No.N/22/2019

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052.

Dated: 06.02.2020

Present:

Shri Shambhu Dayal Meena .. Chairman
Shri H.M. Manjunatha .. Member
Shri M.D. Ravi .. Member

OP No.12/2019

BETWEEN:

1) Apollo Hospitals Enterprise Limited,
A Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
No.19, Bishop Garden,
Raja Annamalaipuram,
Chennari-600 028

2) Matrix Agro Private Limited,
A Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
No.10-3-316/A, Masab Tank,
Hyderabad-500 028.

3) G.J. Raja,
S/o G. Jayaram Reddy,
Aged 58 years having office at
Maruthi Infotech Center, Software Industry,
No.11/1, 12/1, Inner Ring Road,
Chelgatta Village,
Bangalore-560 017. **… PETITIONERS**

[Represented by Sri Shridhar Prabhu,
Advocate, Bengaluru]

AND:

Bangalore Electricity Supply Company Limited,
Having its Corporate Office at
K.R. Circle,
Bengaluru-560 001. … **RESPONDENT**
(Represented by its Managing Director)

[Represented by M/s JUSTLAW
Advocates, Bengaluru.]

O R D E R S

This is a petition under Section 86 (1) (f) of the Electricity Act, 2003 (for short Act, 2003), filed by the petitioners praying for the following reliefs:

a) To issue an order to set aside the demand notice dated 01.01.2019 issued by the Respondent against the Petitioner No.3 demanding cross subsidy surcharge and additional Electricity tax amounting to Rs.1,71,40,955/- produced at Annexure-P4;

b) To issue an order to set aside the demand notice dated 03.01.2019 issued to Petitioner No.1 demanding a due on wheeling tax amount of Rs.33,49,832/- produced at Annexure-P5; and

c) To pass such other incidental order or orders in the circumstances of the case.

2. The present petition is filed on 23.01.2019 before this Commission. It appears subsequent to filing of this petition, the petitioners filed WP Nos.14482-14484/2019 (GM-KEB) before the Hon'ble High Court of Karnataka at

Bengaluru. These Writ Petitions were disposed of by order dated 27.11.2019 directing this Commission to dispose of the present OP No.12/2019 pending before this Commission in an expeditious manner, in any event not later than 4 weeks from the date of receipt of a certified copy of this order and further directing that till a final decision to be taken by this Commission in the said OP, no precipitative action shall be taken by the Respondent/BESCOM. It may be noted that certain demands made by the Respondent BESCOM is challenged in OP No.12/2019 as well as in the above said writ petitions. The certified copy of the order in the said Writ Petitions obtained by the Advocate who appeared for this Commission, was received in this Commission on 02.01.2020.

3. The material facts pleaded by the petitioners may be stated as follows:

a) That the petitioner No.2 Matrix Agro Private Limited (for short Matrix Agro) is a Generating Company within the meaning of Section 2 (28) of the Act, 2003 desiring to wheel power up to 5.4 MW to its captive users utilizing the transmission and distribution network on executing the required wheeling agreement. The Matrix Agro has established 6 MW capacity Bio Mass Power Project at Gulbarga district. It has executed wheeling agreement dated 23.12.2015 (Annexure-P1) with KPTCL, the respondent BESCOM and two other ESCOMs namely, GESCOM and CESC, to wheel the energy from its Biomass Power Project to its captive users situated within the limits of the respondent BESCOM and GESCOM and CESC.

b) As per the terms of the wheeling agreement, Matrix Agro is primarily responsible for payment of all the charges, fees etc., payable under the wheeling agreement dated 23.12.2015 (Annexure-P1). The wheeling agreement, contained the list of captive consumers initially provided and subsequently there had been additions and deletions of the captive consumers to whom the energy was being wheeled. The latest captive users and their equity shareholdings in Matrix Agro as on 29.06.2019 is as shown in Annexure-P2. The Official Memoranda issued from time to time by the respondent for the FY 2018-19 collectively produced as Annexure-P3, would disclose that the consumers to whom the energy was wheeled, were described as captive consumers.

c) The 1st Petitioner Apollo Hospitals Enterprises Limited (for short Apollo Hospitals) and the 3rd Petitioner G.J. Raja, an individual (for short Raja) are the captive users among others getting energy from Matrix Agro. The respondent made a demand against Raja as per Annexure-P4 dated 01.01.2019 to pay the crossed subsidy surcharges and difference in electricity charges totally amounting to Rs.1,71,40,955/- and further the respondent made a demand as against Apollo Hospitals as per Annexure-P5 dated 03.01.2019 to pay a sum of Rs.33,49,832/- towards the difference of wheeling tax for the period from April 2017 to March 2018 as per audit short claim.

d) The Matrix Agro submitted the reply dated 07.01.2019 as per Annexure-P6 and Apollo Hospitals has submitted the reply dated 08.01.2019 as per Anneuxre-P7 to the Respondent BESCOM. The respondent issued clarification dated 09.01.2019 as per Annexure-P8 to Apollo Hospitals along with copies of certain previous communications made to it and also copies of some other communications.

e) The respondent has not explained in its demand notices issued to Apollo Hospitals and Raja, the reasons for demanding the amounts. Any demand for tax or other charges, has to be self-explanatory and cannot be vague and cryptic. The demand notices issued by the respondent suffer from both these infirmities.

f) The petitioner was primarily responsible for all the payments under the wheeling and banking agreement (Annexure-P1), therefore, no demand notices could be sent to Apollo Hospitals or Raja.

g) The contents of the letter dated 20.11.2018 issued by Corporate office of BESCOM to the Chief Engineer (Elec.) C, O&M, relating to the instructions for monitoring group captive units, particularly, the instruction to the effect that – unless the power plant setup by a person to generate electricity is primarily for his own, it does not qualify as a 'Captive Generating Plant' (for short CGP) - is totally flawed in view of the law declare by the Hon'ble ATE in several cases including

the case of Malwa Industries Limited Vs. Punjab State Electricity Regulatory Commission in Appeal No.32/2017 decided on 06.12.2017 and Kadodara Power Private Limited and others Vs. Gujarat Electricity Regulatory Commission & Others decided on 22.09.2009. Copies of the said judgments are at Annexure-P9 & P10 respectively.

h) The respondent has not offered an opportunity of hearing to the petitioners before raising the demand notices and thus, violated the principles of natural justice.

i) As the respondent itself has issued Official Memoranda (Annexure-P3) describing the Apollo Hospitals, Raja and other consumers as captive consumers, the respondent is precluded from raising a demand, denying their status as captive consumers on the principles of estoppel.

j) The demand made in Annexure-P5 against Apollo Hospitals towards difference of "Wheeling Tax Amount" is devoid of any meaning and no such wheeling tax exists.

k) Therefore, the petitioners prayed for allowing the petition.

4. Subsequent to filing of the petition, the petitioners were asked to produce the Memorandum of Association and Articles of Associations of the 2nd petitioner – Matrix Agro, a company incorporated under the Companies Act, 1956. Matrix Agro has produced Memorandum of Association and

Articles of Association which is marked at Annexure-P12, apart from producing the Annual Report for the year 2017-18 marked at Annexure-P11. The 5th the main object mentioned in the Memorandum of Association dated 26.11.2011 relates to establishment of Biomass Power Plant and other incidental events relating to it is as follows:

> *"5. To promote, own, acquire, erect, construct, establish, maintain, improve, manage, operate, alter, control, take on hire/lease Bio Mass Power plants, co-generation power plants, Energy conservation projects, power houses, transmission and distribution systems, tie lines, sub-stations, main transmission lines for generation, whether by conventional or non-conventional methods, distribution, transmission and supply of electrical energy and buy, sell, supply, exchange, market, function as licensee, enter power purchase agreements and deal in electrical power, energy to the Electricity Boards / Corporations / Organisations of the Central or State Government(s), Autonomous bodies, specific industrial units private or public and other consumers for industrial, commercial, agricultural, domestic and any other purpose in India and elsewhere and in any area to be specified by the State Government (s), Central Government, Local Authority, State Electricity Boards and any other Competent Authority in accordance with the provisions of Indian Electricity Act, 1910 and / or Electricity (Supply) Act, 1948*

or any statutory modifications or re-enactment thereof and rules made thereunder."

The main objects 1 to 4 described in the Memorandum of Association to be pursued by the Company on its incorporation relate to development of agriculture, horticulture etc., activities.

5. The respondent appeared through Counsel and filed the statement of objections along with documents marked at Annexure-R1 to R4. The objections raised by the respondent may be stated as follows:

a) That the Matrix Agro is a Generating Company having a 6 MW Biomass Generating Company at Gulbarga and that on 23.12.2015 Matrix Agro, the respondent BESCOM herein and the CESC and KPTCL have executed the wheeling agreement as per Annexure-P1. Apollo Hospitals and Raja are also the consumers of BESCOM having RR Nos.C2 HT-164 and S3 HT-102 respectively. It did not deny that Official Memoranda were issued during FY-2017-18 as per Annexue-P3, describing Apollo Hospitals, Raja and some others as captive consumers. The demand towards wheeling tax stated in Annexure-P5 is really the demand towards electricity tax and that by inadvertence it is shown as wheeling tax.

b) That this Commission issued the letter dated 18.09.2018 (Annexure-R4) directing all ESCOMs to monitor the status of the group captive generation in their respective jurisdiction as per the guidelines stated

in the said letter. Pursuant to it, the Corporate office has issued letter dated 20.11.2018 referred by the petitioners, regarding monitoring of the group captive consumers.

c) The respondent BESCOM found that the so called captive consumers who are consuming power generated by Matrix Agro (Petitioner No2) are in fact not meeting the criteria set-out in the Electricity Act, 2003 and the Electricity Rules, 2005, in so for as their captive consumption of electricity is concerned and also their status as captive consumers. The respondent denied the contention of the petitioners that the contents of the letter dated 20.11.2018 issued by the Corporate office stating to the effect that "unless the power plant, set up by a person to generate electricity, is primarily for his own use does not qualify as captive generating plant", is totally flawed in view of the law declared by the Hon'ble ATE in Malwa Industries Limited case and Kadodara Power Plant case. Respondent has further contended that the clarification issued by the Commission as per Annexure-R4 as to who could claim the benefit of captive consumer is valid and legal. The substance of objections of the respondent is that the definition of captive generating plant as defined in Section 2 (8) of the Electricity Act, 2003 should be read along with Rule 3 of the Electricity Rules 2005, to ascertain the status of a captive power plant and the captive user. The respondent has contended that the petitioners have failed to establish that Matrix Agro (petitioner No.2)

owns captive power plant and that Apollo Hospitals and Raja, the other two petitioners were captive users for the relevant year for which the claims were made under the demand notices at Annexure-P4 & P5.

d) The respondent has denied other contentions raised by the petitioners to the effect that the demands could not have been raised against Apollo Hospitals and Raja as Matrix Agro had undertaken to pay the charges under the wheeling agreement and that show-cause notices should have been issued earlier to issuing demand notices and that the demand notices are vague and cryptic and that the respondent has not made out any legal or factual basis to make the demands and that the demands are barred on the principles of estoppels. The respondent has contended that the demand notices in question were accompanied by a detailed computation sheets comprising the manner of the calculations on sums demanded. The respondent denied that these computation sheets are not made available to the petitioners. The respondent has produced the copies of the said computation sheets at Annexure-R1. The respondent claims that it has produced agreements for power supply entered into between Apollo Hospitals and Raja with it (respondent) at Annexure-R2 & R3 respectively. However, it is found that Annexure-R2 does not relate to Apollo Hospitals against whom demand notice Annexure-P5 was issued but

to some other Apollo Hospitals. As already noted Annexure-R4 is the letter issued by the Commission instructing to monitor the group captive consumers.

e) For the above reasons, the respondent has prayed for the dismissal of the petition.

6. We have heard the learned counsel for the petitioners and reserved the case for Orders on 14.01.2020. They also requested to submit a brief notes of arguments already addressed, within a week time in the Registry. But they have not filed any such written notes of arguments.

7. From the rival contentions and pleadings the following issues arise for our consideration:

1) Whether the second petitioner Matrix Agro can be termed as a Captive Generating Plant (for short CGP), as per the definition of Captive Generating Plant under the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005?

2) If Issue No.1 is held in affirmative, whether Apollo Hospitals (petitioner No.1) and Raja (Petitioner No.3) have fulfilled the requirements of captive users as provided in Rule 3 of the Electricity Rules 2005?

2) Whether the demand notices are defective for the reasons stated by the petitioner?

4) To which the reliefs, the petitioners are entitled to?

5) What Order?

8. After considering the pleadings, documents produced by parties and the submissions made before us, our findings on the above issues are as follows:

9. Issue No.1: Whether the second petitioner Matrix Agro can be termed as a CGP, as per the definition of CGP under the Electricity Act, 2003 (for short Act, 2003) read with Rule 3 of the Electricity Rules, 2005 (for short Rules, 2005)?

a) A 'CGP' is defined under Section 2 (8) of the Act, 2003. It reads thus:-

"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 cooperative society or association of persons for generating electricity primarily for use of members of such cooperative society or association;"

b) The requirements of CGP are stated in Rule 3 of the Electricity Rules, 2005 reads as follows:

"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 cooperative 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.

(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."

c) The definition of CGP makes it clear that to qualify as CGP it should be set up:

(i) By a person primarily for his own use or;

(ii) By a co-operative society or association of persons primarily for the use of members of such co-operative society or association.

d) The Rule 3 of Rules 2005 further explains the meaning of the phrases 'set up by any person for his own use or set up by any co-operative society or association for the use of the members of such co-operative society or association' used in the definition of CGP.

e) The conjoint reading of the definition of CGP with Rule 3 of the Rules, 2005 makes it clear that to claim the status of CGP, it should be set up by any

person, co-operative society or association, etc., primarily for their own use. In other words, one should invest and setup power plant for his own use or for the use of the members of the co-operative society or association as explained in Rule 3 of the Rules, 2005. That is to say in the event, a generating plant is setup or established primarily not for the use of the person setting up of such plant but for the sale of electricity to others, such generating plant cannot be termed as CGP.

f) Section 9 of the Act, 2003 provides for establishment of the CGP. It states that notwithstanding anything contained in this Act, a person may construct, maintain or operate a CGP and dedicated transmission lines. Further, it provides that every person who has constructed a CGP and maintains and operates such plant shall have the right to open access for the purpose of carrying electricity from his CGP to the destination of his use. Such provisions provided in Section 9 of the Act, 2003 show that certain benefits are given to the person who sets up a CGP. The 4th proviso to Section 42 (2) of the Act, 2003 provides that Cross Subsidy Surcharge (CSS) shall not be leviable in case open access is provided to a person who has established a CGP for carrying the electricity to the destination of his own use. Therefore, for claiming the status of a CGP, it should satisfy the meaning assigned as per the definition under Section 2 (8) of the Act, 2003 read with the requirements of CGP stated in Rule 3 of the Rules, 2005.

g) The underlying objectives of allowing to set up captive plants were to attract bulk consumers to set up power plants, primarily for their own use when there was severe power shortage in the country and to entice competition in the sector. The beneficial provision with respect to captive power plant has been provided in the Act, 2003, with a view to add capacity and to secure reliable, quality and cost effective power and facilitate creation of employment opportunities through speedy and efficient growth of industries. The provision relating to captive power plants to be set up by group of persons is primarily to enable small and medium industries that may not individually be in a position to set up plant in a cost effective manner.

h) Of late, it is noticed that, generating plants, which were set up with an intention of selling the power generated (as IPPs or merchant plants) to third parties are being converted into the so called group captive plants to claim the benefits given to captive plants under the Act, 2003. Due to this, the ESCOMs are losing the CSSs. Therefore, this Commission issued instructions to monitor the group captive consumers as per letter dated 18.09.2018 (Annexure-R4). In Para 4 of the said letter, it is stated thus:-

> *"From the definition of 'CGP, as defined in Section 2 (8) of the Act, it is clear that, unless the Power Plant, set up by a person to generate electricity, is primarily for his own use, it does not qualify as a 'CGP'. Therefore, unless a Power Plant is set up by Group*

Captive Users themselves, primarily for their own use, they cannot claim the status of 'Group Captive Generators/Group Captive Users'. In other words, if a group of EHT/HT consumer acquires the right in the already set up Power Plant, he cannot claim the status of 'Group Captive Power Plant Owners/Group Captive Users. Once it is established that the EHT/HT consumers have acquired the right in the status of Group Captive Generators/Group Captive Users by setting up the captive plants themselves, it should be verified as to whether their consumption of Electricity is as laid down in the Rule 3 of the Electricity Rules, 2005."

On the basis of this letter (Annexure-R4), the Corporate office of the respondent has issued an instruction to monitor the Group Captive Consumers vide letter dated 20.11.2018 (produced by the petitioner along with Annexure-P5).

i) The petitioners have contended that the contents in the letter dated 20.11.2018 to the effect that – unless power plant set up by a person to generate electricity is primarily for his own, it does not qualify as CGP – is totally flawed in view of the law declared by the Hon'ble ATE in the cases of Malwa Industries Limited and Kadodara Power Private Limited. The Commission is of the considered view that the above said contention of the petitioners is unacceptable and not valid. As already noted, the definition of CGP and the requirements of CGP stated in Rule

3 of Rules, 2005 make it clear that there is nothing to hold that the instructions given by this Commission, as per Anneuxre-R4 dated 18.09.2018 or the instructions given by the Corporate office in its letter dated 20.11.2018 are against the provisions of the Act, 2003 and Rules, 2005. The petitioner's contention that the above said decisions of the Hon'ble ATE support their contention is incorrect. On the other hand, the said decisions support the view taken by this Commission, as noted above. In Malwa Industries Limited case (Annexure-P9), the 3rd para of Case Note reads thus:-

> *"Captive Generating Plant – Meaning thereof – Section 2 (8) of the Electricity Act, 2003:*
>
> *Held, expression "Captive Generating Plant" as defined in the Act, specifies what it means and what it includes ' use of the word 'means' in the definition Clause indicates that the definition is meant to be exhaustive but the use of the word "includes" in the definition Clause explains its meaning – It does not in any way curtail the width of the opening part of the definition of "captive Generation Plant", which means a power plant set up by any person to generate electricity primarily for its own use – It merely enlarges the meaning of the expression being defined without changing or altering its basic meaning – Thus, a captive Generating plant is one which is set up by any person for generating electricity primarily for his own use – Therefore, any person claiming to have set up a captive generating plant must use the power generated by it mainly for its own use".*

In Kadodara Power Private Limited case (Annexure-P10), the Case Note relating to – CGP – Transfer of - reads thus:-

> *"Captive Generating Plant – Transfer of – Appellant contented that once a captive generating plant is set up it cannot be transferred to another owner and in case such a transfer takes place the CGP will lose its character – Can the ownership of the CGP be transferred after its set up.*
>
> *Held, Act nowhere prescribes that once set up by a person(s) a captive generating plant cannot be transferred to another owner – Nor does the Act say that on transfer of ownership the captive generating plant will lose its character of being captive despite fulfilment of all other conditions requiring it to be so – Therefore, captive generating plant does not lose its character by transfer of the ownership or any part of the ownership provided the generating plant produces power primarily for the use of its owner(s).*

The decision in Kadodara Power Private Limited also does not support the case of the petitioners. The statement of law stated regarding the transfer of ownership of CGP merely points out that CGP does not lose its character by transfer of the ownership or any part of the ownership from the person who sets up CGP to any subsequent transferee provided the generating plant produces power primarily for the use of its owner(s). The above statement of law does not imply that an IPP or merchant plant, can be converted into a CGP by merely purchasing the ownership or any part of the ownership of IPP or merchant plant by certain consumers

primarily for their own use. Therefore, the character or incidents of IPP or Merchant plant remains same irrespective of the subsequent transferee primarily utilising the power for himself.

j) The petitioners have not stated the required facts in the petition to establish that the 2nd petitioner Matrix Agro was/is a CGP as defined in Section 2 (8) of the Act, 2003 read with Rule 3 of the Rules, 2005. The Memorandum of Association marked at Annexure-P12 of Matrix Agro does not show that its main object in establishing the power plant in question was for its own use or for the use of its equity shareholders. The so called captive consumers namely; the 1st & 3rd petitioners and others shown in Annexure-P2, the certificate issued by the Auditor/Chartered Accountant or shown in Anneuxre-P3 the Official Memoranda issued by the respondent, describing them as captive consumers, are not really fulfilling the ingredients of captive consumers. It is not shown that Matrix Agro is set up as a CGP for its own use or for the use of its equity shareholders at the time of its establishment.

k) From the above facts available on record, one can conclude that Matrix Agro was not set up as a CGP and that the petitioners 1, 3 & other so called captive consumers were not shown to be the equity shareholders of Matrix Agro at the time of its establishment. They must have acquired the equity shares at a subsequent stage and, thereafter, they claim the status of captive consumers. As already noted, they

cannot claim captive consumers' status by acquiring the equity shares of Matrix Agro at a later stage, which was not established as a CGP.

l) During the arguments, the learned counsel for the petitioners relied upon the decision of the Hon'ble ATE in M/s Prism Cement Limited Vs. Madhya Pradesh Electricity Regulation Commission and Others in Appeal No.2 of 2018 decided on 17.05.2019, in support of his contention that an IPP can be converted into CGP at a later stage. The following relevant portion in Para 9.8 of Prism case may support his contention. The said portion reads thus:-

> *"The Act and the Rules permit a captive user to subsequently acquire equity shareholding in a power plant which was initially not qualified as a captive generating plant. It is immaterial whether the power plant at the time of initial construction was qualifying as a CGP under Rule 3 or not. Even if at the time of initial construction the power plant was not qualifying as a CGP under Rule 3, the same power plant can subsequently qualify as captive generating plant upon satisfaction of the twin-conditions under Rule 3.*

m) The Commission is of the considered view that the above conclusion reached in Prism case is contrary to the findings given in Malwa Industries Limited case referred in Para 9 (i) of this orders in respect of the meaning of CGP and its scope and objects. We note that Malwa Industries

Limited case is a full-bench decision of the Hon'ble ATE. This decision is not brought to the notice of the Hon'ble ATE while deciding the Prism case. Therefore, we have to follow the full-bench judgment of Hon'ble ATE.

n) Rule 3 of the Rules, 2005 cannot carve out a CGP other than the one stated in Section 2 (8) read with Section 9 of the Act, 2003. The Rules framed can supplement but not contradict the provisions in the Act, 2003. The above interpretation stated in Prism case is contrary to the full-bench decision in Malwa Industries Limited case which is binding on us but not the findings in the Prism case. Therefore, it appears that the requirements laid down in Section 2 (8) read with Section 9 of the Act, 2003 in respect of CGP are to be complied with first, before considering the fulfilment of the conditions stated in Rule 3 (1) (a) of the Rules, 2005.

o) For the above reasons, we hold Issue No.1 in negative.

10. Issue No.2: If Issue No.1 is held in affirmative, whether Apollo Hospitals (petitioner No.1) and Raja (Petitioner No.3) have fulfilled the requirements of captive users as provided in Rule 3 of the Electricity Rules 2005?

As Issue No.1 is held in negative, the consideration of Issue No.2 does not arise.

11. Issue No. 3: Whether the demand notices are defective for the reasons stated by the petitioner?

a) The petitioners contended that the demand notices are defective for the following reasons:-

i) that the demands could not have been raised against Apollo Hospitals and Raja, as Matrix Agro has undertaken to pay the charges under Wheeling agreement;

ii) that the show-cause notices should have been issued earlier to issuing the demand notice;

iii) that the demand notices are vague and cryptic;

iv) that the respondent has not made out any legal or factual basis to make the demands;

v) that the demands are barred on the principles of estoppels; and

vi) difference of wheeling tax amount stated in Annexure-P5 does not convey any meaning.

b) The respondent has contended that the above contentions raised by the petitioners have no merit.

c) On consideration of the rival contentions, we are of the considered view that the so called defects pointed out by the petitioners are not material and for those reasons, the demand notices cannot be set aside. We now consider the reasons for the same.

i) that the demands could not have been raised against Apollo Hospitals and Raja, as Matrix Agro has undertaken to pay the charges under Wheeling agreement:

The wheeling agreement at Annexure-P1 is executed between Matrix Agro, KPTCL, BESCOM and some other Distribution Licensees. The open access consumers whether captive or non-captive are not the parties to the wheeling agreement. Therefore, if the open access consumers fail to pay the CSS, Electricity tax, etc., the responsibility of paying the same is fastened with Matrix Agro. This is stated in Article 5.1 of the Wheeling Agreement specifying that Matrix Agro shall be liable to pay in case of default by captive consumers to pay partly or fully any open access charges additional surcharge, etc., within 15 days of raising the bills for the said charges. The liability to pay CSS and the difference in electricity consumption charge are statutory liabilities of open access consumer and the person who consumes the electricity. In the present case, they are Apollo Hospitals and Raja. Therefore, the respondent BESCOM is entitled to raise the bills for the said charges against the petitioners 1 & 3, in spite of undertaking by Matrix Agro to pay the same on behalf of those open access consumers. Because of the undertaking given by Matrix Agro in the Wheeling agreement, the responsibility to pay the said charges by Apollo Hospitals and Raja is not wiped out. Therefore, we hold

that issue of demand notices against Apollo Hospitals and Raja is valid.

ii) <u>that the show-cause notices should have been issued earlier to issuing the demand notices:</u>

The issue of show-cause notices before passing an order would arise where BESCOM was required to determine the rights and liabilities of any consumer. In the present case the BESCOM is not such an authority to decide the liability of the petitioners. The respondent BESCOM has to merely collect the dues from the petitioners arising from the terms of wheeling agreement or some other statutes. Any dispute regarding the liability to pay the demands should be raised before the competent authority and such authority has to decide the liability to pay such charges. The liability to pay CSS and the difference in electricity tax depends on the fact whether the person consuming the electricity is a captive consumer or not. That fact is to be decided by the Commission. Therefore, we are of the opinion that before raising such claims, the respondent BESCOM need not issue the show-cause notices to the petitioners.

iii) that the demand notices are vague and cryptic:

The respondent has stated that along with demand notices marked at Annexure-P4 & P5 other required documents and the calculation sheets were enclosed. That fact appears to be acceptable as the petitioners themselves have produced such calculation sheets and the other particulars. Therefore, it cannot be said that the notices were vague and cryptic.

iv) that the respondent has not made out any legal or factual basis to make the demands; and

In the event, Apollo Hospitals and Raja could not be treated as captive consumers, they are liable to pay the CSS and difference in electricity consumption charges. It is so found in the present case. Hence this ground cannot be accepted.

v) that the demands are barred on the principles of estoppels:

It is true that the respondent BESCOM in the Official Memoranda issued on different months for FY 2017-18 has shown Apollo Hospitals and Raja and some others as captive consumers. It is found that the assumption of the BESCOM is wrong and BESCOM has also contended like that. It was an admission which was shown to be wrong and incorrect. The petitioners have not shown that because of such admission on the part of BESCOM their position

was altered and they were put to some monetary loss. Therefore, they fail to establish the estoppel alleged by them. Wrong admission by a party cannot be treated as an estoppel against him of the facts admitted. Therefore, the respondent is not barred on the principles of estoppel to make the demands.

vi) <u>difference of wheeling tax amount stated in Annexure-P5 does not convey any meaning:</u>

The respondent has stated in his statement of objections that by inadvertence, instead of mentioning 'electricity tax', it has been mentioned as 'wheeling tax' in the Annexure-P5. However, we note that the amount of Rs.33,49,832/- mentioned in Annexure-P5 relates to the claim towards CSS of Rs.27,53,560/- plus claim towards difference in electricity tax payable of Rs.5,96,272/-. This can be seen at Annexure-R1 (Calculation Sheet) produced by the respondent. For this reason, the demand made under Annexure-P5 cannot be rejected. As already noted the Calculation Sheet was furnished to the petitioners by the respondent. The said Calculation Sheet is produced by the petitioner along with Annexure-P8.

d) For the above reasons, we hold Issue No.3 in negative.

12. Issue No.4: To which the reliefs, the petitioners are entitled to?

In view of the findings reached on the above issues, the petitioners are not entitled to any of the reliefs.

13. Issue No.5: What Order?

It is not contended by the petitioners that any arithmetical errors are crept in the demands made against Apollo Hospitals and Raja. We make it clear that in the event of an arithmetical error in arriving the demand made against these petitioners, the same can be brought to the notice of the respondent and has to be corrected. Subject to these observations, we pass the following:

O R D E R

The Petition is dismissed holding that the petitioners are not entitled to any of the reliefs claimed in the petition.

Sd/-	Sd/-	Sd/-
(SHAMBHU DAYAL MEENA)	(H.M. MANJUNATHA)	(M.D. RAVI)
CHAIRMAN	MEMBER	MEMBER