

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 125 of 2015 &

IA No. 197 of 2015

&

Appeal No. 130 of 2015 &

IA Nos. 207 & 208 of 2015

Dated: 12th October, 2015

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

Appeal No. 125 of 2015 &

IA No. 197 of 2015

In the matter of :

**Uttar Pradesh Sugar Mills Co-Gen Association)
403, Chintels House,)
Station Road,)
Lucknow – 226 001.)**

...Appellant(s)

Versus

**1. Uttar Pradesh Electricity Regulatory Commission)
Kisan Mandi Bhawan, II Floor,)
Gomti Nagar)
Lucknow – 226 010.)**

**2. Uttar Pradesh Power Corporation Limited)
Shakti Bhawan,)
14, Ashok Marg,)
Lucknow – 226 001.)**

...Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Rajiv Yadav
Mr. Rahul Chouhan

Counsel for the Respondent(s) : Mr. C.K. Rai
Mr. Paramhans for **R.1**

Mr. Amit Kapur
Mr. Vishal Anand
Mr. Janmari Manikala for
R.2

Appeal No. 130 of 2015 &
IA Nos. 207 & 208 of 2015

In the matter of :

M/s. Dwarikesh Sugar Industries Ltd.)
Dwarikesh Nagar,)
Village, Bundki, Post-Medhpura Sultan,)
Tehsil-Nagina,)
District-Bijnor)
....Appellant(s)

Versus

- 1. Uttar Pradesh Electricity Regulatory Commission)**
2nd Floor, Kisan Mandi Bhawan,)
Gomti Nagar, Lucknow – 226010)
Through its Secretary)
- 2. Uttar Pradesh Power Corporation Limited)**
Shakti Bhwan,)
14, Ashok Marg,)
Lucknow – 226 001)
Through its Managing Director

3. **Madhyanchal Vidyut Vitran Nigam Limited,**)
4, Gokhale Marg, Lucknow – 226001.)
4. **Purvanchal Vidyut Vitran Nigam Limited,**)
Purvanchal Vidyut Bhawan,)
P.O. Vidyut Nagar, DLW, Varanasi – 221004.)
5. **Paschimanchal Vidyut Vitran Nigam Limited,**)
Victoria Park,)
Meerut – 250001.)
6. **Dakshinanchal Vidyut Vitran Nigam Limited,**)
Urja Bhawan, 220-K.V. UP-Sansthan,)
Bypass Road, Agra – 282007.)
7. **Uttar Pradesh Sugar Mills Co-gen Association,**)
403, Chintels House,)
16, Station Road, Lucknow – 226001.)
Through its Secretary)

.....Respondent(s)

Counsel for the Appellant(s) : Mr. Buddy A. Ranganadhan
Mr. D.V. Raghu Vamsy

Counsel for the Respondent(s) : Mr. C.K. Rai
Mr. Paramhans for **R.1**

Mr. Amit Kapur
Mr. Vishal Anand
Mr. Janmari Manikala for **R.2**

Mr. Rajiv Yadav for **R.7**

ORDER**PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON**

1. These two appeals challenge the order dated 15.4.2015 passed by the U.P. Electricity Regulatory Commission (the State Commission). Since objection was raised to the maintainability of these appeals we posted them for hearing as to the maintainability. We have heard learned counsel for the parties on the said issue. Before we deal with the rival submissions, it is necessary to give brief factual background relevant for the purpose of deciding the issue of maintainability.

2. We shall first go to Appeal No.125 of 2015. The Appellant therein is the Uttar Pradesh Sugar Mills Co-gen Association (the Appellant Association). It is a representative body of sugar mills in the state of Uttar Pradesh having 15 members that are engaged *inter alia* in generation of power through cogeneration technology using bagasse as fuel. Respondent no.1 is the State Commission. Respondent no.2 is Uttar Pradesh Power Corporation Limited (UPPCL). It is controlled by Government of U.P. and is engaged

inter alia in procurement of power from sugar cogeneration units in the State at generic tariff fixed by the State Commission.

3. The State Commission notified the UPERC (Captive and Non-conventional Energy Generating Plants) Regulations 2009 (CNCE Regulations 2009). The said regulations were applicable to the period 1.10.2009 to 31.3.2014. They laid down cost and operational norms for determination of tariff for power generated by captive renewable energy projects. Under CNCE Regulations 2009, the members of the Appellant Association were entitled to a tariff based on the year of their commissioning.

4. On 20.1.2015, the State Commission framed UPERC (Captive and Renewable Energy Generating Plants) Regulations 2014 (CRE Regulations 2014) specifying inter alia the terms and conditions for determination of tariff of Renewable Energy Generating Plants including bagasse based cogenerations selling power under PPAs to distribution licensees (DISCOMs). As a part of the CRE Regulations 2014, the State Commission also determined tariff for the cogeneration plants based on bagasse as fuel for the period

1.4.2014 to 31.3.2019. The CRE Regulations 2014 were made effective from 1.4.2014. As per the tariff schedule of the CRE Regulations 2014, the cogeneration units were entitled to a tariff of Rs.4.56/kwh (for plants commissioned in FY 2005-06 or earlier) to Rs. 5.65/kwh (for plant commissioned in FY 2013-14) depending upon year of commissioning.

5. We shall now go to the facts of Appeal No.130 of 2015. The Appellant therein is M/s Dwarikesh Sugar Industries Limited (Appellant Dwarikesh). It is a public limited company engaged in the business of manufacturing white crystal sugar at its three units in the state of U.P. Respondent no.2 is UPPCL. Respondent nos.3 to 6 are DISCOMS. The bi-product of the sugar units of Appellant Dwarikesh is bagasse which is used by it in its three separate cogeneration plants and the power generated from the said cogeneration plants is sold under PPAs to Respondent no.3 and 5. Appellant Dwarikesh is a member of U.P. Sugar Mills Co-gen Association i.e. the Appellant Association. The Appellant Association is Respondent no.7 in this Appeal.

6. We have already referred to CNCE Regulations 2009 and CRE Regulations 2014. The CRE Regulations 2014 were notified on 20.1.2015 with effect from 1.4.2014 and the existing CNCE Regulations 2009 were repealed. It is the case of the Appellant Dwarikesh that the CRE Regulations 2014 inter alia increased the tariff of bagasse based cogenerators.

7. UPPCL filed Review Petition No.1003/2015 on following three points:

- i. The tariff decided in the regulations cannot be made effective from a retrospective date but only from the date when the regulations have come into effect i.e. 20.1.2015. It was incumbent for the State Commission to have framed the regulations before deciding the tariff.
- ii. The heat rate of 3100 k cal / kwh considered for the plants commissioned in FY 2009-14 in the CNCE Regulations 2009 – should remain same for the plants commissioned in FY 2009-14 and to be commissioned in FY 2014-15.

- iii. For calculation of working capital, the fuel stock of bagasse should remain one month as considered in the CNCE Regulations 2009.

In Review Petition No. 1009 of 2015, the Appellant Association made following points:

- i. Review of Fuel Cost & Escalation.
- ii. Review of Station Heat Rate, O&M cost, ROE & IWC.

The Appellant Association filed Petition No. 1010 of 2015 under Section 142 of the Electricity Act 2003 (**the Electricity Act**).

8. The State Commission vide order dated 15.4.2015 dismissed the review petition filed by the Appellant Association and partly allowed the review petition filed by UPPCL. The State Commission modified the applicability of CRE Regulations 2014 as under :

“The Commission decides that the tariffs provided in the CRE Regulations 2014 shall be effective from 20.1.2015 and for this a proviso 2 clause 1 (2) shall be added as below:-

“Provided that the tariffs given in these regulations shall be considered to be effective from the date of these regulations i.e. 20.01.2015.

However, for the intervening period of 1.4.2014 to 19.1.2015 the tariffs provided for FY 2013-14 in the Regulations 2009 and allowed by the Commission provisionally be earlier orders would be considered as the applicable tariff during this period.”

Petition No. 1010 of 2015 filed by the Appellant Association was disposed of as not pressed.

9. This order is challenged by the Appellant Association and Appellant Dwarikesh. In the appeal filed by the Appellant Association it is prayed that the impugned order be set aside and direction be given that the tariff fixed by the State Commission in accordance with CRE Regulations 2014 shall be applicable with effect from 1.4.2014. In the appeal filed by Appellant Dwarikesh it is prayed that the impugned order be set aside.

10. Since the Respondents have raised objection to the maintainability of these appeals it is first necessary to refer to the submissions of the Respondents.

11. We have heard Mr. C.K. Rai learned counsel appearing for the 1st Respondent State Commission and perused the written submissions. Gist of the written submissions is as under:

a) By the impugned order the State Commission has amended the CRE Regulations 2014 by adding a proviso to Regulation 1(2). The Appellants are seeking judicial review of the amendment to the CRE Regulations 2014 which is not permissible. This legal position is settled by the Constitution Bench of the Supreme Court in **PTC India Ltd v. CERC** ¹.

b) It is equally well settled that while hearing appeal under Section 111 of the Electricity Act this Tribunal cannot go into the validity of the orders passed by the State Commission in exercise of its regulatory power. (**West Bengal Electricity Regulatory Commission v. CESC Ltd.**²)

c) The effect of the impugned order has also been carried out by amending CRE Regulations 2014 by way of UPERC(Captive and Renewable Energy Plants)(First Amendment) Regulations 2015.

¹ 2010 (4) SCC603

² 2002 (8) SCC 715

d) The State Commission has the power under Clause 7 and 8 of the CRE Regulations 2014 to amend the regulations.

e) In this case the amendment is carried out by exercising regulatory powers under Section 181 read with Sections 9,61, 86(1)(a)(b)(e) of the Electricity Act and all other powers enabling in that behalf. The amended regulation has already come into force.

f) In **Maharashtra State Electricity Distribution Company Ltd v. Central Electricity Regulatory Commission (Appeal No.92 of 2011) (MSEDCL V. CERC)** while relying upon **PTC India** this Tribunal has held that this Tribunal cannot interfere with orders passed by the Central Commission in exercise of regulatory powers, while dealing with an appeal under Section 111 of the Electricity Act. Since the Appellants have challenged the validity of the order passed by the State Commission while exercising its regulatory power, the appeal is not maintainable.

g) The Appellants are indirectly seeking judicial review of the amendment to CRE Regulations 2014, which is not permissible. Judicial review of the regulations framed under

the Electricity Act cannot be done directly by this Tribunal. What cannot be done directly cannot be permitted to be done indirectly. (**Ram Chandra Singh v. Savitri Devi**)³

h) A meaningful reading of the grounds of appeal depict that the Appellants in the garb of the present appeal are seeking judicial review of the CRE Regulations 2014. (**Begum Sahiba Sultan v. Nawab Mohd Mansur Ali Khan**)⁴

12. We have heard Mr. Amit Kapur , learned counsel appearing for UPPCL, the 2nd Respondent herein. We have gone through the written submissions filed by UPPCL. Gist of the written submissions is as under:

a) The Appellants are effectively challenging amendment made to the CRE Regulations 2014 by the State Commission in exercise of powers under regulation 7 thereof which is not permissible (**PTC India**).

b) In **MSEDCL v. CERC** this Tribunal has held the order impugned therein passed by the Central Commission

³ 2004 (12) SCC713

⁴ 2007 (4) SCC 343

amending the regulations is the outcome of the exercise of the regulatory power and this Tribunal in exercise of power under Section 111 of the Electricity Act cannot interfere with it.

c) In **Madhya Pradesh Power Generation Company Ltd. v. Madhya Pradesh Electricity Regulatory Commission**⁵ **(Madhya Pradesh Power Generation Company)** while dealing with the question as to whether this Tribunal has jurisdiction to enter into question of validity of regulations, this Tribunal held that it cannot issue directions to the State Commissions to amend regulations as that would amount to exercising powers of judicial review which powers this Tribunal does not have.

d) It is wrongly contended that amendment to CRE Regulations 2014 had not come into force as requirement of prior publication was not complied with. Since this Tribunal is not vested with the powers of judicial review, it cannot go into the question as to whether the regulations have been validly framed after complying with all legal requirements.

⁵ 2011 ELR(APTEL) 1041

e) The Appellants are asking this Tribunal to do something which cannot be done directly. This is not legally permissible. **(Rashmi Relcha Thotai & Anr. V. State of Orissa)**⁶, **(State of Haryana v. MP Mohta)**⁷. The Appeals are in the circumstances not maintainable and are liable to be dismissed.

13. We have heard Mr. Sanjay Sen, Sr. Advocate appearing for the Appellant Association. We have perused the written submissions filed on behalf of the Appellant Association. Gist of the written submissions is as under:

a) The CRE Regulations 2014 cannot be amended through the exercise of judicial powers, such as the power of review. Regulations once enacted become a part of the parent statute. Therefore a statutory body like the State Commission does not have the power of judicial review over such regulations (**PTC India**).

⁶ (2015) 5 SCC 690

⁷ (2007) 1 SCC 457

b) The present appeals are against an illegal adjudicatory order passed by the State Commission in exercise of review jurisdiction.

c) Under Section 94(1)(f) of the Electricity Act review is possible only in relation to decisions, directions and orders passed by the Appropriate Commission. The Appropriate Commission cannot review a regulation in exercise of powers under Section 94.

d) A combined reading of Sections 181, 183(3) & 182 recognizes that regulation making process is different and distinct from any adjudicatory function. To make regulation, which includes amendment, the protocol provided in the parent statute has to be followed. Regulations are subordinate legislations; therefore, they cannot come through a process of judicial orders.

e) The judgment of this Tribunal in **MSEDCL V CERC** is not applicable to the present case. The said judgment is in relation to exercise of powers under Regulation 21 of the CERC (Sharing of Inter-State Transmission Charges and Losses) Regulation 2010. It confers specific powers for

'Removal of Difficulty'. A removal of difficulty order is not an adjudicatory order, but is in the nature of a legislative order. That is why this Tribunal held in this judgment that the order impugned therein is an outcome of exercise of regulatory power. However, in the present case the proceedings were under Section 91(1)(f) of the Electricity Act in relation to review jurisdiction of the State Commission. The exercise of power and the impugned order are a result of 'adjudicatory powers' and not 'regulatory' or 'legislative powers'. The power to remove difficulty by a 'special' or 'general' order cannot be equated with power to review 'decisions, directions or orders'.

f) The judgment of this Tribunal in **Madhya Pradesh Power Generation Company** on which reliance is placed by the Respondents supports the case of the Appellants. It clarifies that the exercise of jurisdiction under the 'removal of difficulty' provision in a statute/regulation stands on a different footing. In the present case, there is no provision available for removal of difficulty. The issue is whether by exercising review jurisdiction the State Commission can change/modify a statute. The impugned order passed in exercise of review

jurisdiction under Section 94 of the Electricity Act is clearly an appealable order. The present appeals are therefore maintainable. No case is made out for rejecting statutory first appeals at the threshold stage.

14. We have heard Mr. Buddy A. Ranganadhan appearing for Appellant Dwarikesh. We have perused the written submission filed by him. The gist of the submissions is as under:

a) It is settled law that the maintainability of the appeal and the jurisdiction of this Tribunal would have to be seen on the pleadings in the appeal itself and not on what the Respondents may have to say on the merits of the issue. It is clear from the pleadings that the grievance raised in the appeals is against the order passed by the State Commission and not against the regulations framed by it. Such appeals are obviously maintainable.

b) The impugned dispensation has not culminated in a regulation under Section 181 of the Electricity Act. There is no notification as mandated by Section 181. Therefore, there

is no regulation in existence and there can be no question of the appeal being directed against a regulation.

c) There is no prayer for direction to this Tribunal to amend regulations. The Appellant's entire case is that the State Commission could not have amended a regulation by an order. Hence the appeals are directed against the order which is seeking to do something which, in law, it cannot namely amend the regulations.

d) In law today there is no regulation. There is no amendment of the regulations. There is only an attempt to amend it which is the subject matter of appeals. There is no prayer for judicial review simply because there is no regulation in existence.

e) Impugned order was passed in a review proceeding under Section 94(1)(f) of the Electricity Act. The State Commission could not resort to legislate under Section 181 of the Electricity Act while deciding a purely adjudicatory matter.

f) If such orders are allowed to be passed there would be a complete breakdown of regulatory certainty. The Appropriate Commission could simply sidestep any inconvenient

regulation by amending it in its order. Such orders would be destructive of the law laid down by the Supreme Court in **PTC India.**

g) By simply amending the regulations Appropriate Commission would keep the regulations outside the purview of Section 111 of the Electricity Act. There would also be no need to have a recourse to mandatory procedure contemplated under Section 181 of the Electricity Act. Requirement of notification will be done away with.

h) Objection as to the maintainability of review petition was raised before the State Commission. However, it was not dealt with.

i) **MSEDCL v. CERC** is not applicable to this case. The submission on this point is identical to the submission raised by the Appellant Association; hence it is not necessary to reproduce it.

j) In **Madhya Pradesh Power Generation Company** the prayer for a direction to the State Commission to amend its regulations was rejected. This Tribunal has not held that the

State Commission could amend the regulation by an order. It has only held that the State Commission was free to amend the regulations so as to determine the tariff more effectively.

15. Issue of maintainability of these appeals is hotly contested. To decide this issue we will have to first go to the Constitution Bench's judgment in **PTC India**, because once we understand the conclusions drawn in that matter which are relevant to this case, everything will fall in place. In that case the question which fell for consideration of the Constitution Bench was whether Parliament has conferred power of judicial review on this Tribunal under Section 121 of the Electricity Act. The Constitution Bench held that Section 121 of the Electricity Act does not confer powers of judicial review on this Tribunal. The Constitution Bench further held that a regulation made under Section 178 of the Electricity Act is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before this Tribunal under Section 111 of the Electricity Act. Therefore, we must bear in mind that this Tribunal does not have power of judicial review.

16. The Appellants want us to set aside the impugned order by which the State Commission has directed that proviso 2 be added to Clause 1(2) of CRE Regulations 2014. The question is whether while dealing with these appeals we would be required to undertake judicial review of the regulations which we cannot do in law. Learned counsel for the Appellants have repeatedly told us that they are not seeking judicial review of the regulations. Their case is that the State Commission has not followed the correct procedure and hence its order is liable to be set aside. The State Commission cannot amend a regulation by a judicial order. The Respondents on the other hand urge that under the garb of assailing the impugned order on the ground that the State Commission has not followed the correct procedure, the Appellants are trying to get the amendment made to the regulations set aside. They are in effect seeking setting aside of the amended regulation which this Tribunal cannot do. We shall examine this submission.

17. At the outset we expressed that as the Appellants are questioning the procedure adopted by the State Commission to amend the regulation and it is the Appellants contention that the

amendment is improperly made and is illegal, as per **PTC India**, the Appellants should seek review of the amended regulation by adopting appropriate remedy. Counsel for the Appellants submitted that after the impugned order is passed, no notification has been issued to give effect to the amendment. The proviso which the impugned order seeks to incorporate in CRE Regulations 2014 has not been notified. Requirements of notification and prior publication as mandated by Section 181 of the Electricity Act have not been complied with. On the other hand in its written submissions Respondent no.1 has stated that the said amendment has been given effect by amending the original regulation by way of UPERC(Captive and Renewable Energy Generating Plants)(First Amendment) Regulations 2015. It is stated that the amendment is carried out by exercising regulatory powers under Section 181 read with Section 9,61, 86(1)(a)(b)(c) of the Electricity Act and all other powers enabling in that behalf and the amended regulation has come into force. It is stated that as per the provisions of Section 182 of the Electricity Act, the amended regulation shall be laid before the State Legislature subject to business convenience of the Government and the Legislative Assembly. Respondent no.2 has also submitted that the Appellant's contention that requirement of

prior publication was not complied with is wrong. In this appeal we will have to deal with these diametrically opposite stands. In short we will have to decide whether the amended regulation is validly framed or not. We shall then be entering upon the forbidden field of judicial review which we cannot do.

18. While dealing with the rival contentions it would be appropriate to first refer to **MSEDCL v. CERC** on which the Respondents have placed reliance. In that case the Central Electricity Regulatory Commission(CERC) notified the Central Electricity Regulatory Commission(Sharing of Inter-State Transmission of charges and losses) Regulations 2010(ISTS Regulations). National Load Despatch Centre(NLDC) was designated as the Implementing Agency for implementing the ISTS Regulations. While implementing the ISTS Regulations NLDC experienced some difficulties. NLDC filed a petition before the CERC praying for removal of the said difficulties. On 4.4.2011 the CERC by the impugned order amended the ISTS Regulations. The Appellant challenged the said order by filing appeal in this Tribunal on the ground that the CERC had dispensed with the mandatory requirement of previous publication as contemplated under Section

178(3) of the Electricity Act. There being violation of the procedure the impugned order was illegal. Secondly it was urged that the CERC had not followed the principles of natural justice. Objecting to the maintainability of the appeals the Respondents submitted that the impugned order amends the regulations made under Section 178 of the Electricity Act, as such the vires of the regulations framed by exercising regulatory power cannot be questioned before this Tribunal. Counsel for the Appellant on the other hand urged that the impugned order was in the nature of determination arrived at after following quasi-judicial procedure which culminated in the issuance of an order. It is not in the nature of legislative exercise. It was issued by the CERC in the executive capacity, hence the appeal is maintainable. The Appellant further contended that the Appellant had not assailed the vires of the regulations. Instead, they were merely questioning the manner of exercise of the power. It was further contended that any order purporting to remove difficulty cannot be considered as representing an exercise beyond that of determination of tariff under Section 62 of the Electricity Act. While dealing with these submissions this Tribunal held that the impugned order was passed by the CERC in exercise of its regulatory power and not

adjudicatory power and hence the appeal was not maintainable. This Tribunal observed that Regulation 21 of the ISTS Regulations confers power on the CERC to remove difficulties. The CERC under Regulation 21 may direct the Implementing Agency or other entities to take suitable action. Hence, the nature of power under Regulation 21 is administrative while exercising the regulatory powers. Rejecting the contention that ISTS regulations in reality fix tariff and therefore exercise under Regulation 21 is necessarily an order, this Tribunal observed that the ISTS Regulations contain the principles and methodology for sharing ISTS charges and losses and there is no determination of tariff thereby. Therefore, the exercise of power while passing the impugned order was not under adjudicatory power of CERC but was under regulatory power. This Tribunal further observed that the directions given by the State Commission became integral part of the ISTS Regulations. When direction in relation to the amendment of regulations is given it cannot be said that it is an adjudicatory order which decides the disputes between the parties. This Tribunal concluded that the impugned order was not passed in exercise of adjudicatory power, but it is the outcome of the exercise of regulatory power and hence the appeal is not maintainable.

19. Counsel for the Respondents however contended that this judgment is not applicable to the present case because Regulation 21 therein conferred specific powers for “Removal of Difficulty”. A removal of difficulty is not an adjudicatory order, but is in the nature of legislative power. Counsel submitted that in the present case the proceedings were under Section 94(1)(f) of the Electricity Act in relation to the review jurisdiction of the State Commission. The exercise of power and the impugned judgment are a result of “adjudicatory powers” and not “regulatory” or “legislative powers”. The power to remove difficulty by a “special” or “general order” cannot be equated with the power to review a decision, direction or order. It is submitted that there is no provision in the original CRE Regulation 2014 to remove difficulty in implementing the regulations. The exercise of power to review to amend a regulation falls in adjudicatory jurisdiction of this Tribunal and hence the Appeal is maintainable.

20. Undoubtedly in **MSEDCL v. CERC** a petition was filed for removal of difficulties in implementation of the ISTS Regulations. It is also true that Regulation 21 of the ISTS Regulations conferred

power on the CERC to remove difficulties and the CERC could under the said Regulations direct the Implementing Agency to take suitable action. Hence, it was held that nature of the power under Regulation 21 was regulatory in nature. It is true that in this case there is no provision in the original CRE Regulations 2014 to remove difficulty. But it is important to note that in this case Regulation 7 of the CRE Regulations 2014 vests in the State Commission general power to amend. It reads thus:

“7: General Power to Amend

The Commission may, at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings before it, and all necessary amendments shall be made for the purpose of determining the real question or issue arising in the proceedings.”

Regulation 8 contains the Commission’s power to relax. It reads as follows:

“8: Power to Relax

The Commission for reasons to be recorded in writing may vary any of the provisions of these Regulations on its own motion or on an application made before it by an interested party.”

21. In view of these provisions it cannot be said that the State Commission in this case lacked the power to amend regulations. Power contained in Regulation 7 & 8 is a regulatory power. Assuming the proceedings before the State Commission were under Section 94(1)(f) it is the case of the Appellants that under Section 94(1)(f), the State Commission cannot review a regulation, it can only review its decisions, directions and orders. We have already noted that it is the case of the Respondents that the State Commissions has exercised regulatory powers under Regulations 7 and 8 of the CRE Regulations 2014 and the amendment is carried out in exercise of powers conferred under Section 181 read with Sections 9, 61, 86(1)(a), 86(1)(b) & 86(1)(e) of the Electricity Act. If by admitting the appeal we embark upon the task of deciding this issue we will be undertaking judicial review of the amended regulation which we cannot do. The fact that the CRE Regulations 2014 do not vest power to remove difficulties on the State Commission does not make this judgment inapplicable to the present case. Pertinently the Respondents are drawing support from the observations of this Tribunal in **MSEDCL v. CERC** that when direction in relation to the amendment of regulations is given it

cannot be said that it is an adjudicatory order which decides the disputes between the parties and that this Tribunal can entertain the Appeal related to the orders passed by the Commission for determination of tariff and resolution of the disputes through the exercise of the adjudicatory power, but not against the orders passed under regulatory power.

22. We must now go to **Madhya Pradesh Power Generation Company**. In that case the Appellant generating company had filed a petition before the State Commission for relaxation of the operating norms of tariff determination by virtue of the power under the relevant regulations because the norms were impossible to be met with on the ground that the generating stations were old. The State Commission rejected the prayer. The appeal was filed under Section 111 of the Electricity Act by the generating company praying that the State Commission's order be set aside. This Tribunal observed that the regulations framed by the State Commission or the Central Commission partake the character of subordinate or delegated legislations having force of law. Referring to **PTC India**, this Tribunal held that it has no jurisdiction to examine the validity of the regulations. The validity of the

regulations can be only challenged by seeking judicial review thereof. It was argued that the Appellant therein was not challenging the regulations, nor was it asking for amendment of the regulations. The Appellant was only asking for a direction to modify the norms in exercise of the Commission's power to relax or to remove difficulties or to apply inherent power. This submission of the Appellant was rejected by this Tribunal. This Tribunal observed that relaxation of norms which was prayed for is possible only when the notified regulation is again notified by bringing about an amendment thereof. This Tribunal further observed that when it asks the State Commission to amend its regulations it virtually implies that the regulations framed by it are deficient and that would amount to exercising powers of judicial review which it does not possess as stated by the Constitution Bench in **PTC India**. This Tribunal further observed that if it asks the State Commission to exercise the power of removal of difficulty or to relax norms or to exercise inherent power, it would be giving directions indirectly which it cannot give directly. This Tribunal reiterated that if it gives direction to the State Commission to amend the regulations, it would be required to observe that the norms set out in the regulations are unjust or improper or illegal and hence amendment

is necessary. That would mean it would have to undertake judicial review of the regulations which it cannot do. In the circumstances this Tribunal held that the appeal was not maintainable.

23. This judgment supports the Respondents' case on maintainability. Here the Appellants want this Tribunal to set aside the impugned order which has directed that CRE Regulations 2014 be amended. In effect the Appellants want the amended regulation to be set aside. It is very clear that the Appellants' grievance is about the contents of the amendment but it is sought to be set aside on the ground that proper procedure was not followed or the manner of exercise of power was not proper. If this Tribunal sets aside the impugned order the amendment will be set aside. To set aside the amendment this Tribunal will have to come to a conclusion that the amendment was illegal as proper procedure was not followed. That would amount to undertaking judicial review of the amendment which is a part of CRE Regulations 2014. The Appellants want this Tribunal to indirectly undertake judicial review of CRE Regulations 2014 which this Tribunal cannot do directly.

24. Mr. Sanjay Sen, learned Senior Advocate appearing for the Appellant Association submitted that **Madhya Pradesh Power Generating Company** clarifies the position that the 'removal of difficulty' provision stands on a different footing. Removal of difficulty function is in the nature of a legislative function and it does not fall within adjudicatory domain of the State Commission. Mr. Sen wants to distinguish **MSEDCL v. CERC** from the present case because in that case petition was filed for removal of difficulties in implementing the ISTS Regulations and it was held that order passed on that application was in exercise of regulatory power whereas in the present case the order is passed on a review petition. We have already stated that the Respondents' case is that the impugned order was passed in exercise of regulatory power. Determination of this issue involves judicial review of the amended regulation which we cannot do. At the cost of repetition it must be stated that in **MSEDCL v. CERC** this Tribunal has held that when direction in relation to the amendment of regulations is given in an order that order is not an adjudicatory order which decides disputes between the parties and this Tribunal can entertain appeals related to orders passed by the Commission for determination of tariff and

resolution of disputes through the exercise of the adjudicatory power but not against the orders passed in exercise of regulatory powers.

25. It bears repetition to state that in **Madhya Pradesh Power Generating Company**, the State Commission was concerned with petition praying for relaxation of norms. Relaxation of norms would have required amendment of the regulations. That would have led to judicial review of the existing regulations, that is, this Tribunal would have had to come to a conclusion that existing regulations were deficient. Hence, the appeal against order rejecting the prayer was held not maintainable. Similarly, in this case for setting aside the order directing that amendment be made to CRE Regulations 2014, this Tribunal will have to come to a conclusion that the amended regulation was not properly framed as the required procedure was not followed. That would involve judicial review of the amended regulation which we cannot undertake.

26. Examined from any angle, we are of the opinion that judicial review of the amended regulation is inevitable. Pertinently, while

the Appellants submit that the amendment has not come into effect, the Respondents submit that it has been given effect to. If we set aside the impugned order and consequently the amendment, we will have to return a finding that it is not properly framed. If we confirm the impugned order we will have to return a finding that it is properly framed. **PTC India** does not permit us to undertake judicial review.

27. In the circumstances and in light of **MSEDCL v. CERC** and **Madhya Pradesh Power Generating Company** we hold that the present appeals are not maintainable. Appeals are therefore dismissed as not maintainable. Needless to say that the Appellant would be free to adopt the remedy of judicial review if they are so advised. On the merits of the case we have expressed no opinion.

28. Pronounced in the Open Court on this 12th day of October, 2015.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

✓ **REPORTABLE/NON-REPORTABLE**