interest to a third party and in that event, the third party shall have the same rights which the transferor had and the transferor shall be put in the same position as regards the other co-owners as the transferor himself was before the transfer. By virtue of the provisions of Sec. 29 of the Act, position of a transferee of a partners interest would not be the*

same as a transferee of a co-owner's interest. Thus, there being a difference in the partnership and co-ownership, defendant No. 12 shall not have any right which his transferee (transferor) partners had in the partnership property."

25. From the foregoing it is observed that the petitioner No.1 is one of the partners in the partnership firm of petitioner No. 2 but the petitioner No. 1 does not have proprietary interest over the solar power plant. As per law, the power plant is the property of the firm and not that of any individual partner. Thus, one of the conditions laid down in Rule 3 for considering the power plant owned by the Petitioner No. 2 as CPP is not found satisfied.

26. In the subject matter, the petitioner No.1 being a consumer of the Respondent is receiving supply of electricity from the Solar Power Plant of petitioner No.2 who is a person other than the distribution licensee of the Respondent No.1's area of supply. The petitioner No.1 while availing open access receiving supply of electricity from a person (solar power plant) other than the distribution licensee of his area of supply. The petitioner No.1 is receiving supply of electricity from solar power plant of petitioner No.2 for its manufacturing unit through licensee's distribution/transmission system. Further, as provided in Section 42(4), such a consumer or class of consumers who is/are permitted to avail open access by the State Commission to receive supply of electricity from a person other than the distribution licensee of his area of supply, 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.

27. The petitioners have contended that the impugned letters raising demand of open access charges by the Respondent No.1 are barred by limitation under the provisions of Section 56 of the Electricity Act 2003 due to the reason that the demand was raised by the Respondents after seven years of captive usage by the petitioners. With regard to aforesaid contention of the petitioners, the Commission has observed the following:

- (i) This Commission had notified the 7th amendment to the MPERC (Cogeneration and generation of electricity from renewable sources of energy) Regulations 2010 on 17/11/2017 withdrawing the exemption from open access charges for the renewable sources. Prior to 7th amendment exemption was available to all open access consumer consuming electricity from renewable sources. Therefore, obligation of payment of open access charges was made vide aforesaid amendment in Regulations.
- (ii) As mentioned in preceding part of this order, the Respondent ascertained the status of the plant for FY 2017-18 and FY 2018-19 on 18.01.2020 as per applicable statutory provisions and documents submitted by the petitioners on 27.07.2019 read with other submissions from time to time.
- (iii) Since the captive status was not proved, therefore, demand of open access charges has been raised on dated 23.01.20 for FY 2017-18 (from Nov 17 onwards), FY 2018-19 and FY 2019-20.

28. On the aforesaid issue, Hon'ble High Court of Madhya Pradesh Bench at Gwalior in its Order dated 13.07.2006 in the matter of Kapoor Saw Manufacturing Co. v/s MPSEB and others (2006 SCC Online MP 612) held the following on the supplementary bill raised on account of error in the matter of calculating tariff:

“(12.) As far as bar contained in sub-section (2) of Section 56 for recovery of the entire amount of arrears for more than 4 years is concerned, Section 56 of the Indian Electricity Act contemplates a procedure for disconnection of electricity for default of payment where a consumer neglects to pay any electricity dues or charge to a Electric Company. The said provision and the bar created under sub-section (2) of Section 56 will apply to cases where recovery of amount is being made on the ground of negligence on the part of the consumer to pay the electricity dues. It is in such cases that recovery beyond the period of 2 years is prohibited. Present is not a case where action is taken due to default or negligence on the part of the consumer. Present is a case where error in the matter of calculating tariff by the Board is being corrected when the error came to the notice of the Board on 18-9-00. The provision of Section 56 will not apply in the facts and circumstances of the present case.”

29. In view of aforesaid Judgment, the amount becomes first due only when the notice of demand was raised. In the instant case, the amount become first due only when demand notice issued after assessment of captive status i.e. 23.01.2020. Therefore, the contention of petitioners that the demand raised by the Respondent No.1 vide its impugned letter is barred by limitation under provisions of Section 56 of the Electricity Act 2003 is not considerable in light of the facts and figures in this matter.

30. In view of foregoing observations and examination of facts and circumstances placed on record in this matter and in light of provisions under MPERC (Cogeneration and Generation of Electricity from Renewables Sources of Energy) (Revision I) Regulation, 2010 as amended read with provisions under Section 42 of the Electricity Act 2003, the Commission finds that the open access charges are leviable in this matter. With the aforesaid observations and findings, the prayers of petitioner are not allowed and the subject petition is dismissed.

(Shashi Bhushan Pathak)
Member

(Mukul Dhariwal)
Member

(S.P.S. Parihar)
Chairman