IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
APPELLATE JURISDICTION

APL No. 38 OF 2024 & IA No. 115 OF 2024 & IA No. 285 OF 2024
AND
APL No. 47 OF 2024 & IA No. 180 OF 2024 & IA No. 195 OF 2024

Dated: 26th July, 2024

Present: Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Mrs. Seema Gupta, Technical Member

APL No. 38 OF 2024 & IA No. 115 OF 2024 & IA No. 285 OF 2024

In the matter of:

Jhabua Power Private Limited
A JV Company of NTPC Ltd
Through its AGM-Commercial
NTPC Engineering Office Complex
3rd Floor, Plot No. 8(a), Block- A,
Sector 24
Noida, Uttar Pradesh- 201301 … Appellant(s)

Versus

1. **Kerala State Electricity Regulatory Commission**
Through its Secretary,
K.P.F.C. Bhavanam, CV Raman
Pillai Road, Vellayambalam,
Thiruvananthapuram, Kerala- 695010 … Respondent No.1

2. **Kerala State Electricity Board Limited**
Through its Chairman & Managing Director
Vydyuthi Bhavanam, Pattom,

Thiruvananthapuram … Respondent No.2
Kerala- 695004

3. **Jindal India Thermal Power Ltd**
Through its Managing Director
Plot No. 2, Pocket-C, Second Floor,
Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070 … Respondent No.3

4. **Jindal Power Limited**
Through its Chairman & Managing Director
Jindal Centre 12, Bhikaji Cama Place
New Delhi – 110066 … Respondent No.4

5. **The Additional Chief Secretary to Government,**
Power (B) Department, Government of Kerala, Room No. 208, 2nd Floor,
North Sandwich Block
Tiruvananthapuram, Kerala – 695001 … Respondent No.5

6. **The Kerala High Tension & Extra High Tension Industrial Electricity Consumers' Association,**
Through its General Secretary
Productivity House,
HMT Road, Kalamasserry, … Respondent No.6
Cochin – 683104

7. **Dejo Kappen, Chairman, Democratic Human Rights & Environment Protection Forum,**
Through its Chairman & Managing Director,
Journalist Garden, Kodimatha, … Respondent No.7
Kottayam, Kerala – 686013

Counsel on record for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Kriti Soni
Aishwarya Subramani
Harsha V Rao for App. 1

Counsel on record for the Respondent(s)	:	Dhananjaya Mishra for Res. 1 Prabhas Bajaj for Res. 2 Matrugupta Mishra Swagitika Sahoo Ritika Singhal Sonakshi Nipun Dave Akanksha V. Ingole Satish Kumar Sharma Shashwat Dubey for Res. 3 Hemant Singh Biju Mattam Mridul Chakravarty Ankita Bafna Lakshyajit Singh Bagdwal Chetan Kumar Garg Robin Kumar Supriya Rastogi Agarwal Nehul Sharma Harshit Singh Lavanya Panwar Alchi Thapliyal Sanjeev Singh Thakur Shaurya Kumar for Res. 4

APL No. 47 OF 2024 & IA No. 180 OF 2024 & IA No. 195 OF 2024

In the matter of:

Jindal India Thermal Power Limited,
Through Mr. Sanjay Mittal, Authorized Representative
Registered Office: Habitat India, C-3, Qutab Institutional Area, Katwaria Sarai, New Delhi- 110016

ALSO AT:
Plot No. 2, Pocket-C, 2nd Floor, Nelson Mandela Road,

… Appellant (s)

Vasanth Kunj, New Delhi – 110 070

Versus

1. **Kerala State Electricity Regulatory Commission**
   Through its Secretary,
   K.P.F.C. Bhavanam,
   C.V. Raman Pillai Road,
   Vellayambalam, Thiruvananthapuram,
   Kerala- 695 010 … Respondent No.1

2. **Kerala State Electricity Board Limited**
   Through its Chairman & Managing Director
   Vydyuthi Bhavanam, Pattom,
   Thiruvananthapuram- 695004, Kerala … Respondent No.2

3. **The Additional Chief Secretary to Government**
   Power (B) Department, Government of Kerala
   Room No. 208, 2nd Floor, North Sandwich Block
   Thiruvananthapuram, Kerala - 695001 … Respondent No.3

4. **Jhabua Power Limited**
   Through its Chairman,
   Unit No. 307, 3rd Floor,
   ABW tower, M.G. Road, Gurugram-122002,Haryana … Respondent No.4

5. **Jindal Power Limited**
   Through its Chairman,
   Jinal Centre, 12, Bhikaji Cama Place,
   Delhi-110066 … Respondent No.5

6. **The Kerala High Tension and Extra High Tension Industrial Electricity Consumer Association,**
   Through its President,
   Productivity House, HMT Road,
   Kalamassery, Cochin- 683104 … Respondent No.6

7. **Shri. Dejo Kappen,**
Through its Chairman,
Democratic Human Rights &
Environment Protection Forum
Journalist Garden, Kodimatha,
Kottayam- 686 013, Kerala … Respondent No.7

Counsel on record for the Appellant(s)	:	Matrugupta Mishra Swagitika Sahoo Ritika Singhal Nipun Dave Sonakshi Akanksha V. Ingole Satish Kumar Sharma Shashwat Dubey for App. 1
Counsel on record for the Respondent(s)	:	Dhananjaya Mishra for Res. 1 Prabhas Bajaj for Res. 2 Anand K. Ganesan Swapna Seshadri Kriti Soni for Res. 4 Hemant Singh Biju Mattam Mridul Chakravarty Ankita Bafna Lakshyajit Singh Bagdwal Chetan Kumar Garg Robin Kumar Supriya Rastogi Agarwal Nehul Sharma Harshit Singh Lavanya Panwar Alchi Thapliyal Sanjeev Singh Thakur Shaurya Kumar for Res. 5

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I.INTRODUCTION:

The order, impugned in these appeals, was passed by the Kerala State Electricity Regulatory Commission ("KSERC" for short) in RP 03 of 2023 dated 29.12.2023 allowing the petition filed by the Kerala State Electricity Board Limited ("KSEBL" for short) seeking review of the earlier order passed by the KSERC in OP 5 of 2021 dated 10.05.2023. The impugned Order dated 29.12.2023, the Appellants contend, is in violation of Order 47 Rule 1 CPC read with Section 94 of the Electricity Act, 2003 ("the Act" for short) as it was passed solely on the ground that a subsequent direction, issued to it by the State Government on10.10.2023 invoking Section 108 of the Act, should be adhered to by the KSERC.

II.FACTUAL MATRIX:

The Ministry of Power, Government of India, vide its Resolution dated 09.11.2013, notified the guidelines for procurement of electricity from Thermal Power Stations set up on DBFOO basis, and issued model documents comprising the Model Request for Qualification (MRFQ), the Model Request for Proposal (MRFP) and the Model Power Supply Agreement (MPSA) collectively known as the Standard Bidding Documents (SBD) which was to be adopted by the distribution licensee for procurement of electricity from power producers through a process of open and transparent competitive bidding under Section 63 of the Electricity Act, 2003, based on the offer of the lowest tariff. Clause 4 of the said guidelines stipulated that: "*Any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government"*.

KSEBL invited two separate bids for procurement of power, on DBFOO basis: (i) for procuring 450 MW power from December-2016 onwards for 25 years, and (ii) for procuring 400 MW power from October-2017 onwards for 25 years. The bids, so invited by KSEBL, were in deviation of the SBD guidelines issued by the MoP (Clause 3.3.1 of the Request for Proposal (RFP) which stipulated the selection of one bidder), and without obtaining prior approval of the Central Government. The first bid was invited on 05.03.2014, and the second on 25.04.2014. Financial bids, received in Bid-1, were opened on 31.10.2014. While ten bidders had submitted their bids, the L1 bidder in Bid-1 had offered only 200 MW. Hence, KSEBL requested L2 to L4 bidders to match their tariff to the bid submitted by L1. However, none of the bidders were willing to do so. Bid-2 was opened on 14-11-2014 and, while eleven bidders participated in the bid, M/s. BALCO, the lowest bidder in Bid-2, offered to supply 100 MW only as against 400 MW for which bids were invited by KSEBL. Hence, KSEBL requested L2 to L6 bidders to match the quoted tariff with that of the L1 bidder. L2 to L5 bidders in Bid-2 conveyed their willingness to match the tariffs quoted by the L1 bidder. After considering both the Bids, KSEBL held, in principle, that the tariff offered by L1 bidder in Bid-1 of @ Rs 3.60 per unit, for supplying 200 MW of power from December-2016 onwards for 25 years, appeared to be competitive. KSEBL issued LoA to the 'L1' bidder, M/s Jindal Power Limited, New Delhi for procuring 200 MW from December-2016 onwards for '25' years. KSEBL noted that L2 bidder in Bid-1, who had quoted a tariff of Rs 4.15 per unit for supplying 115 MW of power from December-2016 onwards for 25 years, had refused to match the L1 bidder's tariff. However, in deviation of its own offer, KSEB L accepted the quoted tariff of L2 bidder in Bid-1 ie at Rs. 4.15 per unit, justifying such acceptance on grounds that the tariff offered by L2 bidder of Bid-1 was less than the tariff quoted by the L1 bidder in Bid-2, and the

tariff “seemed to be competitive when compared to the cost-plus tariff of the recently commissioned NTPC projects, though it was contrary to KSEB L’s offer to match the tariff of L1 bidder in Bid-1. Pursuant thereto, KSEBL issued LoA to ‘L2’ bidder of Bid-1 ie M/s Jhabua Power Limited, Gurgaon for procuring 115 MW from December-2016 onwards for ‘25’ years @ Rs 4.15 per unit. Since the tariff quoted by the remaining bidders (other than L1 and L2) in Bid-1 was equal to or more than the tariff derived in Bid-2, KSEBL did not consider the remaining offers from Bid-1. Thus in Bid-1, from out of the tendered quantity of 450 MW, KSEBL issued LoA for 315 MW (200 MW +115 MW) to L1 and L2 bidders. In so far as Bid-2 was concerned, as against the tendered quantity of 400 MW, KSEBL, in violation of the tendered quantity, issued LOA for 550 MW to L2, L3, L4 and L5 bidders @ Rs 4.29 per unit for 25 years from October- 2017 justifying it on the ground that the tariff offered ‘appeared to be competitive’, when compared to the present cost- plus tariff of the recently commissioned stations of NTPC Ltd, considering the competitive tariff of Rs 4.29 per unit derived through Bid-2, and the likely power shortages in the forthcoming years. Hence, KSEBL decided to procure 550MW through Bid-2 @ Rs.4.29 per unit for twenty-five years from October-2017 onwards.

The Government of Kerala accorded sanction for procuring 865 MW of power, on DBFOO basis, vide G.O(MS) No.45/2014/PD dated 20.12.2014. Subsequently, KSEBL entered into Power Supply Agreements for long- term procurement of 865 MW electricity for a period of 25 years from 1st December 2016 and 1st October 2017 with L-1 and L-2 bidders of Bid-1 and L-1 to L-5 bidders of bid-2 respectively, and filed a petition before the KSERC on 21.04.2015,requesting it to adopt the tariff under Section 63 of the Act for 865 MW of power tied with various generators as per the tariff detailed in the petition. After examining the

petition and the report furnished by KSEB L, KSERC found certain irregularities/ deviations in the bidding guidelines and observed that KSEBL had not obtained prior approval of the Commission and the Central Government with respect to the PSAs and the deviations from the guidelines.

In Para 32 of its Order, in OP No.13 of 2015 dated 30.08.2016, the KSERC noted the following deviations from the standard bidding documents and guidelines issued by the Government of India on 08.11.2013 and 09.11.2013, and the KSERC Tariff Regulations, 2014:

> *"(i) KSEBL has awarded power purchase contract to the second lower bidder at its quoted rate of Rs.4.15 / kWh which is higher than the lowest rate of Rs.3.60/kWh in Bid-1, whereas the guidelines issued by theGovernment of India are only for the selection of the lowest bidder.*
>
> *(ii) KSEBL has not invited all the remaining bidders other than L1 to revalidate or extend their respective bid security and to match their rates with that of L1.*
>
> *(iii) KSEBL has purchased 550 MW of power in Bid-2 as against the tendered quantity of 400 MW*
>
> *(iv) KSEBL has obtained only 200 MW from the lowest bidder in Bid-1at a rate of Rs.3.60 / kWh. Thereafter 115 MW power from L2 has also been purchased at a higher rate of Rs.4.15 / kWh. Thus a total quantity of 315 MW was purchased as against the tendered quantity of 450 MW leaving a balance of 135 MW. KSEBL has purchased more quantity of power than the tendered quantity in Bid-2 stating thereason that it could not get the full tendered quantity in Bid-1. Such purchase of more than the tendered quantity is not in accordance with the general principles of tender process.*

(v) Even if the above 135 MW is considered for procurement from Bid-2,the total quantity that can be purchased is only 535 MW (400 MW + 135 MW). However, KSEBL has purchased 550 MW deviating from the conditions prescribed by Government of India in para 3.3.3 in the guidelines notified by Government of India on 5th May 2015, which has been relied upon by KSEBL to justify award of power purchase contracts to bidders other than the lowest bidder in Bid-2.

(vi) KSEBL has not obtained prior approval from Government of India for the deviations from the standard bidding documents and the guidelines.

(vii) KSEBL has not obtained approval from the Commission before executing the power purchase agreements.

(viii) KSEBL has not included any clause in the impugned PPAs to the effect that the PPA shall have the effect onlwith the approval by theCommission as specified in sub-regulation (1) of regulation 78 of theTariff Regulations, 2014".

Considering the aforesaid facts, documents and legal position, KSERC disposed of OP No.13/2015 vide Order dated 30-08-2016 holding that (i) the purchase of 200 MW of power by KSEBL from M/s Jindal Power Ltd, New Delhi at the rate of Rs.3.60 / kWh, as per the Bid -1 dated 05.03.2014, which was opened on 31.10.2014, was approved; (ii) the purchase of 100 MW of power by KSEBL from M/s Bharat Aluminium Company Ltd, Chhattisgarh at the rate of Rs.4.29/ kWh, as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014, was approved; (iii) approval of the following purchases of power by KSEBL from bidders, other than the lowest bidder (L1), would be considered on getting approval from the Government of India for the deviations from the guidelines, and

on getting the views from the Government of Kerala on the issues raised in paragraphs 34 and 38 of this order. The KSERC further directed that a copy of the order dated 30-08-2016 be submitted to the Government of Kerala with a request to communicate their views after duly considering the relevant facts and legal provisions in view of the Government Order GO (MS) No. 45/2014/PD dated 20.12.2014 sanctioning the purchase of 865 MW of power by KSEBL on DBFOO basis. KSEBL was further directed to follow up the matter with the Government of India and the Government of Kerala, and to submit the results to the Commission as early as possible, considering the fact that power purchases as per Bid-1 will have to commence with effect from December, 2016**.**

Pursuant to the order of the KSERC dated 30-08-2016, the Government of Kerala, vide letter dated15-09-2016, sought clarifications from the Govt. of India on the long-term procurement of 865 MW of power. In response, the Govt of India, vide letter dated 18.11.2016, informed them that approval of the deviations, pointed out by KSERC, should have been obtained from the Central Government before issuance of RFQ, RFP and PSA, and not at this stage; as per the guidelines, deviation on from the provisions of the bidding documents was approved if necessary, and not the action taken by the utility as per practice or precedent; and, in view of the above, the Government of Kerala / KSEBL may take action as appropriate in consultation with KSERC.

Thereafter KSEBL, vide letter dated 15.11.2016, while informing KSERC that purchase of 115 MW power from M/s Jhabua Power Ltd was inevitable, requested them to accord approval for scheduling power from M/s Jhabua Power Ltd from December, 2016, and informed them that they would approach them later with approval from the Ministry of Power once the same was received**.** KSERC, vide letter dated 28.11.2016, directed KSEBL to submit approval from both the Government of India and the

Government of Kerala. KSEBL, while submitting a copy of GO dated 30.11.2016 issued by the Government of Kerala granting them permission to procure 115 MW from M/s Jhabua Power Ltd from 01.12.2016, informed KSERC that no formal communication had been received in respect of approval of the Government of India.

In view of the decision of the Government of Kerala vide GO dated 30.11.2016, KSERC, vide Order in OP No.13 of 2015 dated 22.12.2016, provisionally approved purchase of 115 MW of power by KSEBL from M/s Jhabua Power Ltd at Rs.4.15 / kWh as per the power purchase agreement dated 31.12.2014, subject to clearance from the Government of India.

Thereafter, KSEBL, vide letter dated 25.10.2017, informed KSERC that they were forced to schedule 350 MW power under Bid-2 from 1-10-2017 and could not defer scheduling this power because of the precarious power scenario, and in anticipation of getting approval from the Commission upon clarification/direction from the Govt. of Kerala, they be granted approval. They also produced G.O. dated 21.10. 2017 whereby the State Govt had permitted them to draw the contracted power from 01.10.2017 and had informed them that the Govt order dated 21.10.2017 was not a final order, and final orders in the matter would be issued in due course.

KSERC, vide its letter dated 22.12.2017, allowed KSEBL to schedule 100 MW power from Jindal India Thermal Power Ltd, 100 MW from M/s Jhabua power limited and 150 MW from M/s Jindal Power Limited in view of G.O dated 21.10.2017, approving the power purchase proposal, including the rate for the pending approvals only after the State Government accords final approval for the entire power purchase under DBFOO.

In view of stoppage of supply of 350 MW power by RLDCs, the consequent adverse impact on the state power system due to non-establishment of LC as PSM for the DBFOO contracts under Bid-2, and to avoid denial of purchase of power from exchanges, KSEBL, vide letters dated 20/7/2019 and 2/8/2019, requested KSERC to grant final approval of the PSAs. KSERC, vide letter dated 26/9/2019, declined to grant approval stating that it had, vide its Order dated 30/8/2016, directed KSEBL to get approval of the Govt. of India for the deviations in the standard bidding guidelines and, in view of G.O dated 20/12/2014, to obtain the views of the Govt of Kerala; and, since the said approvals were yet to be submitted, the Commission could not consider the request of KSEBL for grant of approvals for the PSAs entered into with L2, L3 and L4 in Bid-2 under DBFOO.

The Government of Kerala, vide letter dated 20.01.2018, requested the Ministry of Power, GOI for its advice as to whether it would be irregular to confirm the said purchase of power under PSAs executed with the bidders other than L 1 bidder under Bid 1 and Bid 2. In reply, the Central Government, vide letter dated 11.12.2019, informed that the matter had been further examined; the views of the Ministry of Power as communicated earlier vide letter dated 18.11.2016 were read; the deviations pointed out by KSERC should have been got approved by the Central Government before issuance of RFQ, RFP and PSA, and not at this stage; and the Government of Kerala / KSEBL may take action as appropriate in consultation with KSERC.

While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission stated that it had considered scheduling power from the three projects of Bid-2, ie., 100 MW of power from M/s

Jindal India Thermal Power Ltd, New Delhi, 100 MW of power from M/s Jhabua Power Limited and 150 MW of power from M/s Jindal Power Limited, for the limited purpose of estimating the ARR& ERC for the control period; since the required approvals from GoI and State Government was still awaited, the Commission was constrained to use the rate equivalent to the cost of power from BALCO, which was L1 of Bid 2; this consideration was only for the purposes of estimating the cost of power provisionally in the ARR, and shall not be construed as an approval of the power purchase rate or of the PPA itself as per Section 63 of the Act which could be considered only after fulfilment of the conditions specified by the Commission in its order dated 30-8-2016.

The KSERC reiterated that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEBL gets the approval of power purchase from the Government of India for the deviations from the guidelines, and on getting approval of the Government of Kerala on the entire power purchase under DBFOO.

On 06.04.2020, KSEBL wrote to Jindal India Thermal Power Ltd stating that, in the absence of regulatory approval to pass the entire power procurement cost against the unapproved PSAs, KSEBL would have to limit payment to the generators in accordance with the orders of the KSERC. In O.A.No.29/2019 filed on 14.2.2020 seeking approval of fuel surcharge for the period April 2019 to June 2019, and in O.A.No.02/2020 filed on 27.4.2020 seeking approval of fuel surcharge for the period July 2019 to September 2019, KSEBL claimed fuel surcharge for the electricity purchased from the three unapproved DBFOO contracts in bid-2 namely (1) 100 MW power from M/s Jindal India Thermal Power Ltd ,New Delhi, (2) 100 MW from M/s Jhabua Power Ltd and (3) 150 MW from M/s Jindal

Power Ltd. The KSERC, vide Orders dated 14.2.2020 and 27.4.2020, did not approve the fuel surcharge, claimed from the above three unapproved DBFOO contracts, as fixed charge and variable cost of these stations had not been specifically approved. Instead, KSERC directed KSEBL to limit payment of these stations at the rate of BALCO, i.e, the L1 rate of Bid-2.

KSEBL filed Review Petition Nos. 2 of 2020 and 4 of 2020 against the orders of the KSERC dated 14.02.2020 and 27.04.2020 respectively and, vide common order dated 14.08.2020, the review petitions were dismissed.

On 08.09.2020, KSEBL informed Jindal India Thermal Power Ltd that a petition for approval of the PSAs was being filed by them before the KSERC. On 07.10.2020, M/s Jindal India Thermal Power Ltd filed an appeal in DFR No. 369/2020, under Section 111 of the Electricity Act, 2003, before this Tribunal praying that the order passed by KSERC, in OA No. 29/2019 and OA No. 2 of 2020 dated 14.02.2020 and 27.04.2020 respectively, be set aside, and procurement of power be approved as per the tariff in the PSA signed with KSEBL. This Tribunal passed an interim order, and posted the case to 20.11.2020. In the meanwhile, on 12.11.2020, KSEBL filed OP No.5/2021, as a fresh petition under Section 63 of the Act, for adoption of tariff of the unapproved PSAs signed by them.

On 20.11.2020, this Tribunal passed an interim order stating that, as approval of the State Commission for the PSA and the prayer for tariff adoption was still awaited, there shall be stay of operation of the orders dated 14.02.2020 and 27.04.2020 passed by KSERC on the subject of fuel surcharge, as a consequence status quo ante shall be restored to the dispensation prevailing immediately anterior thereto, and the ad-interim order would continue till the application for stay and appeal are

adjudicated upon after final hearing. The appeal, and the application filed therewith, were to be taken up for final hearing after the decision on the fresh petition for approval/adoption has been rendered by the State Commission.

Challenging the interim Order of APTEL dated 20.11.2020, KSERC filed Civil Appeal No. 41/2021 on 04.01.2021 and, by Order dated 27.01.2021, the Supreme Court granted stay of further proceedings before this Tribunal. However, in compliance with the Order passed by this Tribunal on 20.11.2020, KSERC scheduled a public hearing on 09.02.2021 at Ernakulam and on 19.02.2021 at Thiruvananthapuram in OP No. 5/2021. Based on the objections raised by the participants in the public hearings, and in view of the Interim Order of Stay passed by the Supreme Court in Civil Appeal No. 41/2021 dated 27.01.2021, KSERC decided to await the final disposal of Civil Appeal No. 41/2021.

KSEBL, vide letter dated 28/4/2022, informed KSERC that the Govt. of Kerala had issued a G.O. on 27/10/2021 constituting a Committee with the Additional Chief Secretary (Finance) as the Chairman, the Principal Secretary (Power) as the Convenor, and the Law Secretary and CMD KSEBL as members to examine the bidding process and purchase agreements entered into by KSEBL based on the comments of the statutory agencies, and the possibility of terminating/re-negotiating the power purchase agreements in the best interests of the State; and, in the meeting held on 19/1/2022, the Committee recommended that the prudent course of action would be that the deviations in the standard bidding process not be agreed to by the Government of Kerala in respect of the subject PSAs.

By its order, in Civil Appeal No. 41/2021 dated 10.02.2023, the Supreme Court directed KSERC to take a call and decide O.A. No. 5 of 2021 (OP No.5/2021) as expeditiously as possible, but in no case later

than three months; both parties shall co- operate in expeditious disposal of the pending O.P; and the present interim arrangement shall continue up to the date of disposal of O.P No. 5 of 2021 and for a further period of three weeks thereafter.

In its order in O.P No.5 of 2021 dated 10.05.2023, KSERC examined three issues. On issues (i) and (ii), ie whether the tariff had been determined as per the guidelines issued by the Central Government through competitive bidding in a fair and transparent and equitable process under Section 63 of the Electricity Act, 2003 or not?, whether any deviations were made in the bidding process from the guidelines dated 09.11.2013, if so whether the deviations were fair and transparent and to protect the public interest?, and what were the deviations and its long-term financial implications?, the KSERC concluded that the tariff determined by KSEBL, in these unapproved PSAs, was not in a fair, transparent and equitable process, and they had grossly deviated from the guidelines issued by the MoP, Government of India under Section 63 of the Electricity Act, 2003. Further, the deviations made by KSEBL were against public interest and created long term financial implications to the consumers and the State. Hence the petition filed by KSEBL, for final approval of the four un-approved PSAs, was liable to be rejected.

On Issue No.3, ie whether provisional approval given by the Commission for drawing power from the un-approved PSAs amounts to deemed approval?, the KSERC observed that the Central Government had not approved the deviations made by KSEBL in the Standard Bidding Documents and guidelines issued by the MoP dated 9.11.2013, and the Commission had not yet issued final approval; and, in view of the legal and statutory provisions, the contention raised by KSEBL, regarding “deemed approval” was not legally sustainable and was liable to be rejected. The KSERC rejected the Petition in OP No.5/2021 filed by

KSEBL seeking issuance of final orders with respect to drawal of power from generators of the fo**ur** un-approved PSAs**.**

Considering the precarious power situation in the State, the State Government, in the exercise of the powers vested under Section 55 of the Articles of Association of KSEBL and vide its letter dated 01.06.2023, directed KSEBL to take urgent steps to file an appropriate petition before the KSERC praying for continuation of the interim arrangement for drawal of power. In compliance with the said directions, KSEBL filed OP No. 24 / 2023 on 02.06.2023 seeking continuation of the interim arrangement [drawal of power from the 4 PSAs at the L1 rate of Bids], till KSEBL was able to make alternative arrangements for procurement of power, or till the decision in the application for interim relief filed by KSEBL before APTEL, whichever was earlier; or, in the alternate, to grant permission to KSEBL to procure / generate power from alternate sources, at the tariff available through such sources, for meeting the power deficit in the State of Kerala. KSERC, vide its order dt. 07.06.2023, (1) permitted KSEBL to make arrangements for power procurement by continuing the interim arrangement, of scheduling power from the four unapproved DBFOO, which was in force for a period of two weeks from 10.05.2023 as per the directions of the Supreme Court, for a further period of 75 days from the date of the Order, or till alternate arrangements of procuring 500MW RTC power on medium term basis, whichever was earlier; (2) payment for the power supply during the interim arrangement shall be as per the interim Orders of APTEL dated 21.10.2022, 16.12.2022, 10.02.2023 and 17.04.2023 ie to make payment at L1 rate of Bid-2 subject to the final disposal of the pending appeal petitions before APTEL. (3) the interim arrangement shall be subject to the final decision of APTEL in IA 1183/2023 filed by KSEBL in DFR No. 325/2023, against the Order of the KSERC in OP No. 05/2021 dated

10.05.2023.

M/s. JITPL and Jhabua Power Ltd filed Appeal Nos. 572 / 2023 and 583 / 2023 respectively before this Tribunal challenging the said order dated 07.06.2023. There was zero scheduling of power from all the 4 PSAs till 20.06.2023. From 21.06.2023 onwards, Respondent Nos. 1 and 3 commenced supply / scheduling of power, Respondent No. 2 (JITPL) did not resume scheduling of power to KSEBL. However, Respondent No. 1 - Jhabua Power Ltd and Respondent No. 3 - Jindal Power Ltd continued with the scheduling of power only upto 20.07.2023, and thereafter discontinued scheduling of power to KSEBL. On 24.07.2023, the Appeals filed by Respondent Nos. 1 and 2, against the order passed by the Commission dated 07.06.2023, were disposed of by this Tribunal recording the submission, made on behalf of the Commission, that the order dated 07.06.2023 could not be construed as compelling the generators to sell power to KSEBL at L1 rates, and it was for the respective generators to decide whether or not to supply power to KSEBL, in terms of the order dated 07.06.2023 passed by the Commission.

Pursuant to the order passed by KSERC, in OP No. 05/2021 dated 10.05.2023, the generators viz. M/s Jhabua Power Ltd. (215 MW) stopped supply of power from 01.06.2023 onwards, M/s JITPL (100 MW) from 03.06.2023 onwards and M/s Jindal Power Ltd. (150 MW) from 06.06.2023 onwards.

Appeal No. 518/2023 filed by KSEBL before this Tribunal, against the Order passed by KSERC in OP No. 05/2021 dated 10.05.2023, was disposed of by order dated 31.10.2023 granting them liberty to file a Review Petition before the KSERC. In terms of the liberty granted by this Tribunal, KSEBL filed the Petition, in RP No. 03 of 2023, seeking review of the Order passed by the KSERC in OP No.05 of 2021 dated

10.05.2023. On the KSERC passing an order, in RP No. 03 of 2023 dated 29.12.2023, the present appeals have been filed.

III.CONTENTS OF THE ORDER OF KSERC IN OP No. 05 of 2021 DATED 10.05.2023:

O.P. No. 05 of 2021 was filed on 12.11.2020 by KSEBL under Section 86(1) (b) and Section 63 of the Electricity Act, 2003, for adoption of tariff of the PSAs signed by them, seeking final orders with respect to drawal of 350 MW of power (Jindal Power Ltd-150MW, Jhabua Power Ltd.-100MW and Jindal India Thermal Power Ltd – 100MW) contracted by them through the second bid invited under DBFOO Guidelines-2013, during 2014 in the light of various orders issued by the KSERC (Order dated 30-8-2016 in OP No. 13/2015, Order dated 8-7-2019 in OA No. 15/2018, Order dated 14-2-2020 in OA No. 29/2019, Order dated 27-4-2020 in OA No. 2/2020, Order dated.14-8-2020 in RP No. 2/2020 and RP No. 4/2020, and directions contained in the letter dated 22.12.2017). KSEBL had also filed IA No.5/2023 dated 22.03.2023 amending the prayer seeking final orders for drawal of 115 MW of contracted power under Bid-1 from Jhabua Power Ltd in view of the orders on approval of ARR, ERC and tariff of KSEBL for the control period 2022-23 to 2026-27 in O.P. No.11/2022 dated 25.06.2022. The KSERC allowed IA No.05/2023, filed by KSEBL on 24.03.2023 seeking approval for amending the relief portion of OP No. 05/2021, in view of the Order passed by it on 25.06.2022 in OP No.11 of 2022.

In the light of the directions issued to it, by the Supreme Court in Civil Appeal No. 41/2021 dated 10.02.2023, KSERC examined the following issues:

(1) Whether the tariff has been determined as per the guidelines issued by the Central Government through competitive bidding in a fair and transparent and equitable process under Section 63 of the Electricity Act, 2003 or not?

(2) Whether any deviations were made in the bidding process from the guidelines dated 09.11.2013 and if so, whether the deviations are fair and transparent and to protect the public interest? What are the deviations and its long-term financial implications?

(3) Whether provisional approval given by the Commission for drawing power from the un approved PSAs amounts to deemed approval?

Issues (1) and (2), being interconnected and inter-related, were considered together by the KSERC. After taking note of Sections 63 and 86(1)(b) of the Electricity Act, 2003, Regulation 78 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014, the judgement of the Supreme Court in **Energy Watchdog and Ors. vs. Central Electricity Regulatory Commission and Ors.** and ***The TATA Power Company Limited Transmission vs. Maharashtra Electricity Regulatory Commission and Ors,*** the judgement of this Tribunal in **Essar Power Limited vs. Uttar Pradesh Electricity Regulatory Commission and Ors,** the 2013 Govt of India Guidelines, more particularly clauses 2.1.1, 3.3, and 4 thereof, and to its earlier orders in O.P No.13/2015 dated 30/8/2016, the KSERC observed that, based on the estimated demand forecast and power shortage, KSEBL had decided to procure 850 MW of power for a period of 25 years through open tender, as per the DBFOO Guidelines issued by the Ministry of Power on 08-11-2013, and notified by the Government of India on 9-11-2013, in two bids, the 1st tender was floated on 5.3.2014 and the 2nd tender was floated on 25.04.2014; the first delivery of 450 MW was to commence in December, 2016 and the balance 400 MW in October, 2017; instead of inviting a

single tender, KSEBL had decided to split the procurement tenders, and had floated two separate tenders within a span of 50 days**;** and the reason stated by them, for splitting of bids, was that DBFOO guidelines provided for only one delivery date, and two delivery dates were necessary.

The KSERC noted the following important deviations in the tendering process, the selection process, L1 matching, enhancement in fixed charges etc. from the bidding guidelines in the present power purchase under DBFOO Scheme:

(1) Deviation in tendering process:

There was no provision in the 2013 bidding guidelines for splitting up of the bids; without prior approval of the Central Government and without obtaining prior permission from the Commission, KSEBL had decided to invite two bids for procurement of 850 MW; they had intimated this decision to the Commission only on 18.12.2014, after completion of the bidding process; it was also informed to the Commission that KSEBL shall file a formal petition for adoption of tariff under Section 63 of the Electricity Act, 2003 once they entered into a Power Supply Agreement; splitting up of tenders enabled the same bidders to participate, and to submit two separate bids quoting two different tariff rates in two tenders for power generated from the same plant to the procurer; thus, the generators could quote different tariff in the two tenders and to attain additional financial benefit which, ultimately, resulted in huge loss to KSEBL; if they had floated one tender, instead of splitting it into two, the bidders would have lost their chance to submit two separate bids quoting two different tariffs from the same plant; further, KSEBL would not have lost the chance to get 850 MW of power @ Rs. 3.60 per kWh for the entire period of 25 years; hence this significant deviation made by KSEBL, to bypass the Bidding guidelines, created huge financial implications on the State and the general public.

(2) **Deviations in selection process (Selection of lowest bidder):**

As per Clause 3.3 of the Request for Proposal (RFP), which is the provision for selection of the bidder, the bidder, who quotes the lowest tariff offered to the Utility in conformity with the provisions of Clause 3.5, shall be the "Selected Bidder"; as per the guidelines, if two or more bidders quote the same tariff, the bidder is to be selected through drawal of lots; thus, only one bidder can be selected in this process; but KSEBL had selected the L1 bidder in Bid -1 and the L2 bidder in addition to L1, and also five bidders in Bid-2, thereby violating the guidelines issued by the MoP; and had entered into PSAs without approval of the State Commission.

(3). Deviations in L1 matching:

As per Clause 3.3.3. of the RFP guidelines, L1 matching is provided only in the event the Lowest Bidder withdraws or is not selected. For this purpose, the Utility may invite all the remaining bidders to revalidate or extend their respective bid security as necessary, and match the Bid of the aforesaid Lowest Bidder. If, in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the Selected Bidder. But KSEBL, in addition to selecting the L1 bidder in Bid-1, also selected the L2 bidder, and entered into Power Sale Agreement (PSA) with the L2 Bidder, that too without matching the L1 tariff. KSEBL also agreed to pay a higher tariff of Rs. 4.15 for kWh in Bid-1 which was higher than the L1 rate of Rs. 3.60/ kWh by Rs.0.55/unit. This irregular decision was taken by them stating that the L2 tariff of Bid-1 at Rs. 4.15/kWh was lower than L1 tariff of Bid-2 (Rs.4.29/kWh). The monetary loss sustained to the consumers, for the purchase of 115 MW, was estimated at Rs 59.08 crores per annum, and Rs1477 crores for 25 years.

In Bid-2, KSEBL, instead of inviting all the remaining bidders to

revalidate or extend their bid security as specified in paragraph 3.3.3 of the RFP document for fresh bids, selectively invited L2 to L4 bidders only. In Bid -2 also, after selecting the L1 bidder (Rs.4.29/kWh), KSEBL, instead of inviting all the bidders, selectively invited bidders L2 to L5 to match the L1 bid tariff. This was in violation of para 3.3.3 of RFP.

(4).Changes made in purchase of bid quantity:

KSEBL invited two bids for the purchase of 450 MW and 400 MW respectively. Instead of contracting the bid quantity as mentioned in the bid, the petitioner contracted 315 MW in Bid-1 and 550 MW in the tendered quantity of Bid-2. The reason given by them for such deviation was that they could procure 315 MW only in Bid-1. KSEBL contracted for purchase of additional tendered quantity of 150 MW at a higher rate of Rs. 4.29 per kWh instead of exploring the possibility to get power @ Rs. 3.60 per kWh in Bid-1. This deviation also created additional liability of about Rs 77.06 crores per annum and Rs 1926.50 crores for 25 years on the consumers.

(5) Enhancement in fixed charge:

In Bid-1, M/s Jhabua Power Ltd, Gurgaon had quoted Rs.2.39/kWh as fixed charge and Rs. 1.76/kWh as variable charge, whereas in Bid- 2 M/s Jhabua Power Ltd increased the fixed charge from the quoted fixed charge of Rs.2.65/kWh to Rs.2.97/kWh during the L1 matching i.e., increased the fixed charge by Rs 0.32/unit in Bid-2. This deviation/irregular action created huge monetary loss to KSEBL and the consumers of the State, estimated at Rs 23.83 crores per annum and Rs 595.75 crores for 25 years. KSEBL or the generator could not satisfactorily explain the reason for such an increase in the tariff during the L1 matching. Likewise, M/s Jindal power Ltd, who was the L-1 bidder in Bid -1, had quoted the tariff @Rs.3.60/kWh comprising of fixed charge @ Rs.2.74/kWh and variable charge @ Rs.0.86 per unit. The same M/s

Jindal Power Ltd had also offered to supply 150 MW @ Rs.4.29/kWh comprising fixed charge @ Rs.3.43/kWh and variable charge @ Rs.0.86/kWh. The Commission also noted that, in both the bids, M/s. Jindal Power Ltd had offered to supply power from the same plant, but had quoted different fixed charges i.e., Rs.2.74/kWh in bid-1 whereas fixed charges quoted in bid-2 was @Rs.3.43/unit. The Commission could not understand what was the reason for quoting higher fixed charge of Rs.3.43/kWh per unit in bid-2, ie. Rs. 0.69/kWh more than the quoted amount of Rs.2.74/kWh in Bid-1. The bidder offered to supply power from the same plant, same location and using the same machinery. If the bidder, M/s Jindal Power Ltd offered to supply power from bid-2 also at the same fixed charge of Rs.2.74/unit quoted in bid-1, KSEBL could have annual savings of Rs.77.10 crores, and savings for the entire period of 25 years would be Rs.1927.50 crores. KSEBL, being well aware of the fact that since the fuel chargeis determined by the coal price determined by the Ministry of Coal and coaltransportation cost through rail fixed by the Ministry of Railways and should be paid at these rates depending upon various factors, should not have permitted the “matched bidders” to enhance their fixed charge.

(6) Additional quantity of power procurement:

KSEBL proceeded to purchase additional quantity (865 MW) of power in excess of the tendered quantity (850). There is no provision in the 2013 MoP guidelines for the purchase of additional quantity of power in excess of the tendered quantity. This is also a deviation from the MoP guidelines. KSEBL had followed the procedures stipulated in the repealed RFP guidelines notified by the Ministry of Power, Govt. of India dated 22/7/2010 while selecting the bidders other than L1. In the bidding process, KSEBL has not invited all the remaining bidders other than L1 to revalidate or extend their respective bid security and to match their rate

with that of L1.

As per Regulation 78 of the 2014 Tariff Regulations, prior approval of the commission is mandatory for entering into PPA with generators by the distribution licensee including KSEBL under Section 86(1)(b) of the Electricity Act, 2003. However prior approval of the Commission was not obtained before entering into PPA with generators in the DBFOO contract.

In response to the clarification sought by the Commission regarding the date of willingness sought by the petitioner from the L1 bidder in Bid-1 for the supply of additional quantity of power, KSEBL had clarified that the date was 15.11.2014, Bid-1 was opened on 31.10.2014 and Bid-2 was opened on 14.11.2014. But, on 15.11.2014, the very next day of opening Bid-2, and after realizing the higher rates in Bid-2, KSEBL had asked the L1 Bidder (Jindal Power Ltd.) to convey its willingness to increase the quantum offered by it in Bid -1, on the same tariff. But the generator did not express their willingness to match with L1 tariff @ Rs.3.60/unit quoted by M/s Jindal Power Ltd who quoted L1 bid in Bid-1**.** If KSEBL had sought willingness tomatch L1 rate with other bidders in Bid-1, prior to the opening of Bid-2, they could have secured sufficient power at L1 rate, and KSEBL lost their chance to secure procurement of power to the extent of 115 MW from the L2 Bidder in Bid-1, at the L1 rate of Bid-1, by disclosing the bid amount in Bid-2 in advance. Public interest was violated when KSEBL selected the bidders other than L1 in bid-1 and bid-2, deviating from the SBD guidelines. The deviation noted by the Commission alone would create an additional liability of Rs.237.07 crores per annum and Rs. 5926.75 crores for 25 years.

KSERC observed that the above-mentioned deviations were significant and the process was not fair and transparent, which required prior approval of the Central Government. Under Section 63 of Electricity Act, 2003, the Commission could adopt tariff, if such tariff has been

determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. KSEBL had not submitted any evidence to substantiate that the deviations noted by the Commission would come within the purview of the project specific modifications expressly permitted in the SBD. In this case, KSEBL had significantly deviated and blatantly violated the guidelines issued by the MoP, which required prior approval of the Central Government. Further, as per Section 86(1)(b) of the Electricity Act, 2003, the State Commission is competent to regulate electricity purchase and procurement process.

In addition, KSEBL had executed the PSAs without obtaining approval of the Commission as stipulated in Regulation 78 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 which came into force with effect from 14.11.2014. They had executed the PSAs during the period 26.12.2014 to 02.02.2015, blatantly violating the said Regulations issued by the Commission. The settled position was that the Commission can adopt the tariff under Section 63 of the Electricity Act, 2003, only if the tariff is adopted through a fair and transparent process of bidding in accordance with the guidelines notified by the Central Government. The deviations noted by the Commission from the bidding guidelines would clarify the lack of transparency which required prior approval of the Central Government.

Clause 1.1.4 of RFP was part of the bidding documents, which conferred discretion on the bidders to bid up to 25 percent of the capacity. But the Utility could accept only those bids which matched the lowest Bid. As per this clause, the Utility had the discretion to accept only those bids which matched the L1 bid. Here the word “accept” meant to receive the bids and not selection of the bidder. Evaluation of bids and selection of Bidder etc. were clearly specified in Clause 3.1 and Clause 3.3 of the RFP. The whole process seemed to lack transparency and objectivity, and failed

at the touch stone of public interest.

The Ministry of Power, vide its letter dated 18.11.2016, had clarified that, ***"the deviations as pointed out by the KSERC would have been got vettedand approved by Central Government, before the issuance of RFQ, RFP and PSA and not at this stage****. As per the Guidelines, deviations on the provisions of the bidding documents are approved, if necessary and not the actions taken by the utility as per practice or precedent*. *In view of the above Government ofKerala/ KSEB Ltd may take action as appropriate in consultation with KSERC***.**" The Central Government, vide letter dated 11th December 2019, reiterated the same position and clarified that "*the views of Ministry of Power as communicated earlier vide letter dated 18.11.2016 are reiterated.* ***The deviations as pointed out by KSERC would have been got vetted and approved by the Central Government before issuance of RFQ, RFP and PSA and not at this stage****. Government of Kerala/ KSEB Ltd may take actions as appropriate in consultation with KSERC***."**

The above-mentioned replies would show that the Central Government had rejected the request for approval of the deviations in the DBFOO guidelines made by KSEBL. The State Government had neither approved the deviations pointed out by the Commission nor accorded final approval for purchase of the unapproved DBFOO contracts. As per Clause 4 of the Resolution dated 9.11.2013, issued by the Central Government under Section 63, ***any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government****.* Hence the Central Government alone was competent to approve the deviations from the SBD guidelines. Further, the law laid by the Supreme Court in ***Bajaj Hindustan Ltd. vs. State of U.P. and Ors. (14.03.2016 - SC) : MANU/SC/0476/2016*** *would clarify that* if the words used were "with the prior approval" for getting validity of any

such action taken ….prior approval shall be obtained and subsequent ratification is not possible.

In view of the above observations, the Commission came to the conclusion that, in this case, the tariff determined by KSEBL in these unapproved PSAs was not in a fair, transparent and equitable process and they has grossly deviated from the guidelines issued by the MoP, Government of India under Section 63 of the Electricity Act, 2003. Further, the deviations made by KSEBL were against public interest and created long term financial implications to the consumers and the State. Hence the petition filed by KSEBL, for final approval of the four un-approved PSAs, were liable to be rejected.

On Issue No.3, KSERC noted the submission that it had approved to draw contracted power from these four generators and had been allowing to pass through portion of the cost of power, and through this action it had granted deemed approval for the PSAs and all the pre-requisites for conclusion of a binding contract as per the Indian Contract Act,1972 are satisfied. The KSERC thereafter observed that it had, vide Order dated 22-12-2016, provisionally approved purchase of 115 MW of power from M/s Jabhua Power Ltd, L2 bidder of Bid 1, in view of the facts, circumstances and urgency explained by KSEBL vide their letter dated 15.11.2016, and in view of the decision of the Government of Kerala in GO dated 31.11.2016; in the said Order, the Commission had specifically mentioned that the approval was provisional only and had stated “that the Commission hereby approves provisionally the purchase of 115 MW of power by KSEB Ltd. from M/s.Jhabua Power Limited @ Rs.4.15/kWh as per the power purchase agreement dated 31.12.2014, subject to the clearance from the Government of India and subject to the final decision of the Hon’ble High Court in WP (C) 33100/2014” and final approval was subject to the clearance from Government of India; further the

Commission, vide its letter dated 22.12.2017, had allowed KSEBL to draw power provisionally from three un-approved PSAs of the generators namely, M/s Jindal India Thermal Power Ltd, M/s Jhabua Power Ltd and M/s Jindal Power Ltd, clarifying that the Commission may approve the power purchase proposal including the rate for the pending approvals only after the Government of Kerala accords final approval for the entire power purchase under DBFOO.

In response to the request of KSEBL, sought vide Letters dated 20.07.2019 and 02.08.2019 to grant approval for the unapproved PSAs, the Commission, vide letter dated 26/08/2019, had clarified that it could not consider the request of KSEBL to grant approval for the PSAs entered into with L2, L3 and L4 in Bid-2 under DBFOO.

While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission had emphasised that this consideration was only for the purposes of estimating the cost of power provisionally in the ARR, and shall not be construed as an approval of the power purchase rate or of the PPA itself as per Section 63 of the Act which can be considered only after fulfilment of the conditions specified by the Commission in its order dated 30-8-2016; similarly, while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission had reiterated that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEBL gets approval of power purchase from the Government of India for the deviations from the guidelines, and on getting the approval of the Government of Kerala on the entire power purchase under DBFOO; hence the arguments raised by KSEBL, regarding deemed approval, were not acceptable; the concept of deemed approval was explained by the Supreme Court in various decisions. *(Sushila Mafatlal Shah*

MANU/SC/0482/1988: (1988) 4 SCC 490. Ankit Ashok Jalan vs. Union of India (UOI) and Ors. (04.03.2020 - SC): MANU/SC/0276/2020.); the settled position was that the principle “deemed approval” was applicable only if there was a specific provision in the Act/Rules or Regulations; KSEBL had not pointed out any provision either in the Electricity Act, 2003, Rules or Regulations framed thereunder by the Commission to substantiate their contentions to that effect.

As clarified above, the Central Government has not approved the deviations made by KSEBL in the Standard Bidding Documents and guidelines issued by the MoP dated 9.11.2013, and the Commission has not yet issued final approval. In view of the legal and statutory provisions, the contention raised by KSEBL regarding “deemed approval” was not legally sustainable and was liable to be rejected. Issue No.3 was answered accordingly

The KSERC rejected the Petition in OP No.5/2021 filed by KSEBL seeking issuance of final orders with respect to drawal of power from generators of the following un-approved PSAs: (1) 115 MW of power from Jhabua Power Ltd (L-2 of Bid-1). (2) 150 MW of power from Jindal Power Ltd (Bid-2). (3) 100 MW of power from Jindal India Thermal Power Ltd (Bid-2). (4) 100 MW of power from Jhabua Power Ltd (Bid-2).

IV. ORDER ISSUED BY THE GOVT OF KERALA UNDER SECTION 108 OF THE ELECTRICITY ACT ON 10.10.2023:

GOVERNMENT OF KERALA
Power(B) Department
No. 125/B1/2021-POWER 10-10-2023, Thiruvananthapuram
From
Additional Chief Secretary to Government
To
The Secretary
Kerala State Electricity Regulatory Commission

KPFC Building, OPP. Police Head Quarters
Vellayambalam, Thiruvananthapuram – 695 010

… …

WHEREAS the Ministry of Power, Government of India, as per the resolution 1st cited, issued guidelines for procurement of Electricity from Thermal Power Stations set up on Design, Build, Finance, Own and Operate (DBFOO) basis.

AND the State Government, as per the letter 2nd cited, had directed KSEBL to review the power procurement plan and have the bidding process initiated on the basis of guidelines and Bidding documents prescribed by the Ministry of Power. Accordingly KSEBL invited two tenders, for procurement of round the clock power, using linkage coal us fuel on DBFOO basis.

AND the Chairman & Managing Director, KSEBL, as per the letter cited 3rd, requested the approval of Government for the long term procurement of electricity to the extent of 865 MW on DBFOO basis as per the guidelines prescribed by the Ministry of Power.

AND as per the Government order 4th cited, Government of Kerala had accorded sanction for procurement of 865 MW of power on DBFOO basis, subject to the conditions prescribed therein. Consequent thereto seven power purchase agreements were executed with various generating companies for the supply of 865 MW of power. OP No.13/2015 was filed by KSEBL before KSERC on 21.04.2015, for approval of the above power purchase and for adoption of tariff, as contemplated under Section 63 of the Electricity Act 2003.

AND the Commission by its order cited as 5thabove, interalia found that while carrying out the bidding process, KSEBL had deviated from the prescribed guidelines issued by the Ministry of Power, Government of India. Among the seven power purchase agreements, it had only approved the purchase of 200 MW of power from M/s Jindal Power Ltd. (L1) at the rate of Rs.3.60/kWh for 25 years as per Bid-1 dated 05.03.2014 which was opened on 30.10.2014 and the purchase of 100 MW of power from M/s Bharath Aluminium Company Ltd.(L1) at the rate of Rs.4.29/kWh for 25 years as per Bid-2 dated 25.05.2014 which was opened on 14.11.2014. The Commission further ordered that the approval of the remaining power purchase agreements will be considered only after getting the approval from Central Government for the deviations from the

guidelines and on getting the views from Government of Kerala in this regard.

WHEREAS the Chairman & Managing Director KSEBL, as per the letter cited 6th, requested to give concurrence for procuring 115 MW power from M/s Jhabua Power Ltd. with effect from 1 December 2016, L2 bidder in Bid-1, which was rejected by KSERC, stating that the power supply will start on 01-12-2016 and if it was not purchased, it will cause huge financial loss and power deficit. Accordingly, the Government as per order cited 8th above, permitted KSEBL to procure 115MW power from M/s Jhabua Power Ltd. with effect from 01/12/2016.

AND WHEREAS on consultation, the Central Government, as per the letter 7th cited, opined that the deviations pointed out by KSERC would have been got vetted and approved by Central Government before issuance of RFQ, RFP and PSA and not at this stage and directed to take appropriate action in consultation with the KSERC.

WHEREAS, the Commission by its order read as 9th above in petition No.1893/DD(T)/Jhabua/2016/KSERC in OP No.13/2015, noticing the Government order read as 8th above, provisionally approved the purchase of 115 MW of power by KSEB Ltd. from M/s Jhabua Power Ltd. as per the power purchase agreement dated 31.12.2014, subject to the clearance from Government of India and also to the final decision of the Hon'ble High Court in WP (C) No. 33100/2014.

AND WHEREAS pending detailed consideration of the matter, Government, as per the order 10th cited, again permitted KSEBL to draw the contracted 550 MW power with effect from 01-10-2017, subject to the condition that final orders in the matter will be issued in due course viewing that KSEBL has concluded long term agreements for 25 years for 550MW of power on the basis of e-tenders on DBFOO terms with effect from 01.10.2017 on the basis of an analysis of demand-supply gap in Kerala and projected availability of transmission corridors from the States in which the generating plants are located.

WHEREAS the State Government again sought the opinion of Central Government in the matter and as per the letter 11th cited, the Ministry of Power informed as follows:

"The matter has been further examined. The views of Ministry of Power as communicated earlier vide letter dated 18.11.2016 are reiterated. The deviations as pointed out by KSERC would have been got vetted and

approved by the Central Government before issuance of RFQ, RFP and PSA and not at this stage. Govt. of Kerala/KSEB Ltd may take action as appropriate in consultation with KSERC."

WHEREAS, the Government have constituted a committee under the chairmanship of the Additional Chief Secretary, Finance Department, as per order cited 12th, to examine this issue based on the comments of the Statutory agencies and to report the possibilities of terminating/renegotiating the PPA in the best interest of the State. The Committee recommended for not approving the deviation in the standard bidding process in respect of the power purchase agreement and to inform the same to KSERC and to decide subsequent action on receipt of the final disposal of the matter by KSERC. Government have examined the minutes of the Committee held on 19-01-2022 and decided to get more details on Power Purchase Agreements (PPAs) including termination payment, compensation payment etc.

AND WHEREAS O.P No.5/2021 was filed by KSEBL before the Commission, praying for issuance of final orders in the matter of granting approval of four power supply agreements executed with the respective generating agencies including that seeking for issuance of final orders pursuant to order dated 22.12.2016. However, the Commission by its order read as 14th above, rejected the petition of KSEBL. Aggrieved thereto, the KSEBL preferred Appeal No.518/2023 before the Appellate Tribunal for Electricity, New Delhi.

AND as per the letter cited 15th, the Chairman & Managing Director KSEBL requested intervention of the Government of Kerala in the matter highlighting the impact of the KSERC orders on the power position of the State detailing the technical and financial implications as follows:

<u>Technical implications without DBFOO Contracts</u>

(1) For meeting the evening peak demand, KSEBL is procuring power from the market to the order of 400 MW to 600 MW, even after scheduling of power from generators of four unapproved contracts, depending upon the impact of summer rains.

2) Non scheduling from four, unapproved contracts will reduce the availability from 1033.22 MW to 652.73 MW at Kerala periphery.

3) If the demand soars high, the deficit in the peak will be of the order of 1100 MW. Currently the market prices are of the order of Rs.10/- from 19:00 hrs till 24:00 hrs.

4) There is a chance of scarcity in availability of power as the demands picks up in the country, which is now slightly declined due to the impact of summer rains.

5) Even after availing power from DBFOO stations, hydel storage position is sufficient to meet the state demand up to 1st week of June 2023 due to the impact of heat wave, with summer rains, this can extend a little further.

6) For meeting the swap commitments starting from 16th June 2023, the reservoir levels were managed so as to have around 750 MU at the beginning of this water year 2023-24. The situation will be aggravated further with the non-availability of 380.49 MW from these stations.

7) Load restrictions needs to invoke throughout the day to balance the increasing demand with depletion of hydel reserves and delayed monsoon.

8) 465 MW is inevitable to manage the LGB of the state. If 465 MW of power needs to be curtailed, the same may be done after contracting from equivalent alternate source. Tender procedure for re-tendering of 500 MW RTC power on Medium Term basis is undergoing, which may take around 3-4 months for finalization including time period for seeking KSERC approval. Alternatively, a fresh tender for the long term period for the balance period of DBFOO contracts (around 18 years) will take minimum six months to finalise.
9) Also, due to fluctuating rate in power market it is not able to ensure purchase of power at affordable rate. Hence the tariff may go up exorbitantly.

10) In the worst scenario, KSEBL may be forced to impose power restrictions in the state of Kerala including to those on Industrial Consumers.

Financial Implications

1. In case of termination of Agreement by Utility, as per Clause 31.3.2 of DBFOO PPA, KSEBL will be liable to pay damages. The termination payment of the four unapproved DBFOO Contracts amount to approximately Rs.500 crores.

2. In addition to the above, KSEBL have to make immediate disbursal of the pending amount to be disbursed to the generator on account of restrictions as per KSERC Order and APTEL Orders is around Rs.270 Crore which includes Rs. 171.46 crores disputed in PRAAPTI portal.

3. As per the current market trend, the per unit energy charge to replace the above shortfall comes around Rs.5-6/unit which in turn leads to tariff hike.

4. It is pertinent to note that the Ministry of Power, vide communication dated 23.05.2023 has sought the willingness of other beneficiaries of North/West/ South region tor availing the power from Jhabua Power Ltd. to the extent of 215 MW on account of the orders dated 10.05.2023 of Hon'ble KSERC.

WHEREAS the Government, as per letter cited 16th above, directed KSEBL. to approach KSERC to make an interim arrangement and to get necessary time to overcome the electricity crisis in the State.

WHEREAS the KSEBL approached the Kerala State Electricity Regulatory Commission by filing IA No.1383/2023 and thereby sought permission to make interim arrangement to overcome the power crisis in the State. The Commission by its order dated 07.06.2023 read as 17th above granted extension of time up to 75 days from 07.06.2023.

WHEREAS the Chairman & Managing Director, KSEBL as per the letter cited 18th, again requested Government to intervene in the matter and to allow KSEBL to procure power at PPA rates and approve DBFOO contracts from unapproved GENCOS. It is further informed that, in order to limit the financial implications due to purchase of additional power from the market within manageable levels so as to avoid tariff shocks to the consumers and to ensure sustainability of the utility, demand side management by way of power cut or load restriction or both is the only way out and also requested to consider the gravity of the matter and issue directions on imposing load shedding/power cut if the monthly power purchase cost crosses Rs.900 crores.

WHEREAS KSERC, as per the order cited 19th, in OP No. 50/2023 further ordered to extend the interim arrangement for procurement of power from the unapproved DBFOO contracts for the period up to 31.12.2023 or till alternate arrangements are made by KSFBL for procuring 500 MW RTC power on medium term basis or whichever is

earlier subject to final decision of the Hon'ble APTEL in DFR No.325/2023, filed against the order of Commission dated 10.05.2023 in OP No.05/2021.

WHEREAS the Government have examined the request of Chairman & Managing Director, KSEBL with connected records in detail and observed as follows:-

A. Consequent to non-approval of power purchase agreements by the Commission, substantial amounts are due to the generation companies, in pursuant to the agreements executed with the KSEBL. Further, the said companies are no longer supplying power to KSPBL. In order to solve the said issue KSEBL is now purchasing power from the market at very higher rates. The cost of power purchase required for the remaining period of the DBFOO contract from July 2023, by adopting an alternative system, will cause huge financial constraints and a situation may arise where power will not be available even at the existing contract rates. In the event of non-approval of power purchase agreements, State will be put to power crisis and consequential power restrictions, which will not be in the best interest of the State.

B. A comparison of the power purchase rate on cancellation of construct is also verified and is found to be comparatively much higher than that of the contract rates that would have been had the contract not been canceled. There had been an increase in the market price from every point of time. Therefore, entering into new contracts in the current situation will also lead to a huge increase in the electricity charges which ultimately turn out to be the liability of the consumers and they will be put in trouble.

C. It appears that since 2010, the State of Kerala has been witnessing recurring rampant power restrictions. Consequent to the said power restrictions, the cost of power procurement was increased from year to year. During the summer of 2010 to 2012 and from 09/2012 to 05/2013, the State of Kerala was facing severe power deficit and was constrained to impose load shedding and power restrictions throughout the State.

D. It was in the said compelling circumstances that steps were initiated by the KSEBL to procure adequate quantity of power through open access mechanisms, on a long term basis. The demand of power in the State was projected an increase at the rate of 7% to 8%, on an

annual basis. Accordingly, the Board had invited tenders for procurement of power, which had culminated in execution of seven power purchase agreements, as stated herein afore. So much so, as is seen therefrom, the public purpose and public good involved therein is apparent and evident,

E. Owing to the deviations committed by the Board in the bidding process, the Commission its order dated 10.05.2023 denied approval for the power supply agreements executed by the KSEBL for the purchase of 465 MW of power. Insofar as the deviations committed by the KSEBL are concerned, there cannot be any squabble as things stands now, more particularly on the face of order dated 30.08.2016 and order dated 22.12.2016 respectively passed by the Commission. However, the matter is now pending before the learned Appellate Tribunal.

F. The Electricity Act of 2003 contemplates for the most efficient and economical development and operations of electricity industry, so as to benefit the consumer, predominantly, the public at large.

G. Section 108 of the Electricity Act of 2003 reads as thus; Section 108 (Directions by State Government) :-

(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.

H. Section 108 of the Act gives power to the State Government to issue directions in writing to the Commission in the matters of policy, involving public interest. Furthermore, Section 108 (2) of the Act of 2003 recognizes the dominant position of the State Government in deciding as to whether any direction issued by the State Government relates to a matter of policy involving public interest, then the decision of the Government thereon shall be final.

I. Accordingly, when a matter is placed before the Government which involves public interest and public good, then the Government is empowered to issue necessary directions in writing to the

Commission in that regard, in the matter of discharge of its functions, as contemplated under the Electricity Act of 2003.

J. As observed above, there had been an increase in the market price from time to time. Therefore, entering into new contracts in the current situation will lead to a huge increase in the electricity charges to be paid by the consumers and the public/consumers will be put in trouble to meet the liability arising therefrom. Any cancellation of unapproved power purchase agreements at this length of time will not be in the best interest of the State. Moreover, the public should not be put in peril for the irregularities/mistakes/deficiencies happened due to any procedural and technical reasons. It appears that KSEBL, despite earnest efforts, is not in a position to come up with an alternate arrangement to overcome the impending power crisis in the State

K. KSEBL was bound to follow the instructions laid down by KSERC regulations. If any mistake had occurred, alternative means should have been sought earlier so as to avoid the losses. Now the public should not be held liable for the shortcomings due to procedural flaws.

L. The State Government is of the opinion that for the benefit of the society especially the public at large, it should formulate a policy purely based on public interest and it is necessary to intervene in the matter and to issue directions in writing to the Commission, in the matter of granting approval to the power purchase agreements.

M. For the reasons stated in the preceding paragraphs, in the best interest of the consumers of power in the State and to avoid the impending power crisis, it is only apposite for the State Government to take a policy decision, in public interest, enabling to issue necessary directions, as contemplated under Section 108 of the Electricity Act of 2003.

NOW THEREFORE, after detailed examination of the matter, considering all facts and observations, without prejudice to any enquiry ongoing in the matter and without ratifying the procedural irregularities pointed out by KSERC, keeping in view the larger interest of the public, the Government deems it appropriate to invoke the power under section 108 of Electricity Act 2003 and accordingly, in exercise of the said power, Government hereby direct Kerala State Electricity Regulatory Commission to reconsider/review their orders in O.P No.5/2021 filed by

Kerala State Electricity Board Limited, in accordance with the policy of the Government for the best interest of the State and public at large.

Yours Faithfully,

KR JYOTHILAL

Additional Chief Secretary”

V.CONTENTS OF THE ORDER PASSED BY THE KSERC IN RP NO. 03/2023 DATED 29.12.2023:

KSEBL filed the Petition, in RP No. 03 of 2023, seeking review of the Order passed by KSERC in OP No.05 of 2021 dated 10.05.2023. The reliefs sought therein was to recall / review the order dated 10.05.2023 passed in OP No. 05 / 2021 thereby allowing OP No. 05 / 2021, and granting the reliefs sought therein, particularly, granting approval to the following PSAs executed between the Petitioner and the respective generators:- (a) PSA for 115 MW capacity (under Bid-1) with Jhabua Power Ltd. dated 31.12.2014, (b) PSA for 100 MW capacity (under Bid-2) with Jhabua Powe; r Ltd. dated 26.12.2014, (c) PSA for 150 MW capacity (under Bid-2) with Jindal Power Ltd. dated 29.12.2014, and (d) PSA for 100 MW capacity (under Bid-2) with Jindal India Thermal Power Ltd. dated 29.12.2014.

In the said review petition, KSEBL referred to the policy directive issued by the Government of Kerala, under Section 108 of the Electricity Act, 2003, and stated that, taking cognizance of the public interest involved in the approval of the 4 PSAs, the grave consequences being faced by the State of Kerala, and the grave prejudice to public interest and consumer interest, on account of disapproval of the said 4 PSAs, the Government of Kerala, exercising jurisdiction under Section 108 of the

Electricity Act, 2003, was issuing the policy directive dated 10.10.2023 to the KSERC; in view of the policy decision taken in public interest by the State Government, and the directions issued vide Policy Directive dated 10.10.2023 u/s 108 of the Electricity Act, 2003, KSEBL prayed that the order dated 10.05.2023 be reviewed; there were sufficient reasons for review and modification of the order dated 10.05.2023; and allowing the present Review Petition would meet the ends of justice and shall also be in the interest of the public / the consumers in the State of Kerala.

The KSERC thereafter observed that the present petition filed by KSEBL was for seeking review of the Order of the Commission dated 10.05.2023 in OP No. 05/2021, in view of the policy directions dated 10.10.2023, issued by the State Government by invoking the powers conferred on it under Section 108 of the Electricity Act, 2003. The KSERC thereafter summarized the background and circumstances which necessitated the Order in Petition OP No. 05/2021 dated 10.05.2023 being issued, and extracted the relevant portion of the policy directives dated 10.10.2023 whereby the State Government, after detailed examination of the matter, considering all facts and observations, without prejudice to any enquiry ongoing in the matter and without ratifying the procedural irregularities pointed out by KSERC, keeping in view the larger interest of the public, deemed it appropriate to invoke the power under Section 108 of Electricity Act 2003 and accordingly, in exercise of the said power, directed the KSERC to reconsider/review their orders in O.P No.5/2021 filed by KSEBL in accordance with the policy of the Government for the best interests of the State and the public at large.

The KSERC examined the policy directions dated 10.10.2023 issued under Section 108 of the Electricity Act, 2003, and noted the following: (1) The policy directives dated 10.10.2023 are the views of the State

Government, regarding power purchase of 465MW of power from the unapproved DBFOO contracts entered into by the KSEBL in the financial year 2014-15, which was sought by the Commission vide its Order in OP No. 13/2015 dated 30.08.2016, and its subsequent letter dated 08.09.2016 addressed to the State Government. However, KSEBL could pursue and get the views and directions of the State Government subsequent to the Order of the Commission in OP No. 05/2021 dated 10.05.2023. (2) The policy directions was issued duly considering the technical and financial implications subsequent to denial of adoption of tariff and approval of PSAs of the four DBFOO contracts under question. (3) the policy directions were issued by the State Government invoking its powers under Section 108 of the Electricity Act, 2003. (4) In the said Policy Directions, the State Government has highlighted the following: (i) In the event of non-approval of power purchase agreements, the State will be put to power crisis and consequential power restrictions, which will not be in the best interest of the State. (ii) entering into new contracts in the current situation will also lead to a huge increase in the electricity charges which will ultimately turn out to be the liability of the consumers and they will be put in trouble. (iii) during the summer of 2010 to 2012 and from 09/2012 to 05/2013, the State of Kerala was facing severe power deficit and was constrained to impose load shedding and power restrictions throughout the State. The demand of power in the State projected an increase at the rate of 7% to 8 %, on an annual basis. Accordingly, the Board had invited tenders for procurement of power, which had culminated in execution of seven power purchase agreements. So much so, as is seen therefrom, the public purpose and public good involved therein is apparent and evident. (5) insofar as the deviations committed by KSEBL are concerned, there cannot be any squabble as things stands now,

more particularly on the face of the order dated 30.08.2016 and the order dated 22.12.2016 respectively passed by the Commission. However, the matter is now pending before the Appellate Tribunal. (6) Section 108 of the Act gives power to the State Government to issue directions in writing to the Commission in the matters of policy, involving public interest. Furthermore, Section 108(2) recognizes the dominant position of the State Government in deciding as to whether any direction issued by the State Government relates to a matter of policy involving public interest, then the decision of the State Government thereon shall be final. (7) there had been an increase in the market price from time to time. Therefore, entering into new contracts in the current situation will lead to a huge increase in the electricity charges to be paid by the consumers and the public/consumers will be put in trouble to meet the liability arising therefrom. Any cancellation of unapproved power purchase agreements at this length of time will not be in the best interest of the State. Moreover, the public should not be put in peril for the irregularities/mistakes/deficiencies which happened due to any procedural and technical reasons. It appears that KSEBL, despite earnest efforts, is not in a position to come up with an alternate arrangement to overcome the impending power crisis in the State. KSEBL was bound to follow the instructions laid down by KSERC regulations. If any mistake had occurred, alternative means should have been sought earlier so as to avoid the losses. Now the public should not be held liable for the shortcomings due to procedural flaws. (8) the State Government is of the opinion that for the benefit of the society, especially the public at large, it should formulate a policy purely based on public interest, and it is necessary to intervene in the matter and to issue directions in writing to the Commission, in the matter of granting approval to the power purchase agreements. (9) the State

Government further clarified that, for the reasons stated in the preceding paragraphs, in the best interest of the consumers of power in the State and to avoid the impending power crisis, it is only apposite for the State Government to take a policy decision, in public interest, enabling it to issue necessary directions, as contemplated under Section 108 of the Electricity Act of 2003 apposite for the State Government to take a policy decision, in public interest, enabling it to issue necessary directions, as contemplated under Section 108 of the Electricity Act of 2003. (10) the State Government further directed that, considering all facts and observations, without prejudice to any enquiry ongoing in the matter and without ratifying the procedural irregularities pointed out by KSERC, keeping in view the larger interest of the public, the Government deems it appropriate to invoke the power under Section 108 of the Electricity Act, 2003 and accordingly, in exercise of the said power, the Government hereby direct Kerala State Electricity Regulatory Commission to reconsider/review their orders in O.P No.5/2021 filed by Kerala State Electricity Board Limited, in accordance with the policy of the Government for the best interest of the State and public at large.

The KSERC further observed that the State Government had not ratified the procedural irregularities pointed out by the Commission in the bidding documents by KSEBL in the process of entering into DBFOO contracts in question, and had also clarified that the ongoing enquires on the procedural irregularities shall continue. However, keeping in view larger public interest, the State Government, by invoking Section 108 of the Electricity Act, 2003, had directed the Commission to reconsider/review its Order in OP No. 05/2023 dated 10.05.2023.

The KSERC considered the following issues:- (1) Issue No.1:

(a) whether the policy directives of the State Government under Section 108 of the State Government is binding on the Commission?;
(b) whether there will be technical and financial implications in the State due to non approval of the four DBFOO contracts?
(2) Issue No.2: whether the respondent generators are bound to give power supply as per the PSA signed under DBFOO contracts, if the Commission approves the PSA in view of the policy direction of the State Government?

On issue No. 1(a), the KSERC noted the submission of KSEBL that the policy directives issued by the State Government, under Section 108 of EA-2003, was binding on the Commission, especially due to the saving provisions under Section 108(2) of EA-2003, and hence the Commission should review its Order dated 10.05.2023 in view of the binding policy directives issued by the State Government dated 10.05.2023; the respondent M/s Jindal Power Limited (M/s JPL) had also endorsed the views of KSEBL; however, the respondent M/s Jindal Thermal Power Limited and M/s Jhabua Power Limited had submitted that the policy directives of the State Government was not binding on the Commission, and it could be taken as guidance only in the process of tariff determination. Hence the Commission had no authority to review its earlier decision based on the policy directives of the State Government dated 10.05.2023. Further, the review petition cannot be entertained based on a subsequent event, and occurrence of some subsequent event or development cannot be taken note of declaring the initial order as vitiated by error apparent.

The KSERC examined the issues raised by the State Government in the policy direction dated 10.10.2023, and noted that (i) the electricity demand in the Country and in the State has been increasing year after year, especially after the Covid-19 pandemic; the State is expected to

have an annual average increase in peak demand of 250MW to 350MW in the coming years, whereas the same in the Country is in the range of 12400 MW to 21000 MW per annum; the annual increase in energy demand in the State was in the range of 1250 MU to 2000 MU in the coming years, whereas the anticipated increase in energy demand in the State was 82000 MU to 1,45,000 MU; though more thrust is given for RE sources, the dependence on coal based generation may continue for more years; even by the year 2031-32, the coal based generation may contribute more than 50% of the energy requirement though its share in installed capacity may reduce to 28.80% of the total installed capacity in the Country; also, the installed capacity of coal/lignite based plants were likely to increase to 2,59,600 MW from the present level of 2,13,000 MW; in the last few years, the electricity prices in the energy exchanges was also comparatively high; due to dependence on imported coal, due to coal shortages, the average power purchase rate of all coal based stations except Talcher- II pit head stations were in the range of Rs 4.60/unit to Rs 5.50 /unit in the year 2022-23; the rate of short term power purchase arranged by KSEBL during the year 2023-24 was in the range of Rs 5.12/unit (in October 2023) to Rs 6.34/unit (in March 2024); in the recent bid invited by KSEBL for procuring 500 MW RTC power on FOO basis, two bidders only participated in the Bid, and the total offered quantum was 403 MW as against the bid quantum of 500 MW; the L1 rate arrived through reverse auction was Rs 6.88/unit; the electricity demand in the country was much higher than the availability, may be due to the shortage in the availability of domestic coal; this had resulted in higher electricity rates in the short-term and medium term market; duly considering the emerging power shortages in the State, the Commission vide its Order dated 07.06.2023 and 21.08.2023 had permitted KSEBL to continue to draw power from the four unapproved DBFOO contracts till 31.12.2023;

there was no doubt that there was growing demand for electricity and the State may face power shortages for a few more years to come; hence, there was merit in the public interest pointed out by the State Government in its policy directives dated 10.10.2023; and the policy directives was only to review/ reconsider the Order dated 10.05.2023, wherein the four DBFOO contracts with total capacity of 465MW was denied citing the procedural violations and technical issues on tendering process done by KSEBL for procuring power through DBFOO basis.

After referring to the judgements of the Supreme Cout in " ***Paschimanchal Vidyut Vitran Nigam Ltd. & Ors. Vs. Adarsh Textiles & Anr., (2014) 16 SCC 212***; and the judgement of the Orissa High Court in **Dwaraka Resorts Pvt. Ltd. Vs. State of Orissa & Ors., 2014 SCC Online Ori 498**, the KSERC held that it had necessarily to be guided by the policy directive dated 10.10.2023 issued by the Government of Kerala, which clearly recorded the reasons and grounds, its basis in public interest, requiring to reconsider / review its orders in OP No. 05 / 2021, in the matter for granting approval to the four (4) Power Supply Agreements(PSAs) in question. The KSERC also noted the judgements of APTEL in *Appeal No. 352 / 2022 "**Fatehgarh Bhadla Transmission Company Ltd. Vs. CERC & Ors.**, Judgment dt. 02.05.2023", Appeal No. 189 / 2022, 369 / 2022* and *4 / 2021 "**Steel City Furnace Association Vs. PSERC & Ors.**, Judgment dt. 31.10.2022", Appeal No. 92 / 2013 in **Tamil Nadu Electricity Consumers' Association Vs. Tamil Nadu Electricity Regulatory Commission & Ors.,** Judgment dt. 21.01.2014 and Appeal No. 05/2009 "**Kerala State Electricity Board Ltd. Vs. KSERC & Ors.,** Judgment dt. 18.08.2010"*, and observed that the matters involved in the said judgments related to specific issues raised by the State Government in determination of tariff by the SERCs under Section

62 of EA-2003; as per the provisions of EA-2003, the tariff determination was a statutory function of the State Commissions, and the Government cannot interfere in such matters; however, in the present case, the policy directive issued by the State Government was not against the statutory functions of the Commission for determination of tariff; here the only issue, raised by the State Government, was to review/ reconsider denial of four purchases entered into by KSEBL on DBFOO basis citing the procedural violations and technical issues; the State Commission vide its original order, in Petition OP No.13/2015 dated 30.08.2016, itself clarified that the Commission may approve these power purchases after getting the views of the State Government on the deviations pointed out by the Commission; the State Government, in the policy direction, had clarified that separate enquires were going on the deviations pointed out by the Commission; and the Government had further clarified that the public should not be put in peril for the irregularities/ mistakes / deficiencies which happens due to procedural and technical reasons.

The KSERC further observed that Order 47 of the Code of Civil Procedure, 1908, read along with Section 94 of the Electricity Act, 2003, permits the Commission to review its order for any “sufficient reasons” also among other reasons specified therein; in the instant case, the views of the State Government on the deviations on the bidding procedure pointed out by the Commission in its Order dated 30.08.2016, the views on the DBFOO purchase, and the policy directives dated 10.10.2023 under Section 108 of EA-2003 were sufficient reasons for review/ reconsider the Order of the Commission dated 10.05.2023.

The KSERC, after careful examination of the policy directives of the State Government dated 10.10.2023, the petition of KSEBL dated 10.11.2023, the comments of the respondent generators, various judgments of the Supreme Court and APTEL, other documents and

matters placed before the Commission during the proceedings of the subject petition, decided to adopt the tariff and grant approval for the following four purchases entered into by KSEBL on DBFOO basis, without prejudice to any enquiries by the State Government on the procedural irregularities/ mistakes/ deficiencies which happened due to procedural and technical reasons pointed out by the Commission in its Order dated 10.05.2023 (i) PSA for 115 MW capacity (under Bid-1) with Jhabua Power Ltd. dated 31.12.2014; (ii) PSA for 100 MW capacity (under Bid-2) with Jhabua Power Ltd. dated 26.12.2014; (iii) PSA for 150 MW capacity (under Bid-2) with Jindal Power Ltd. dated 29.12.2014; and (iv) PSA for 100 MW capacity (under Bid-2) with Jindal India Thermal Power Ltd. dated 29.12.2014.

On Issue No. 2, the KSERC observed that three generators were involved in the four DBFOO contracts under consideration in the present review petition; out of the three generators, M/s Jindal Power Limited had consented to supply 150 MW as per the terms of the signed PSA dated 29.12.2014; however, the other two generators strongly opposed the review petition filed by KSEBL based on the policy direction of the State Government dated 10.10.2023; among other objections, M/s Jhabua Power Limited (JPL) and M/s Jindal India Thermal Power Limited (JTPL) had submitted that they had made alternate arrangements to sell the power contracted with KSEBL under DBFOO basis, citing denial of approval of power supply agreement by the Commission vide Order dated 10.05.2023. After referring to the details of the alternate arrangements made by them, the KSERC noted that: (i) Procurement of electricity from Thermal Power Stations set up on Design, Build, Finance, Own and Operate (DBFOO) basis under Section-63 of the EA-2003, was a separate scheme envisaged by the Central Government vide guidelines dated 9th November 2023; the Central Government had also published the model

bidding documents including model Power Supply Agreement (PSA) along with the guidelines; (ii) unlike other Power Supply Agreements signed between the supplier/generator and the utility/DISCOMs, Part-III of the signed PSAs contained details of the Power Station from which power is offered to supply to the utility, including details of the site of the project (Article-10), construction of the power station (Article-11), Monitoring Power Station (Article-12), completion certificate (Article-13), Entry into commercial service (Article-14), Operation and Maintenance (Article-15), Monitoring of operation and maintenance (Article-16), Allocated capacity (Article-18) etc; further, Article-31 of the PSA dealt with termination of the agreement and the circumstances and the procedures of termination; the DBFOO contracts envisaged to allocate a specified capacity of the plant to the utility during its useful life/terms of the agreement; the supplier could not unilaterally terminate the contract and allocate the capacity on commercial reasons, without complying with the procedures and practices; (iii) though final approval of the signed PSA was not approved by the KSERC, the generator M/s Jhabua Power Limited and M/s Jindal Thermal Power Limited had been supplying power to KSEBL as per the terms of the PSA; thus the PSA was in operation since the date of signing the agreement, i.e, from December, 2014 to the year 2023; after operation of the PSA for more than 9 years continuously, and while the matter of final approval was under due consideration of APTEL and thereafter of the Commission, the supplier could not unilaterally terminate and reallocate the contracted capacity under DBFOO to others; (iv) even after denial of final approval of the PSAs under question vide its order dated 10.05.2023, the Commission had permitted KSEBL to draw power from these contracts till 31.12.2023; the Commission had also written to the coal companies to ensure availability of coal to the generators for supplying power under these contracts; hence, there was no idling of the

plants and their interests was not affected till date; however due to their own reasons, the generators were not supplying power to KSEBL; even after denial of the approval of the PSAs, KSEBL, with the concurrence of the State Government and with the permission of the Commission, has been requesting the generators to continue to supply power to it till 31.12.2023 as permitted by the Commission; but without supplying power to the utility as per the terms of the signed PSA, the suppliers could not claim that their commercial interests were affected; the PSA signed by the generators and KSEBL was governed by the provisions of the Electricity Act, 2003; Section-111 of the EA-2003 provided for filing appeal by the affected parties against the orders of the SERCs before the APTEL; further, Section 125 of the EA-2003 provides for filing second appeal before the Supreme Court if the decision in the first appeal also not satisfied; KSEBL had already filed Appeal No. 518 of 2023 before the APTEL against the Order of the Commission dated 10.05.2023 within the time limit specified for filing Appeal; the suppliers were bound to comply with the orders and judgements of APTEL and the Supreme Court; till the Higher Courts finally decide on the appeal petition filed by the affected parties, the generators cannot divert the contracted power under DBFOO basis and they cannot enter into long term/ medium PPAs during the terms of the present PSAs , unless both the parties consented to terminate the PSA as per Article 31 of the Agreement; ignoring these facts, if the generators proceed with signing long term/ medium term PPAs for selling the power allocated to KSEBL through DBFOO contracts, it may ultimately lead to breach of contracts at multiple levels; and the generators should avoid this type of unethical practices.

The KSERC further observed that it was a known fact that, due to various reasons, the electricity prices in the market at present is much higher than the rates of the DBFOO contracts under question; hence, the

suppliers may be commercially benefitted by unilaterally stopping the power supply to KSEBL, and entering into new contracts at present at the prevailing trend of electricity prices; this was against business ethics, contract law and provisions of EA-2003; and there was no merit in the argument of the respondents that, due to commercial reasons, they had made alternate arrangements with other DISCOMs/ traders to sell the power allocated to KSEBL through DBFOO basis.

The KSERC also noted that JPL was a joint venture of NTPC Ltd, which was a Navaratna Company owned by the Central Government; over the years, NTPC Ltd had very good relations with the State of Kerala and was always providing a helping hand when need arises during the power crisis in the State; NTPC Vidut Vyapar Nigam Ltd (NVVN) was a fully owned subsidiary of NTPC Ltd for facilitating the trading of electricity among various DISCOMS and other interested parties; the present agreement signed on 27th September 2023 between Jhabua Power Ltd and NVVN was a commercial arrangement, entrusting the trader NVVN to arrange trading the surplus power with M/s JPL, the JV of NTPC Ltd with other DISCOMS; Article 9.0 of the PPA dealt with the tariff of the transaction; there was no firm tariff for the sale of surplus power available with M/s JPL, the JV of NTPC Ltd with the trader NVVN, the wholly owned subsidiary of NTPC Ltd; in the absence of a firm tariff, the supply of power cannot be considered as a concluded contract and firm in nature; hence, there was no issue or no breach of the said contract involved in supply of power to KSEBL as per the PSAs dated 26.12.2014 and 29.12.2014 signed between KSEBL and Jhabua Power Ltd (JPL) on DBFOO basis; only in case the parties to a contract has the legal authority to enter into the said contract, then only it becomes legally enforceable; while the PSA in question was under the active consideration of APTEL, and thereafter the Commission, JPL had no legal authority to enter into contract for sale

of the same quantity of power committed under the said PSA; and the Commission was of the considered view that M/s Jhabua Power Ltd , the JV of NTPC Ltd, shall fully honour the policy directives of the Government of Kerala dated 10.10.2023, and shall supply power to KSEBL as per the terms of the PSAs dated 26.12.2014 and 29.12.2014 signed between KSEBL and M/s Jhabua Power Ltd.

With regards the difficulty raised by the respondent generator M/s JTPL, the Commission held that, while the PSA of JTPL with KSEBL in question was in the active consideration of APTEL and thereafter the Commission, JTPL had no legal authority to enter into contract for sale of the same quantity of power committed under the said PSA with any other party; the respondent generator M/s JTPL had a fruitful relationship with the State of Kerala over the years in meeting the power demand of the State; the Commission expected that this would continue in future by fulfilling the contractual obligations as per the PSA signed with KSEBL for supplying 100 MW of power on DBFOO basis.

The KSERC, therefore, allowed the Revision Petition of KSEBL based on the directive of the State Government under Section 108(2) of the Electricity Act, 2003 and the legal positions and other reasons explained in the Order. The respondent generators were directed to supply power to KSEBL in terms of the PSA signed between the generators with immediate effect. KSEBL was directed to submit a status report of the compliance of the Order within one month from the date of the Order with all necessary details including compliance of the Order by the respondents.

The petition was accordingly disposed of.

VI.RIVAL SUBMISSIONS:

Elaborate submissions, both oral and written, were put forth by Mrs. Swapna Seshadri and Mr. Matrugupta Mishra, Learned Counsel

appearing on behalf of the Appellants, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of KSEBL and Sri Dhananjay Mishra, Learned Counsel appearing on behalf of KSERC. It is convenient to examine the rival contentions under different heads.

VII. "ANY OTHER SUFFICIENT REASON" IN ORDER 47 RULE 1 CPC: ITS SCOPE:

A. SUBMISSIONS OF THE APPELLANT:

It is contended, on behalf of the appellants, that the power of review conferred on the KSERC, under Section 94(1)(f) of the Electricity Act, is in terms of the provisions of the CPC i.e., Section 114 read with Order 47 Rule 1; the review was allowed relying on material not on record when O.P. No.05 of 2021 was decided, and holding that the words "*any other sufficient reason"*, in Order 47 Rule 1 CPC, would include a Section 108 directive issued by the State Government; KSERC has transgressed the scope and extent of review permissible under law; in **State of West Bengal v. Kamal Sengupta (2008) 8 SCC 612,** the Supreme Court held that the term "*any other sufficient reason*" has to be interpreted analogous to the other two grounds enumerated in Order 47 Rule 1 and, while examining if review is permissible, only those documents must be considered which were on record at the time of the initial Order; there is no basis for KSERC to hold that the directive subsequently issued on 10.10.2023, under Section 108 of the Electricity Act, would fall under "sufficient reason" warranting review of the Order dated 10.05.2023; and KSERC has not explained as to how this is "any other sufficient reason" or how this is analogous to the other two grounds in Order 47 Rule 1 CPC.

It is further submitted, on behalf of the appellants, that the main argument of KSEBL was that a wide construction should be given to the words "*any other sufficient reason*"; all the judgments cited are either cases where the court had found an error apparent, and thus the matter had to be reviewed in any case (***BCCI v. Netaji Cricket Club (2005) 4 SCC 741***); or the subsequent event, such as death of a party, caused the abatement of the suit (***Devesh Nagaliya v. Pradeep Kumar (2021) 9 SCC 796);*** or the question in appeal had become largely academic owing to efflux of time (***T.N. Chockalingam Chettiar v. Chidambaram Pillai 1960 SCC OnLine Mad 104);*** or the review was allowed due to exceptional circumstances and where compliance of the original order would cause injustice (***Narain Das v Chiranji Lal, 1924 SCC OnLine All 409);*** none of the judgments lay down the principle that review can be allowed on sufficient grounds alone; KSEBL's and KSERC's contention that the Section 108 directive simply culls out the situation existing at the time of passing of the Order dated 10.05.2023, and is not a subsequent event, makes matters worse since KSERC would then have exercised the power of appeal, which is not vested with it; and, in ***Parisan Devi v. Sumitri Devi (1997) 8 SCC 715***, the Supreme Court held that review cannot be an appeal in disguise**.**

B.SUBMISSIONS URGED ON BEHALF OF KSERC:

It is submitted, on behalf of KSERC, that the head "other sufficient reasons", under Order 47 CPC, is independent of the other two heads; the said head is not circumscribed by the principle of *ejusdem generis*, but only by the principle of its being analogous with the previous two heads i.e. error apparent or discovery of new evidence not available earlier; in ***BCCI vs. Netaji Cricket Club***, (2005) 4 SCC 741, it has been held that review would be permissible for any other sufficient reason, and would not be barred on the basis of subsequent events; furthermore,

even in Order 47 itself, subsequent events are not a bar for the exercise of review jurisdiction; the only bar in Order 47 is a subsequent judgment/decision; the best exposition, on the theory of subsequent events/happenings, is contained in ***Rajesh Darbar vs Narasingrao Krishnaji Kulrani***, (2003) 7 SCC 219 where it was held that subsequent events/happenings are a bar for review only where rights have already vested in a party; no vesting of rights, as such, took place upon the passing of the original order dated 10.05.2023 in the Section 63 Petition; and the validity of the said order was the subject matter of an appeal filed by KSEBL before this Tribunal, which was ultimately withdrawn by KSEBL on 31.10.2023 with liberty to file review on account of the Section 108 direction issued by the State Government on 10.10.2023.

C.SUBMISSIONS URGED ON BEHALF OF KSEBL:

It is submitted, on behalf of KSEBL, that the Review sought by it was specifically under the ground *" other sufficient reasons";* it was not on the basis on any error apparent on the face of the record or any new or important matter or evidence which was not available earlier; the head 'other sufficient reason', is independent of the other two heads; the decision of the Supreme Court, holding that the sufficient reason category, should be analogous to the other two heads, does not mean that, in addition to being a sufficient reason, the review petition should satisfy the character of new evidence not available earlier, or error apparent on the face of the record; it would only mean that the reasons to interfere in a review petition should be sufficient, comparable to the extent of error apparent on the face of the record and discovery of new and material evidence; and, just as every error shall not qualify, similarly any or every reason may not be a "sufficient reason" for grant of review.

Reliance is placed, on behalf of KSEBL, on **Board of Control for Cricket in India: (2005) 4 SCC 741**; **Jagmohan Singh: (2008) 7 SCC**

38; ***Davesh*** **Nagalya** ***V. Pradeep Kumar, (2021) 9 SCC 796; Narain Das*** **v.** ***Chiranji Lal,*** **I*****LR (1925) 47 All 361; and T.N. Chockalingam Chettiar, (1960) 73 LW 533***.

D.JUDGEMENTS ON THE SCOPE OF THE WORDS "FOR ANY OTHER SUFFICIENT REASON" in ORDER 47 RULE 1 CPC:

1. Board of Control for Cricket in India v. Netaji Cricket Club, (2005) 4 SCC 741

The relevant facts, in **Board of Control for Cricket in India v. Netaji Cricket Club, (2005) 4 SCC 741,** were that Netaji Cricket Club (Netaji) was a member of the Tamil Nadu Cricket Association which, in turn, was a member of the Board of Control for Cricket in India (Board). Netaji filed a suit for declaration and injunction in the Madras High Court for the following reliefs: *"1. to declare that the eligible candidates who were entitled to contest for the post of President in BCCI proposed by a member of the North Zone should be permitted to contest in the election process and also be entitled to be elected as the President and act as such for the term in the election to be conducted in the annual general meeting on 29-9-2004 and 30-9-2004 at Hotel Taj Bengal, Kolkata*; (*2*) *For a permanent injunction restraining the defendants from seeking to disqualify any eligible person or persons proposed by any member of the North Zone, as representative from the said zone representing a member in the North Zone as their candidate for the Presidential post of BCCI by virtue of such candidate not being a resident member within the zone or not being a member of the said association giving him the representation."* The apprehension expressed, in the said suit, was that the Board, in its ensuing election of office-bearers, would not permit some candidates to contest on the ground of residence.

Two interim applications ie OA No. 803 of 2004 and OA No. 804 of 2004 were filed in the said suit. The prayer in OA No. 803 of 2004 was that the annual general meeting (AGM) be conducted under the Chairmanship of a retired Supreme Court Judge with absolute power to scrutinise and approve the list of authorised representatives from member associations eligible to vote in the AGM. The prayer in OA No. 804 of 2004 was for an injunction restraining BCCI from interfering with the proposal of any representative of any member of the North Zone for the post of President on the basis of residential qualification. By an interim order, a learned Single Judge of the said High Court appointed Shri S. Mohan, a former Judge of the Supreme Court as a Commissioner to conduct elections and to take necessary decisions with regard to qualification, nomination and conduct of elections. The third respondent was further prohibited from disqualifying any member of BCCI and prevent them from voting.

Aggrieved by the said order, the Board preferred a letters patent appeal. Before the Division Bench of the Madras High Court, an undertaking was given by the learned Senior Counsel appearing on behalf of the Board that the Board would not disqualify any candidate for the post of President on the ground of residence. Pursuant to the said undertaking a statement was made by the learned counsel appearing on behalf of “Netaji” that the apprehension of the plaintiff-first respondent, which formed the basis for moving the Court by filing a suit, had vanished. With the consent of the parties, the suit itself was withdrawn and both the appeal and the suit were disposed of by setting aside the impugned order on the ground that it need not be in existence; the elections scheduled on 29-9-2004 at 10.30 a.m. was directed to be continued by the first defendant-appellant body strictly in accordance with the provisions of their constitution and the rules or bye-laws framed thereunder; the counsel on

record for the first defendant-appellant had made an endorsement to the effect that 'the appellant shall not disqualify any candidate for the post of President on the ground of residence'; the said undertaking had been given by the learned Senior Counsel Mr T.R. Rajagopal across the Bar, and the same was recorded; and the undertaking should be given effect to in letter and spirit without any deviation.

The annual general meeting was convened on 29-9-2004. In the said meeting although no person was prevented from contesting the election for the post of President of the Board on the ground of residence, the Maharashtra Cricket Association was not permitted to take part in the election through Mr D.C. Agashe or any other person. Shri Jagmohan Dalmia, who chaired the meeting, cast one vote as a result whereof equal number of votes i.e. 15 each were polled on both sides whereupon he also gave his casting vote. The AGM held on 30-9-2004 was adjourned till 26-10-2004. The Board filed a special leave petition on limited grounds against the said order of the Division Bench dated 29-9-2004. After the AGM was held, a review petition was filed by "Netaji", before the Division Bench of the Madras High Court contending that the purported undertaking given by the learned Senior Counsel, appearing on behalf of the appellant, was not adhered to, and no appeal had been filed by the appellants against the order of injunction passed by the learned Single Judge in OA No. 803 of 2004. A review petition was also filed by Mr D.C. Agashe seeking review of the said order dated 29-9-2004 contending that he had not been allowed to participate in the said election having been disqualified therefor although no order of disqualification was served.

The said review application was admitted by the said Division Bench of the High Court on 8-10-2004 observing that the undertaking across the Bar given by the learned Senior Counsel appearing on behalf of the Board had not been given effect to in its letter and spirit. On an application made

in this behalf by “Netaji”, an interim order also came to be passed. The High Court opined that it had been misled by the undertaking made on behalf of the first respondent which was sought to be reviewed in the Review Application; the undertaking offered on behalf of the first respondent Board, not to disqualify any member from any of the zones, had not been given effect to in letter and spirit as directed in the judgment dated 29-9-2004, and prima facie there were reasons to believe as to the alleged breach of the said undertaking; hence, they were satisfied that a prima facie case had been made out for granting injunction; and, therefore, there shall be an order of interim injunction as prayed for until further orders. SLPs (C) Nos. 21820-22 of 2004 were preferred by the appellants questioning the said order dated 8-10-2004.

It was contended before the Supreme Court, on behalf of the appellant, that the undertaking given by the learned counsel appearing on behalf of the appellant before the Division Bench of the Madras High Court was in consonance with the contention raised in the memo of appeal itself which had been duly recorded, and the said undertaking having not been violated, the application for review was not maintainable; as no person, contesting for the post of President having been disqualified on the ground of residence, the review petition was not maintainable wherein, a shift was made to the right of voting vis-à-vis the right to contest for the post of President which was not the basis for filing of the Suit; the same might give rise to an independent cause of action and, thus, keeping in view the scope and purport of the suit, the review application should not have been entertained; in the said suit Mr Agashe, being not a party, the contention that he was not allowed to represent the Maharashtra Cricket Association could not be taken to be a ground for entertaining a review application; a breach of an undertaking cannot give rise to a revival of the suit; and the interim order goes far beyond the scope of the suit.

It was contended before the Supreme Court, on behalf of Sri Jagmohan Dalmia, that subsequent events could not have been taken into consideration; and the order admitting the review application and the interim order passed by the Madras High Court was contrary to the relevant provisions of the Code of Civil Procedure (Code) and on a wrong understanding of the dispute relating to the Maharashtra Cricket Association.

It was contended before the Supreme Court, on behalf of the Maharashtra Cricket Association and Mr Agashe, that the undertaking given by a Senior Counsel must be construed in the light of the understanding of the learned Judges before whom the same had been given across the Bar; the learned Senior Counsel appearing on behalf of the Board before the Madras High Court had not filed any affidavit as regards the tenor of his undertaking; and, in this view of the matter, the statement of the Judge in the impugned order should be accepted.

It is in this context that the Supreme Court held that an undertaking had been given by the learned Senior Counsel appearing on behalf of the Board; in the impugned order, the Division Bench, before whom such undertaking had been given, was of the opinion that it was misled; having regard to the understanding of such undertaking by the Division Bench, they did not intend to deal with the effect and purport thereof as they were of the opinion that the Division Bench of the Madras High Court itself was competent therefor; they were of the opinion that the jurisdiction of the High Court, in entertaining a review application, could not be said to be ex facie bad in law; Section 114 of the Code empowered a court to review its order if the conditions precedent laid down therein were satisfied; the substantive provision of law did not prescribe any limitation on the power of the court except those which were expressly provided in Section 114 of

the Code in terms whereof it was empowered to make such order as it thinks fit.

The Supreme Court further observed that Order 47 Rule 1 of the Code provided for filing an application for review; such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there existed an error apparent on the face of the record but also if the same was necessitated on account of some mistake or for any other sufficient reason; a mistake on the part of the court, which would include a mistake in the nature of the undertaking, may also call for a review of the order; an application for review would also be maintainable if there exists sufficient reason therefor; what would constitute sufficient reason would depend on the facts and circumstances of the case; the words "sufficient reason", in Order 47 Rule 1 of the Code, were wide enough to include a misconception of fact or law by a court or even an advocate; and an application for review may be necessitated by way of invoking the doctrine "*actus curiae neminem gravabit*".

The Supreme Court further observed that it was also not correct to contend that the Court, while exercising its review jurisdiction in any situation whatsoever, cannot take into consideration a subsequent event; in a case of this nature when the Court accepts its own mistake in understanding the nature and purport of the undertaking given by the learned Senior Counsel appearing on behalf of the Board and its correlation with as to what transpired in the AGM of the Board held on 29-9-2004, the subsequent event may be taken into consideration by the Court for the purpose of rectifying its own mistake; furthermore, the impugned order was interlocutory in nature; the Division Bench of the High Court had jurisdiction to admit the review application and examine the contention as to whether it could have a relook over the matter; and the

Supreme Court, ordinarily, would not interfere with an interlocutory order admitting a review petition.

2. Davesh Nagalya v. Pradeep Kumar, (2021) 9 SCC 796:

In **Davesh Nagalya v. Pradeep Kumar, (2021) 9 SCC 796**, an application was filed by Pradeep Kumar, (the successor-in-interest of tenant Tika Ram) before the Court of Rent Control and Eviction Officer, Dehradun, the District Magistrate, contending that Subhash Chand was a divorcee and had no children and was willing to devote full time in the said proposed business of sale of milk, curd, ghee and butter. The application was however opposed by the landlord contending that, after death of Tika Ram, he had left behind 8 legal heirs who were joint tenants in the disputed property; Subhash Chand was a sub-tenant and he was involved in demolition, changing the structure and making furniture for last two months; Shri Pradeep Kumar had put such person in possession of the property; Subhash Chand was doing business of milk products in Dehradun; the application was filed only to cover up the sub-tenancy; Pradeep Kumar had put such person in possession of the shop who was not a member of their family; and thus property would be deemed to be vacant under Section 12(2) of the Act.

However, the District Magistrate permitted Subhash Chand to be inducted as a partner on 15-11-1982. Thereafter, on 19-11-1982, a written partnership deed was signed between Pradeep Kumar and Subhash Chand. The landlord challenged the order passed by the District Magistrate by way of revision before the District Judge which petition was dismissed on 12-12-1983. Further challenge before the High Court through the writ petition also remained unsuccessful. The appellant challenged the said order by way of special leave petition before this Court but the same was dismissed. Thereafter, the appellant filed an application for review before the High Court on the ground that, pursuant to the death

of the tenant-Pradeep Kumar i.e. one of the partners of the firm, the partnership did not survive in view of Section 42(*c*) of the Partnership Act, 1932. was to the order passed by the The High Court of Uttarakhand. in Review Application No. 105 of 2008, did not consider the factum of death of Pradeep Kumar, the successor-in-interest of Tika Ram the tenant.

The contention of the appellant before the Supreme Court, in **Davesh Nagalya,** was that the partnership between Pradeep Kumar and Subhash Chand had come to an end automatically on the death of Pradeep Kumar on 21-5-2004; the tenancy also had come to an end in view of Section 12(2) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972; subsequent events, consequent to the order passed by the District Magistrate, had to be taken into consideration; and the High Court however failed to take into consideration the death of one of the partners leading to deemed vacation of the premises.

During the pendency of the appeal before the Supreme Court, Subhash Chand, another partner, who was allowed to enter into partnership with Pradeep Kumar by the District Magistrate, also died.

It is in this context that the Supreme Court, in **Davesh Nagalya,** referred to its earlier judgement, in **Pasupuleti Venkateswarlu v. Motor & General Traders, (1975) 1 SCC 770**, wherein, on the jurisdiction and propriety vis-à-vis circumstances which come into being subsequent to the commencement of proceedings, it was held that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding; equally clear was the principle that procedure is the handmaid and not the mistress of the judicial process; if a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy; equity justified bending the rules of procedure, where no specific provision

or fair play was violated, with a view to promote substantial justice—subject, of course, to the absence of other disentitling factors or just circumstances; limitation on this power, to take note of updated facts, could not be contemplated to be confined to the trial court; if the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice; and the proposition, that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed, must be affirmed; the subsequent event of death of Pradeep Kumar being relevant was bound to be taken into consideration by the High Court in the review petition; and, with the death of both partners and not having any clause permitting continuation of the partnership by the legal heirs, the non-residential tenanted premises was deemed to be vacant in law as the tenant was deemed to have ceased to occupy the building.

3. T.N. Chockalingam Chettiar v. Chidambaram Pillai, 1960 SCC OnLine Mad 104:

The appeal, in **T.N. Chockalingam Chettiar v. Chidambaram Pillai, 1960 SCC OnLine Mad 104,** was against the Judgment of the District Munsif of Pudukottai granting a mortgage decree in favour of the plaintiff, but allowing certain reliefs to the defendants. By his judgment dated 29th February 1956, the learned Judge originally held that the defendants were paying land revenue exceeding Rs. 150 per annum, and they were disentitled to the benefits of the Act; in consequence, the appeal was allowed and the preliminary decree was modified by deleting the clause relating to payment in instalments, and also payment of costs to the

defendant by the plaintiff. I.A. No. 169 of 1956 was subsequently filed in the lower Court for a review of this judgment, on the main ground that the judgment proceeded upon a certain admissions as to matters of fact by the defendants in the suit, particularly, by the third defendant giving evidence as D.W. 1. The petitioners in this interlocutory application pleaded that there were other facts which ought to be taken into consideration, and which came to light by enquiry on their part, which would be sufficient to show that this admission was erroneous, though made in good faith, and ought not to have been acted upon. It is upon this basis, that the review of the judgment was sought under Ss. 144 and 151 of the Civil Procedure Code and O. 47, R. 1 of the Civil Procedure Code.

The learned Subordinate Judge went into this matter, and came to the conclusion that these admissions were erroneous, and should not have been acted upon. He then properly addressed himself to the question whether he had jurisdiction to review the judgment, within the scope of O. 47, R. 1, C.P.C., particularly the words “for any other sufficient reason” occurring in that rule. He referred to the authority for the view that these words had to be construed *ejusdem generis* with the other categories of the rule laying down the limits of propriety, with regard to the exercise of the powers of review by a Court. But, even so, he thought that a case had been established for the grant of a review, and in the result, he allowed the application and remanded the suit for fresh hearing according to law. It is this order which is now substantially canvassed in the civil miscellaneous appeals.

The Madras High Court held that, it was not in dispute that the time for payment of the decretal amount in instalments, which was available to the defendants under the provisions of Madras Act I of 1955 (even assuming that they were entitled to the benefits of this Act), had now expired, so that they were now liable to pay the decretal amount

immediately; it was also not in dispute that a final decree had been made, following the preliminary decree, determining and stating the liability; the only part of the claim which would be affected by the provisions of Madras Act I of 1955 would be the liability for costs; as under that statute it is the plaintiff who is to be held liable for costs, and not the agriculturist defendant or defendants; they were not convinced that this was a case in which the exercise of power of review by the lower Court was justified; it was obvious that, if parties were to be permitted to gather fresh facts and to allege them in order to affect or modify an earlier admission in the record of trial, and to obtain a review upon such basis, this may affect the principle of the finality of decision, and also leave the door open for abuses of several kinds; on the contrary, it may be that, under the particular circumstances of this case, the learned Judge felt that the interests of justice required interference by way of review, and too narrow a construction upon the words, “or for any other sufficient cause” in O. 47, R. 1, C.P. Code will not accord with equitable principles; in any event, since the matter had become largely academic, owing to the efflux of time and the subsequent events that had transpired, it would now be sufficient to allow the appeal, though the court was not committing itself to a finding that powers of review ought not to be exercised in conceivable circumstances of this character, and the order of remand was set aside.

In **Narain Das v. Chiranji Lal, 1924 SCC OnLine All 409,** the appeal before the Allahabad High Court was based mainly on the technical ground that the words “for any other sufficient reason” in order XLVII, rule 1, of the Code of Civil Procedure must not be extended to matters which are not strictly *ejusdem generis* with those referred to in the earlier part of the rule. The Allahabad High Court held that the words “for any other sufficient reason” in order XLVII, rule 1, were not only very wide in themselves, but were intentionally so made by the Legislature, because

of the possibility of exceptional cases arising in which obvious injustice would be worked by strict adherence to the terms of the decree as originally passed.

4. Rajesh D. Darbar v. Narasingrao Krishnaji Kulkarni, (2003) 7 SCC 219

In **Rajesh D. Darbar v. Narasingrao Krishnaji Kulkarni, (2003) 7 SCC 219,** the three appeals, which were disposed of by the judgment of the Karnataka High Court, were preferred under Section 72(4) of the Bombay Public Trusts Act, 1950 (for short the Act), wherein the challenge was to the common judgment and order passed by the Court of the IInd Additional District Judge, Bijapur. The dispute related to the elections claimed to have been conducted by two rival groups for the Managing Committee of the Vidya Vardhak Sangh, Bijapur, a society registered under the Societies Registration Act, 1860 and under the provisions of the Bombay Public Trusts Act, 1950. The dispute arose because the names of thirty-eight persons were included in the electoral rolls for the election. While the appellants claimed that the thirty-eight persons whose names were included in the electoral roll were not eligible to participate in the process of election, the other group, that is Respondents 1 to 12, contested the claim. Initially after the election, the elected Committee started functioning in October 1996, as the date of election was 6-10-1996. Subsequent Committees were also elected as the term of office was 3 years, but the basic dispute about the eligibility of the thirty-eight persons still remained.

After taking note of the submission of the appellants that, by passage of time the dispute as regards the validity of the election in October 1996 had become non-est, and that of Respondents 1 to 12 that the dispute did not become infructuous by passage of time as the basic issue regarding

eligibility remained, the Supreme Court observed that where the nature of the relief, as originally sought, had become obsolete or unserviceable or a new form of relief would be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it was but fair that the relief is moulded, varied or reshaped in the light of updated facts (***Patterson* v. *State of Alabama*: 294 US 600);** it was important that the party claiming the relief or change of relief must have the same right from which either the first or the modified remedy may flow; subsequent events in the course of the case cannot be constitutive of substantive rights enforceable in that very litigation except in a narrow category, but may influence the equitable jurisdiction to mould reliefs; conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where there is a change in the law and it is made applicable at any stage (***Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri*: AIR 1941 FC 5**); Courts of justice may, when the compelling equities of a case oblige them, shape reliefs — cannot deny rights — to make them justly relevant in the updated circumstances; where the relief is discretionary, courts may exercise this jurisdiction to avoid injustice; likewise, where the right to the remedy depends, under the statute itself, on the presence or absence of certain basic facts at the time the relief is to be ultimately granted, the court, even in appeal, can take note of such supervening facts with fundamental impact (**Pasupuleti Venkateswarlu v. Motor & General Traders: (1975) 1 SCC 770)**; where a cause of action is deficient but later events have made up the deficiency, the court may, in order to avoid multiplicity of litigation, permit amendment and continue the proceeding, provided no prejudice is caused to the other side; all these are done only in exceptional situation and cannot be done if the statute, on which the legal proceeding is based, inhibits, by its scheme or otherwise, such change in the cause

of action or relief; the primary concern of the court is to implement the justice of the legislation; and rights vested by virtue of a statute cannot be divested by this equitable doctrine (**V.P.R.V. Chockalingam Chetty v. Seethai Ache: AIR 1927 PC 252);** : 26 All LJ 371]

The Supreme Court, in **Rajesh D. Darbar**, referred with approval to the Full Bench Judgement of the Punjab High Court, in **Ramji Lal Ram Lal v. State of Punjab: AIR 1966 Punj 374 (FB)**, wherein it was held that courts often take notice of events that happen subsequent to the filing of suits and at times even those that have occurred during the appellate stage and permit pleadings to be amended for including prayer for relief on the basis of such events; but this is ordinarily done to avoid multiplicity of proceedings or when the original relief claimed has, by reason of change in the circumstances, become inappropriate and not when the plaintiff's suit would be wholly displaced by the proposed amendment (**Steward v. North Metropolitan Tramways Co: (1885) 16 QBD 556)** and a fresh suit by him would be so barred by limitation.

After referring to its earlier judgement in **Rameshwar v. Jot Ram: (1976) 1 SCC 194,** the Supreme Court, in **Rajesh D. Darbar**, then held that courts can take notice of subsequent events and can mould the relief accordingly; but this can be done only in exceptional circumstances; this equitable principle cannot, however, stand in the way of the court adjudicating the rights already vested by a statute; a party cannot be made to suffer on account of an act of the court; there is a well-recognised maxim of equity, namely, *actus curiae neminem gravabit* which means an act of the court shall prejudice no man; this maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law; the other maxim is, *lex non cogit ad impossibilia* i.e. the law does not compel a man to do that what he cannot possibly perform; and the applicability of the abovesaid maxims was approved by

the Supreme Court in **Raj Kumar Dey v. Tarapada Dey: (1987) 4 SCC 398] , Gursharan Singh v. New Delhi Municipal Committee: (1996) 2 SCC 459,** and **Mohd. Gazi v. State of M.P: (2000) 4 SCC 342.**

5. Jagmohan Singh v. State of Punjab, (2008) 7 SCC 38:

In **Jagmohan Singh v. State of Punjab, (2008) 7 SCC 38**, the first respondent had invited applications for allotment of 3950 freehold residential plots in Mohali. The appellant applied for allotment of a plot, and deposited the requisite earnest money. He was successful at the draw of lots for allotment of a plot. A letter of intent was issued on the same day. Before the said draw of lots, a brochure was issued. The appellant sought for permission to mortgage the plot as per prescribed Form VI along with the letter of approval. No permission was, however, granted. The appellant did not deposit the balance amount. The Estate Officer cancelled the letter of intent and forfeited the earnest money. The revision application, filed thereagainst, was dismissed. An application for review was filed but no order was passed thereupon. He thereafter filed a writ petition before the High Court which was dismissed. He filed a review petition, inter alia, on the premise that other instances had come to his knowledge where the first respondent had granted opportunity to a large number of people to deposit the balance 15% of the amount even after the period of 60 days had elapsed, by a long margin. However, the High Court opined that the review application was not maintainable as the said documents had come to the knowledge of the appellant only after the decision in the writ petition. Aggrieved thereby, the appellant approached the Supreme Court.

It is in this context that the Supreme Court observed that, almost in a similar situation though not absolutely identical, the revisional authority itself in exercise of its statutory power had granted extension; forfeiture of earnest money, therefore, had not been adhered to in a large number of

cases; in **Teri Oat Estates (P) Ltd. v. U.T., Chandigarh: (2004) 2 SCC 130,** the Supreme Court had opined that the power of forfeiture should be taken recourse to as a last resort and the action of the statutory authority is required to be judged on the touchstone of Article 14 of the Constitution of India; the High Court in its judgment failed to consider this aspect of the matter; Order 47 Rule 1 of the Code of Civil Procedure does not preclude the High Court or a court to take into consideration any subsequent event; and, if imparting of justice in a given situation is the goal of the judiciary, the court may take into consideration (of course on rare occasions) the subsequent events.

After referring to its earlier judgement in **Board of Control for Cricket in India v. Netaji Cricket Club: (2005) 4 SCC 741,** the Supreme Court, in **Jagmohan Singh**, observed that they did not intend to enter into the merit of the matter as they were of the opinion that, in the peculiar facts and circumstances of this case, interest of justice shall be subserved if the impugned judgments are set aside and the matter is remitted to the revisional authority for consideration of the appellant's case afresh in the light of various orders passed by the said authority as also the High Courts.

6. Narain Das v. Chiranji Lal, 1924 SCC OnLine All 409:

In **Narain Das v. Chiranji Lal, 1924 SCC OnLine All 409,** the appeal before the Allahabad High Court was based mainly on the technical ground that the words “for any other sufficient reason” in order XLVII, rule 1, of the Code of Civil Procedure must not be extended to matters which are not strictly *ejusdem generis* with those referred to in the earlier part of the rule. The Allahabad High Court held that the words “for any other sufficient reason” in order XLVII, rule 1, were not only very wide in themselves, but were intentionally so made by the Legislature, because of the possibility of exceptional cases arising in which obvious injustice

would be worked by strict adherence to the terms of the decree as originally passed.

E.ANALYSIS:

Section 94(1) of the Electricity Act stipulates that the Appropriate Commission shall, for the purposes of proceedings under the Electricity Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of reviewing its decisions, directions and orders. Since the power of review conferred on the KSERC is the same as that vested in a Civil Court under the CPC, it is only if the ingredients of Order 47 Rule 1 CPC are satisfied, would the KSERC be entitled to review its earlier order in OP No.5 of 2021 dated 10.05.2023. The three grounds stipulated in Order 47 Rule 1 CPC, which must be satisfied for the exercise of the power of review, are: (1) on account of some mistake or error apparent on the face of the record, (2) from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced at the time when the decree was passed or order made, or (3) for any other sufficient reason.

It is the admitted case of the Respondents that KSERC has exercised its jurisdiction to review the earlier order not on the first two grounds, but on the ground of *"any other sufficient reason"*. The only reason, on the basis which the earlier order dated 10.05.2024 was reviewed by the KSERC, is the direction issued by the Government of Kerala on 10.10.2023 under Section 108 of the Electricity Act. The said Section 108 Order refers mainly to the acute power shortage in the State, and availability of power only at a far higher rate than that at which the KSEBL had entered into PSAs with the Appellants and others and, therefore, KSERC should review its decision. None of the grounds which weighed

with the KSERC, in passing its earlier order in OP No.5 of 2021 dated 10.05.2023 (refusing to adopt the tariff under Section 63 and rejecting grant of approval of the PPAs), were even referred to by the Government of Kerala in its Section 108 directive dated 10.10.2023.

As the Section 108 directive does not express any views on the correctness of the earlier order of the KSERC, in O.P. No. 05 of 2021 dated 10.05.2023, it is evident that the justification put-forth by the Government of Kerala to direct the Commission to review its earlier order is unconnected with the lis which related to adoption of tariff under Section 63 and approval of the PSAs under Section 86(1)(b) of the Electricity Act.

Can review be sought on grounds wholly unconnected with the issues which arose for consideration in the original lis which culminated in the order, review of which is sought, having been passed? In examining this question, it is relevant to note that the power to review an earlier order on merits, whereby the error sought to be corrected is one of law, must be specifically conferred. There is no inherent power of review vested in any Court or a body exercising judicial functions. The power of review is a creature of statute and unless a statute expressly provides for it, there is no power vested in any judicial or quasi-judicial body to review the decision already given by it. (***Kuthina v. Nathal Pinto Bhai, AIR 1941 Mad 272).*** Unless a statute provides a remedy by way of review, the Court cannot review its own judgment except in very exceptional circumstances, such as, for example, where it passed an order inadvertently. (**Anantharaju Chetty v. Appu Hegade 37 M.L.J. 162**; **M.J. Kutinha v. Nathal Pinto Bai, 1940 SCC OnLine Mad 242).**

"Review" literally and even judicially means re-examination or re-consideration **(S. Nagaraj v. State of Karnataka, JT 1993 (5) SC 27**; **Ram Kirpal v. Union of India, 1998 SCC OnLine Guj 73)** of the case in

certain specified and prescribed circumstances. ***(Parduman Singh v. State of Punjab*, 1957 SCC OnLine Punj 231 : AIR 1958 P&H 63).** The very purpose for which the power of review is statutorily conferred is to correct the errors in the earlier order, albeit on limited grounds. Review of an earlier order, without recording the errors therein and without correcting them, is impermissible. In the present case, directions have been issued, in the impugned order dated 29.12.2023, in terms of the interim arrangement which prevailed during the pendency of O.P.No.05 of 2021 and prior thereto, that too after the said O.P. was finally disposed of by order dated 10.05.2023. The impugned order does not record any finding that the tariff, determined by the bidding process undertaken by KSEBL, complies with the twin tests stipulated in Section 63 of the Electricity Act. In our view, such an exercise of review is impermissible.

More or less identical to Section 94(1)(f) of the Electricity Act is Section 22(3)(f) of the Administrative Tribunals Act, 1985 which stipulates that a Tribunal shall have, for the purposes of discharging its functions under the Administrative Tribunals Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of reviewing its decisions.

While examining the scope of Section 22(3)(f) of the Administrative Tribunals Act, the Supreme Court, in **Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596,** held that Section 22(3)(f) indicated that the power of review available to the Tribunal was the same as has been given to a court under Section 114 read with Order 47 CPC; the power is not absolute and is hedged in by the restrictions indicated in Order 47; a review cannot be claimed or asked for merely for a fresh hearing or argument or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing

it; and any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 47, would amount to an abuse of the liberty given to the Tribunal under the Administrative Tribunals Act to review its judgment.

The law declared by the Supreme Court, in **Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596,** would apply squarely to a review proceeding under Section 94(1)(f) of the Electricity Act and, consequently, any attempt by the KSERC, other than correction of an apparent error in its earlier order in O.P. No. 5 of 2021 dated 10.05.2023, or to review the said order on grounds not set out in Order 47 CPC, must be held to an abuse of the powers conferred on it under Section 94(1)(f) of the Electricity Act to review its orders.

The only ground, on which the earlier order dated 10.05.2023 was sought to be reviewed by the KSERC, is the directions issued by the Government of Kerala on 10.10.2023 under Section 108 of the Electricity Act. The said order, by which the KSERC was directed to review its earlier order, does not refer to any of the grounds which weighed with the KSERC, in passing its order in OP No.5 of 2021 dated 10.05.2023 refusing to approve the PSAs (on the ground that the bidding process undertaken by KSEBL was not in accordance with the Central Govt guidelines), were even referred to, much less considered, by the Government of Kerala in its Section 108 order dated 10.10.2023.

Since the Section 108 order issued by the Government of Kerala dated 10.10.2023 does not express any views on the correctness or otherwise of the earlier order of KSERC dated 10.05.2023, it is evident that the justification put-forth by the Government of Kerala to direct the Commission to review its earlier order has no connection with the lis in O.P. No. 05 of 2021 which related to the adoption of tariff under Section

63 of the Electricity Act and approval of the PPAs. Likewise the KSERC, while reviewing its earlier order dated 10.05.2023 on the basis of the Section 108 order of the Government of Kerala dated 10.10.2023, has not even held, in the impugned order dated 29.12.2023, that its earlier order dated 10.05.2023 suffered from any error or that the bidding process undertaken by KSEBL fulfilled the twin tests of Section 63 of the Electricity Act justifying adoption of the tariff determined through the said bidding process.

It is difficult for us, therefore, to uphold the impugned order dated 29.12.2023 since it has neither pointed out any error in its earlier order dated 10.05.2023 nor has the said order dated 10.05.2023 been subjected to correction by the KSERC in the impugned order, which is the very purpose for which the power of review is exercised.

As the Section 108 directive was passed on 10.10.2023, five months after the Section 63 order was passed by the KSERC on 10.05.2023, it is evident that the Section 108 directive is a subsequent event. It is the admitted case of KSEBL that KSERC had exercised its jurisdiction to review its earlier order dated 10.05.2023 not on any one of the first two grounds, but on the grounds of *"any other sufficient reason".* Consequently, it is only if review of the order, in O.P. No. 5 of 2021 dated 10.05.2023, satisfies the test of *"any other sufficient reason"* in Order 47 Rule 1 CPC, can the impugned order dated 29.12.2023 be upheld.

After referring to the earlier judgements in **Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao, (1899-1900) 27 IA 197; Roy Meghran v. Beejoy Gobind Burral, ILR (1875) 1 Cal 197; Hari Shankar Pal v. Anath Nath Mitter, 1949 FCR 36; Moran Mar Basselios Catholicos v. Mar Poulose Athanasius, AIR 1954 SC 526; Thungabhadra Industries Ltd. V. Govt. of A.P., AIR 1964 SC 1372;**

Parison Devi v, Sumitri Devi, (1997) 8 SCC 715; Haridas Das v, Usha Rani Banik, (2006) 4 SCC 389; Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389; Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909; K. Ajit Babu v. UOI, (1997) 6 SCC 473; Gopabandhu Biswal v. Krishna Chandra Mohanty, (1998) 4 SCC 447; Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596; State of Haryana v. M.P. Mohla, (2007) 1 SCC 457 and Gopal Singh v. State Cadre Forest Officers' Association, (2007) 9 SCC 369, the Supreme Court, in **State of W.B. v. Kamal Sengupta, (2008) 8 SCC 612,** held that: (i) The power of the Tribunal to review its order/decision under the Act is akin/analogous to the power of a civil court under Section 114 read with Order 47 Rule 1 CPC; (ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 CPC and not otherwise; (iii) The expression "any other sufficient reason" appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds. (iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power of review; (v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review. (vi) A decision/order cannot be reviewed on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court; (vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision; the happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent; (viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence

was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier."

In **Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596**, the Supreme Court held that the expression *"any other sufficient reason"* used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the said rule.

As the words used in Order 47 Rule 1 CPC are *"any other sufficient reason",* not any or every reason would justify exercise of the power of review under Order 47 Rule 1, for the word *"reason"* used therein is preceded by the word *"sufficient".* It is only if the reason is other than, but analogous to, the first two grounds referred to in Order 47 Rule 1 CPC, and is "*sufficient*", would the KSERC then be held to be justified in exercising its power of review. While this ground of *"any other sufficient reason"* is not the same as the first two, a review petition under Order 47 Rule 1 CPC, it must be remembered, has a limited purpose and cannot be allowed to be "an appeal in disguise". **(Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715),** as that would amount to exercise of an appellate power which is not available to be exercised by the Regulatory Commissions, that too against its own orders.

We shall now take note of the subsequent events referred to in the judgements relied on behalf of the Respondents, and consider whether or not these judgements apply to the facts of the present case.

In **Board of Control for Cricket in India v. Netaji Cricket Club, (2005) 4 SCC 741**, the subsequent event, which led to the Division Bench of the Madras High Court entertaining a review petition, was the breach/violation of the undertaking given on behalf of BCCI, before it on 29.09.2004, that it would not disqualify any candidate for the post of President on the ground of residence. However in the AGM held,

thereafter, on 30-9-2004, the purported undertaking, given by the learned Senior Counsel, appearing on behalf of BCCI, was alleged not to have been adhered to by the BCCI, and Mr D.C. Agashe was allegedly not allowed to participate in the election.

It is in this context that the Supreme Court observed that the words "sufficient reason", in Order 47 Rule 1 of the Code, were wide enough to include a misconception of fact or law by a court or even an advocate; the Court, while exercising its review jurisdiction, can take into consideration a subsequent event; and the subsequent event may be taken into consideration by the Court for the purpose of rectifying its own mistake.

In **Davesh Nagalya v. Pradeep Kumar, (2021) 9 SCC 796**, an application was filed by Pradeep Kumar, (the successor-in-interest of the tenant) before the District Magistrate, contending that Subhash Chand was carrying on business in the said premises, and the property was not vacant. The Landlord contended that, as Pradeep Kumar had put Subhash Chand in possession of the shop, though he was not a member of their family, the property should be deemed to be vacant. The District Magistrate permitted Subhash Chand to be inducted as a partner, and thereafter a written partnership deed was signed between Pradeep Kumar and Subhash Chand. The land lord challenged the order passed by the District Magistrate by way of revision before the District Judge which petition was dismissed. Further challenge before the High Court, through a writ petition, also remained unsuccessful.

After dismissal of the Writ Petition, the appellant-landlord filed an application for review before the High Court on the ground that, pursuant to the death of the tenant-Pradeep Kumar i.e. one of the partners of the firm, the partnership did not survive in view of Section 42(*c*) of the

Partnership Act, 1932. The Uttarakand High Court did not consider the factum of death of Pradeep Kumar in the Review Application.

It is in this context that the Supreme Court, in **Davesh Nagalya,** held that, for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed; the subsequent event of death of Pradeep Kumar being relevant was bound to be taken into consideration by the High Court in the review petition; and, with the death of both partners and not having any clause permitting continuation of the partnership by the legal heirs, the non-residential tenanted premises was deemed to be vacant in law as the tenant was deemed to have ceased to occupy the building.

In **T.N. Chockalingam Chettiar v. Chidambaram Pillai, 1960 SCC OnLine Mad 104,** the District Munsif granted a mortgage decree in favour of the plaintiff, but allowed certain reliefs to the defendants. In appeal, the learned Judge originally held that the defendants were disentitled to the benefits of the Act. Review was sought on the ground that the judgment proceeded upon certain factual admissions by the defendants in the suit; and there were other facts which ought to be taken into consideration, and which came to light by enquiry on their part, which would be sufficient to show that this admission was erroneous. The Madras High Court held that, since the matter had become largely academic, owing to efflux of time and the subsequent events that had transpired, the appeal should be allowed without the court committing itself to a finding that powers of review ought not to be exercised in conceivable circumstances of this character.

It is thus clear that the Madras High Court, in **T.N. Chockalingam Chettiar**, left the question, whether subsequent events could be a ground for review under the head “for any other sufficient reason”, open.

In **Narain Das v. Chiranji Lal, 1924 SCC OnLine All 409,** the Allahabad High Court held that the words “for any other sufficient reason” in order XLVII, rule 1, were not only very wide in themselves, but were intentionally so made by the Legislature, because of the possibility of exceptional cases arising in which obvious injustice would be worked by strict adherence to the terms of the decree as originally passed.

In **Rajesh D. Darbar v. Narasing Rao Krishnaji Kulkarni, (2003) 7 SCC 219,** the Supreme Court observed that where the nature of the relief, as originally sought, had become obsolete or unserviceable or a new form of relief would be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it was but fair that the relief is moulded, varied or reshaped in the light of updated facts. These observations were not made in the context of exercise of the power of review under Order 47 Rule 1 CPC.

In **Jagmohan Singh v. State of Punjab, (2008) 7 SCC 38**, the appellant’s allotment of a plot was cancelled, and his earnest money was forfeited. On his writ petition being dismissed, he filed a review petition contending that other instances had come to his knowledge where opportunity had been granted to a large number of people to deposit the balance amount even after expiry of the stipulated period. The Supreme Court held that Order 47 Rule 1 CPC does not preclude the High Court or a court to take into consideration any subsequent event; if imparting of justice in a given situation is the goal of the judiciary, the court may take into consideration (of course on rare occasions) the subsequent events; and, in the peculiar facts and circumstances of this case, interest of justice

shall be subserved if the impugned judgments are set aside and the matter is remitted to the revisional authority for consideration of the appellant's case afresh in the light of various orders passed by the said authority as also the High Courts.

In all the judgments relied on behalf of the Respondents, as referred to hereinabove, the subsequent event was integrally connected to the original lis. As noted earlier in this order, it is not as if the Section 108 order, issued by the Government of Kerala on 10.10.2023, has even mentioned any error in the original order passed by the KSERC on 10.05.2023, which error necessitated correction by way of review. None of the reasons which weighed with the KSERC, in holding that the bidding process undertaken by KSEBL did not comply with the guidelines issued by the Central Government and, consequently, the tariff could not be adopted under Section 63 and the PPAs executed by KSEBL with the Appellant could not be approved, has even been faulted in the Section 108 order issued by the Govt of Kerala on 10.10.2023. We, therefore, find it difficult to accept the submission, urged on behalf of the Respondents, that the Section 108 order dated 10.10.2023, even if it be a subsequent event, would justify the KSERC reviewing its earlier order dated 10.05.2023. While, in principle, subsequent events which are integrally connected to the original dispute, which has culminated in the order under review being passed, may fall within the ambit of “any other sufficient reason” and constitute a ground for review under Order 47 Rule 1 CPC, such a subsequent event must be integrally connected with the lis justifying review of the original order passed by the Commission.

In the present case, the subsequent event is unconnected to the original lis and has no bearing on the Section 63 tariff adoption exercise undertaken by the KSERC which culminated in its’ passing the order in

OP No.5 of 2021 dated 10.05.2023. For exercise of the review jurisdiction on the ground of “any other sufficient reason”, the subsequent event must not only be integrally connected with the original lis, but should also justify the original order under review being set aside on the ground that it suffers from some error. KSERC, while reviewing its earlier order dated 10.05.2023 on the basis of the Section 108 order of the Government of Kerala dated 10.10.2023, has not even held that its earlier order dated 10.05.2023 suffers from any error or that the bidding process undertaken by KSEBL fulfils the twin tests of Section 63 of the Electricity Act, justifying adoption of the tariff determined through the said bidding process or in approving the PPAs executed by KSEBL with certain generators including the appellants herein.

It is not possible for us to hold, in the present case, that the subsequent event of the Section 108 Order passed by the State Govt, though unconnected to the original Section 63 proceedings in OP No.5 of 2021, would nonetheless constitute *“any other sufficient reason”* justifying review of the order in OP No.5 of 2021 dated 10.05.2023.

In the absence of any finding being recorded that the earlier order passed by it on 10.05.2023 suffered from any error or, based on a subsequent event, it had now come to light that the twin tests stipulated under Section 63 were satisfied, it was impermissible for the KSERC, relying solely on the subsequent Section 108 directive dated 10.10.2023, to direct the Appellants to supply power to KSEBL at the rates stipulated in the PPAs executed by them, which the KSERC had declined to approve in its earlier order dated 10.05.2023.

We are satisfied, therefore, that the review order passed by KSERC on 29.12.2023 does not fall within any one of the grounds stipulated under Order 47 Rule 1 CPC, and necessitates being set aside on this score.

VIII.DIRECTIONS UNDER SECTION 108 OF THE ELECTRICITY ACT: CAN THE COMMISSION BE DIRECTED TO EXERCISE ITS QUASI-JUDICIAL POWER IN A PARTICULAR MANNER?

A.SUBMISSIONS OF THE APPELLANTS:

It is submitted, on behalf of the appellants, that a directive issued by the State Government, under Section 108 of the Electricity Act, is not binding on the KSERC; such an order acts merely as a guidance; in the present case, the only reason, for allowing the review by KSERC, is the Section 108 Directive; the State Government does not have the power, under Section 108, to direct the manner in which KSERC should exercise its judicial functions i.e., to review its own decisions; KSEBL has drawn an artificial distinction between the function of tariff determination in which the Section 108 direction does not *necessarily* have to be followed by KSERC versus functions like approval/adoption of PSAs under Section 63, like in the present case; this distinction is meaningless, since the Electricity Act does not divide the functions to be performed by KSERC as "tariff functions" or "non-tariff functions"; it cannot be that the Section 108 directive is binding for non-tariff functions, but can be ignored in case KSERC is performing tariff functions; reliance placed by KSEBL, on **UPPCL v. NTPC (2009) 6 SCC 235,** to contend that KSERC has the powers to re-hear the matter on merits in a review petition, and to grant approval to the PSAs after having rejected it earlier, is not tenable; in **UPPCL v NTPC,** the Supreme Court examined the powers of revision of tariff being exercised by the Central Commission *on a continuous basis,*

and held that these are distinct from the exercise of a review power; clearly, this judgment gives no power to KSERC to overturn its own decision on the status of the PSAs which lies solely within the appellate jurisdiction of this Tribunal; even the other judgments relied upon by KSEBL do not stipulate that a Section 108 directive is mandatory; in **Paschimanchal Vidyut Vitran Nigam Limited (2014) 16 SCC 212,** it was held that grant of subsidy to consumers is the prerogative of the State Government under Section 65 read with Section 108 of the Electricity Act, and such decisions were held to be binding; this is clearly different from grant of approval of PSAs which is the prerogative of the State Commissions, and therefore the Section 108 Directive, to that effect, cannot be held to be binding by placing reliance on the above-stated judgment; the Supreme Court has categorically held in **Real Food Products Limited v AP State Electricity Board (1995) 3 SCC 295** that a Section 108 Directives (similar to the directions issued under Section 78A of the Electricity (Supply) Act, 1948) are not mandatory and, even in matters related to tariff fixation, the State Commission must be guided by such directions thereby invalidating any distinction between tariff and non-tariff issues that KSEBL has sought to contend; lastly, even **Dwarka Resorts Private Limited (2014) SCC OnLine Ori 498** dealt with the issue of subsidy by the State Government and the Section 108 Directive issued in this regard; there is nothing in the judgment to suggest that the Section 108 Directive is mandatory and binding on the KSERC, that too to exercise its review jurisdiction; if the arguments of the Respondents were to be accepted, then the generators would be at the mercy of the State Government which may choose to disapprove the PSAs once the *public interest* is served, and leave the Appellants high and dry; the same is evident from KSEBL's past conduct whereby KSEBL floated bids for procurement of power post the Tariff Order dated 25.06.2022, and even

after issuance of the Order dated 10.05.2023; it is only due to KSEBL's inability to secure any bids that KSEBL is now insisting on supply of power from the generators; once KSEBL is able to make alternative arrangements, it will once again try to wriggle out of the PSAs; the power of review has been exercised by the Respondent Commission, while passing the impugned order, purely acting upon the direction issued under Section 108 of the Electricity Act which, unless taken cognizance of by this Tribunal by setting aside the impugned order, would legitimise exercise of the judicial power based purely on an executive direction; and, in ***Orient Paper Mills Ltd. v. Union of India***, 1968 SCC Online SC 59, the Supreme Court held that no authority, however highly placed, can control the decision of a judicial or a quasi-judicial authority, and exercise of quasi-judicial power should not be allowed to be influenced by administrative considerations or directions given by their superiors.

B.SUBMISSIONS URGED ON BEHALF OF KSERC:

It is submitted, on behalf of KSERC, that its consistent stand in the present matter from the inception has been that a decision on the adoption of tariff and approval of PPAs under Section 63 would be taken after the State Government and the Central Government have communicated its views on the matter; at para 40 of the original order dated 30.08.2016 passed in O.P. No.13 of 2015, the Commission had categorically stated that only the PPAs with L-1 bidders were being approved, and that approval for the other PPAs would be considered after the views of the Central and State Governments were furnished; till the passing of the order dated 10.05.2023, KSEBL failed to furnish the views of the State Government; in fact, in the proceedings in OP No. 5 of 2021, the limited submission was that the State Govt had formed a Committee on 27.10.2021 which had, in a meeting held on 19.01.2022, taken the *prima*

facie view that it may not be prudent to approve the PPAs in question; no further material was produced by KSEBL regarding the views of the State Government prior to the order dated 10.05.2023; in the order of 10.05.2023, the Commission's finding regarding public interest are that the tariff determined by KSEBL in these unapproved PPAs is not a fair, transparent and equitable process, and KSEBL has grossly deviated from the Guidelines issued by the Central Government; further, the deviations made by KSEBL are against public interest, and have created long-term financial implications to the consumers and the State; however, vide the Section 108 directions dated 10.10.2023, the State Government has now communicated that it would be in public interest and consumer interest to approve the PPAs as the financial implications of non-approval would be far greater; the Commission has independently examined in detail the public interest aspect invoked by the State Government, before arriving at a decision; the examination included the reasonableness of the discovered price in the bid, the necessity or otherwise of having long-term PSAs with coal-based power generators, the impact on consumers and public in general in the case of continuation or otherwise of the PSAs etc; the review was undertaken by exercising the power under Section 86(1)(b) of the Act to ensure that adequate power at reasonable cost is available to the public; thus the Commission has now taken into account the public interest/ consumer interest angle indicated by the State Government, and has decided to approve the PPAs after independently analyzing the issue of financial implication in the review order dated 29.12.2023; in effect, the Commission has revised its earlier findings of public interest in the order dated 10.05.2023, based on the views finally furnished by the State Government under Section 108; the Commission has also taken due note of the judgments cited by KSEBL on Section 108, being ***Paschimanchal Vidyut Vitran Nigam Ltd. & Ors. Vs. Adarsh***

Textiles & Anr.**,** (2014) 16 SCC 212 and ***Dwaraka Resorts Pvt. Ltd. Vs. State of Orissa & Ors.*****,** 2014 SCC Online Ori 498; in view of the principles of law laid down in the above-mentioned judgments, the Commission has chosen to be guided by the policy directive dated 10.10.2023 issued by the Government of Kerala, which clearly records the reasons and grounds of public interest for approving the PPAs; the Commission has not blindly followed the Section 108 direction, but has independently analysed the reasoning on public interest in the review order; it has chosen to adopt the tariff and grant approval for the PPAs, *without prejudice* to any enquiries by the State Government on the procedural irregularities/ mistakes/ deficiencies which had earlier been pointed out by the Commission in its Order dated 10.05.2023; and, in this context, the Commission took note of the fact that the State Government specifically took cognizance of the procedural irregularities, and has initiated an enquiry to fix accountability for the same.

C.SUBMISSIONS URGED ON BEHALF OF KSEBL:

It is submitted, on behalf of KSEBL, that Section 108 is part of the Parliamentary legislation, the plenary Act, which vests the powers and functions on the State Commission; no such additional condition can be read in Section 108 such as that a policy directive cannot be in regard to the exercise of quasi-judicial functions; Parliament, in its wisdom, has vested powers in the State Government specifically to give directions in public interest to the State Commission without any limitation or qualification (similar powers are available to the Central Government qua the Central Commission under Section 107), and it will not be correct to read any such restriction; sub-section (2) of the above two provisions, making the Appropriate Government's decision on any dispute as to whether the directive is a policy matter or in public interest - as final and

binding, further fortifies the scope of the powers vested; the law laid down by the Supreme Court on the scope of such policy directive being binding on the Appropriate Commission, are: (a) ***Paschimanchal Vidyut Vitran Nigam Limited:*** (2014) 16 SCC 21, Paras 21 and 23, (b) **Real Food Products Limited** case, (1995) 3 SCC 295, Para 8, (c) **Dwaraka Resorts Pvt. Ltd.** case, 2014 SCC Online Ori 498, Para 24*;* accordingly if, in a given case, the State Commission decides to follow the directive given, as in the present case, there is nothing illegal about the same, even in matters of determination of specific tariff; in the present case, the State Commission has decided to be guided by the policy directives, and has also further made its own assessment, in Para 31 of the Impugned Order; and the State Commission has decided to be guided by the policy directives.

D. JUDGMENTS ON THE SCOPE OF SECTION 108 OF THE ELECTRICITY ACT:

1. APTRANSCO VS SAI RENEWABLE ENERGY PVT.LTD: (2011) 11 SCC 34:

In **APTRANSCO vs Sai Renewable Energy Pvt. Ltd: (2011) 11 SCC 34,** the Supreme Court held that the State Commission was not bound by any policy directions issued by the Government under the Act, if such directions hampered the statutory functions of the Commission; all policy directions shall be issued by the State Govt consistent with the objects sought to be achieved by the Electricity Act and, accordingly, shall not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of the structure of tariffs for supply of electricity to various classes of consumers; the State Govt. was further

expected to consult the Regulatory Commission in regard to the proposed legislation or rules concerning any policy direction and to duly take into account the recommendations of the Regulatory Commission on all such matters; the scheme of the provisions was to grant supremacy to the Regulatory Commission; the State was not expected to take any policy decision or planning which would adversely affect the functioningof the Regulatory Commission or interfere with its functions; fixation of tariff was the function of theRegulatory Commission; and the State Govt. had a minimum role in that regard.

2. KERALA STATE ELECTRICITY BOARD V. KERALA STATE ELECTRICITY REGULATORY COMMISSION (ORDER IN APPEAL NO. 05 OF 2009 DATED 18.08.2010):

In **Kerala State Electricity Board v. Kerala State Electricity Regulatory Commission (Order in Appeal No. 05 of 2009 dated 18.08.2010),** this Tribunal held that it is settled law, as laid down by this Tribunal as well as the Supreme Court, that all policy directions are not binding on the State Commission, since the State Government cannot curtail the powers of the State Commission in the matter of determination of tariff; and the State Commission was perfectly in its right to disregard the directive, through a letter by the Government, on rates of depreciation as applicable for determination of ARR and ERC

3. SIEL LIMITED VS. PUNJAB STATE COMMISSION (ORDER OF APTEL IN APPEAL NO. 4, ETC. OF 2005 DATED 26.05.2006)

In ***SIEL Limited Vs. Punjab State Commission*** **(**Order in Appeal No. 4, etc. of 2005 dated 26.05.2006), this Tribunal held that the State Commission had the powers to determine the tariff; the orders passed by

it, under Section 61 and 62 of the Act relating to tariff, will bind the State Governments; the Commission is an independent statutory body and its directions, in terms of the Act, are binding on the State Electricity Board whose *de jure* owner is the State; the Appropriate Commission, while determining tariff, is required to be guided by the parameters enshrined therein; one of the factors, on the basis of which tariff is to be determined, is the consumer interest; sub-clause (d) of Section 61 requires the Commission to safeguard the interest of the consumers and ensure that the recovery of the cost of electricity is effectedin a reasonable manner; there was nothing in Sections 61and 62 of the Electricity Act to show that orders relating to tariff will not bind the State Government; the Commission is an independent statutory body; the Commission is not powerless to issue orders and directions relating to matters having a bearing on and nexus with the determination and fixation of tariff; its directions are binding on all persons and authorities, including the State Government; and the State Commission is perfectly in its right to disregard the directive, through a letter by the Government, on rates of depreciation as applicable for determination of ARR and ERC.

4. POLYPLEX CORPORATION VS UTTARAKHAND ELECTRICITY REGULATORY COMMISSION (ORDER OF APTEL IN APPEAL NO. 41,42 AND 43 OF 2010 DATED 31.01.2011):

In **Polyplex Corporation vs Uttarakhand Electricity Regulatory Commission (Order of Aptel in Appeal no. 41,42 and 43 of 2010 dated 31.01.2011)**, this Tribunal held that the State Commission was an independent statutory body; therefore, the policy directions issued by the State Government were not binding on the State Commission, as those directions

could not curtail the power of the State Commission in the matter of determination of tariff; the State Government may have given any such policy direction in order to cater to the popular demand made by the public, but while determining tariff the State Commission may take those directions or suggestions for consideration, but it is for the State Commission which has a statutory duty to perform either to accept the suggestion or reject those directions taking note of the various circumstances; and it was purely discretionary on thepart of the State Commission on acceptability of the directions issued by the state government in the matter of determination of tariff.

5. TAMIL NADU ELECTRICITY CONSUMERS' ASSOCIATION V. TAMIL NADU ELECTRICITY REGULATORY COMMISSION & ANR. (ORDER OF APTEL IN APPEAL NO. 92 OF 2013 & IA NO.151 OF 2013 DATED 21.01.2014):

In **Tamil Nadu Electricity Consumers' Association v. Tamil Nadu Electricity Regulatory Commission & Anr. (Order in Appeal No. 92 of 2013 & IA No.151 of 2013 dated 21.01.2014),** this Tribunal was called upon to consider whether the directions issuedunder Section 108 were binding on the State Commission. Relying on the judgment of the Supreme Court in **APTRANSCO vs Sai Renewable Energy Pvt. Ltd:(2011) 11SCC 34,** and the judgmentof this Tribunal, in **Polyplex (Order in Appeal No. 41,42 and 43 of 2010 dated 31.01.2011),** this Tribunal held that the following inferences could be made: (1) the Commissions are independent statutory authorities and are not bound by any policy or direction

which hamper its statutory functions; (2)the term 'shall be guided' is not mandatory, and its character would depend upon a case to case basis;the State Commission in discharge of its functions under the Act has to be guided by the directions of the State Government, but the same are not mandatory; and the State Commission being an independent statutory authority is not bound by any policy directions which hampers its statutory functions.

This Tribunal then summarised its findings holding that the State Commission in discharge of its functions under the Electricity Act, 2003 has to be guided by the directions of the State Government u/s 108 of the2003 Act, but the same are not mandatory and binding. The State Commission being an independent statutory authority is not bound by any policy directions which hampers its statutory functions. (ii) the State Commission has to be guided by the directions of the State Government u/s 108 of the Act only in the discharge of the functions assigned to it under the 2003 Act. Such directions have to be implemented only under the functions andpowers assigned to the State Commission under the 2003 Act.

6. STEEL CITY FURNACE ASSOCIATION V. PUNJAB STATE ELECTRICITY REGULATORY COMMISSION & ORS. (ORDER IN APPEAL NO. 189 OF 2022, 369 OF 2022 AND 4 OF 2021 DATED 31.10.2022):

In **Steel City Furnace Association v. Punjab State Electricity Regulatory Commission & ors. (Order inAPPEAL No. 189 of 2022, 369 of 2022 and 4 of 2021 dated31.10.2022),** it was contended that the Commission was bound by the order issued by the State Government '*in public interest*' in exercise of the powers vested in it by Section 108 of the

Electricity Act. In this context, this Tribunal observed that they could not subscribe to the view that the directions ofthe State Government, under Section 108 of the Electricity Act, would bind the State Commission; that was not themandate of the statute; the law only said that the State Commission '*shall be guided*' by such directions as may be issued by the State Government in matters of public interest';the provision contained in Section 108 could be contrasted with Section 11 of the Electricity Act, 2003 wherein an appropriate government is vested with the power '*in extraordinary circumstances*' to specify that the generating companies shall operate and maintain their generatingstations '*in accordance with the directions*' of the government; the expression "*extraordinary circumstances"* was defined by the explanation to mean such circumstances as may arise out of threat to the security of the State, public order or a natural calamity or "*such other circumstances arising in the public interest"*; given the language employed in Section 11, there could be no debate that the generating companies were *bound* to act '*in accordance with*' the directions of the government issued to deal with the situation arising out of such extraordinary circumstances, the caution being – asprovided by sub-section (2) – for such measures also to be adopted as would "*offset the adverse financial impact of the directions"* for the generating companies; and in contrast, Section 108 of the Electricity Act only expected the State Commission to *"be guided by*" the directions of the State Government; for the CERC to be guided by the directions issued under Section 107(1) of the Act, such directions should have been issued by the Central Govt, in writing, on a policy matter involving public interest. Firstly, not every direction issued by the Central Govt would fall within the ambit of Section 107(1); the directions in writing must relate to a matter of policy; again not all matters of policy, but only those policy directiveswhich involve public interest fall within the ambit of the said provision; further

Section 107(1) only requires the CERC, in the discharge of its functions, to be guided by such directives; the meaning of the words “guided by” is to be “assisted by in reaching a conclusion”; the directives of the Central Govt, under Section 107(1), can only be of assistance to the CERC in taking a decision; and, while the CERC should take such directives into consideration while discharging its functions, it is not bound by such guidance.

E.JUDGEMENTS RELIED ON BY LEARNED COUNSEL ON EITHER SIDE:

I. REAL FOOD PRODUCTS LTD. V. A.P. SEB, (1995) 3 SCC 295:

Section 78A of the Electricity Supply Act, 1948, was worded similarly to that of Section 107 and 108 of the Electricity Act,2003, and provided that the “the Board shall be guided by such directions on questions of policy as may be given to it by the State Government”. In **Real Food Products Ltd. v. A.P. SEB, (1995) 3 SCC 295,** the Supreme Court held that the view expressed by the State Government on a question of policy is in the nature of a direction to be followed by the Board in the area of the policy to which it relates; in the context of the function of the Board of fixing tariff in accordance with Section 49 read with Section 59 and other provisions of the Electricity Supply Act,1948, the Board is to be guided by any such direction of the State Government; the direction of the State Government was to fix a concessional tariff for agricultural pump-sets at a flat rate per H.P which relate to a question of policy which the Board must follow; however, in indicating the specific rate in a given case, the action of the State Government may be in excess of the power of giving a direction on a question of policy, which the Board, if its conclusion be different, may not be obliged to be bound by; but where the Board considers even the rate suggested by the State Government, and finds it

to be acceptable in the discharge of its function of fixing the tariffs, the ultimate decision of the Board would not be vitiated merely because it has accepted the opinion of the State Government even about the specific rate; in such a case, the Board accepts the suggested rate because that appears to be appropriate on its own view; and, if the view expressed by the State Government in its direction exceeds the area of policy, the Board may not be bound by it unless it takes the same view on merits itself.

This judgement in **Real Food Products Ltd,** rendered in the context of the Electricity Supply Act, 1948, may not be applicable in the context of Sections 107/108 of the Electricity Act, 2003, by which Act the 1948 Act was repealed. In this context it is useful to note that the Statement of objects and reasons for introducing the Electricity Bill, 2001 records, among others, that, over a period of time, the performance of State Electricity Boards had deteriorated substantially on account of various factors; for instance, though power to fix tariffs vested with the State Electricity Boards, they had generally been unable to take decisions on tariffs in a professional and independent manner, and tariff determination in practise had been done by the State Governments; cross-subsidies had reached unsustainable levels; to address this issue, and to provide for distancing of government from determination of tariffs, the Electricity Regulatory Commissions Act was enacted in 1998; and it created the Central Electricity Regulatory Commission and had an enabling provision through which the State Governments could create a State Electricity Regulatory Commission.

The said Statement of objects and reasons further records that, with the policy of encouraging private sector participation, generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the regulatory commissions, the need for harmonizing and rationalizing the provisions in the Indian

Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose; accordingly, it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Boards and the responsibilities of the State Governments and the State Electricity Boards with respect to regulating licensees.

The law declared by the Supreme Court, in **Real Food Products Ltd.**, is that, in discharging its functions of fixing the tariffs, the State Electricity Board is to be guided by the direction of the State Government. As noted hereinabove, the aforesaid judgement was passed interpreting the scope of Section 78-A of the Electricity (Supply) Act, 1948. It is with a view to provide for distancing of the government, from determination of tariffs, that the Electricity Regulatory Commissions Act,1998 was enacted, and the Central Electricity Regulatory Commission was created thereby. The enabling provisions under the 1998 Act are now mandatory provisions under the Electricity Act, 2003 with Part X thereof obligating the constitution of State Electricity Regulatory Commissions. Detailed provisions have also been made in Part IX of the 2003 Act regarding tariff, and the power to determine tariff now vests exclusively with the appropriate Regulatory Commissions. The judgement of the Supreme Court, in **Real Food Products Ltd**, rendered in the context of Section 78-A of the Electricity Act, 1948 would have no application since Regulatory Commissions- both Central and State- have been constituted, with a view to distance tariff determination by these Commissions from the Government, under the subsequent enactments ie the Electricity Regulatory Commissions Act,1998 and the Electricity Act, 2003. The law

laid down in the said judgement may no longer apply in the changed context.

2.U.P. POWER CORPN. LTD. V. NTPC LTD., (2009) 6 SCC 235 :

The question which arose for consideration, in **U.P. Power Corpn. Ltd. v. NTPC Ltd., (2009) 6 SCC 235,** was as to whether the amount required to be paid by National Thermal Power Corporation towards revision of scales of pay of its employees in terms of the recommendations made by the High-Level Committee with retrospective effect, from 1-1-1997 can be a subject-matter of revision in tariff for the tariff years 1997-1998, 1998-1999 and 1999-2000.

The Supreme Court held that the Electricity Regulation Commissions Act, 1998 (for short "the 1998 Act") came into force with effect from 9-6-1998. In terms of Section 3(1) of the said Act, the Central Electricity Regulatory Commission (in short "the Central Commission") was established, and was conferred the powers and functions in terms of Section 13 thereof; a regulatory commission not only makes regulations, but is also in charge of implementation thereof; it also has an adjudicatory role to play in the event of any dispute or difference arising between several players involved in the framing of tariff for the consumers of electrical energy; the Central Commission has the exclusive jurisdiction to frame not only tariff but also any amendment, alterations and additions in regard thereto; in terms of the 1998 Act as also the Regulations framed thereunder, the Central Commission exercises legislative power, power of enforcement of the Regulations as also the adjudicatory power; each of its functions, although separate and distinct, may sometimes overlap; Regulation 92 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (for short "the 1999 Regulations") confers on the Central Commission the power of review both suo motu and otherwise with respect to tariff; Regulation 103 confers the power of

review on the Central Commission, and thereunder the Central Commission may not only exercise its jurisdiction suo motu but it may review a decision even if an application is filed within a period of sixty days of making of any decision, direction or order; while exercising its power of review, so far as alterations or amendment of a tariff is concerned, the Central Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order 47 Rule 1 thereof; its jurisdiction would not be barred in terms of Order 2 Rule 2 of the Code of Civil Procedure or the principles analogous thereto; revision of a tariff must be distinguished from review of a tariff order; whereas Regulation 92 of the 1999 Regulations provides for revision of tariff, Regulations 110 to 117 also provide for extensive power to be exercised by the Central Commission in regard to the proceedings before it; and the concept of regulatory jurisdiction provides for revisit of the tariff.

The Supreme Court further held that Section 62 of the Electricity Act, 2003 confers power upon the Commission to determine the tariff; Section 65 enables the State Government to grant subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62; Section 108 of the 2003 Act deals with the power to issue directions by the State Government; the Commission shall be guided by such directions in the matter of policy involving public interest as the State Government may give to it in writing; the Central Commission has plenary power; its inherent jurisdiction is saved; having regard to the diverse nature of jurisdiction, it may for one purpose entertain an application so as to correct its own mistake, but in relation to another function its jurisdiction may be limited; the provisions of the 1998 Act do not put any restriction on the Central Commission in the matter of exercise of such a jurisdiction; and It is empowered to lay down its own procedure.

3.PASCHIMANCHAL VIDYUT VITRAN NIGAM LTD. V. ADARSH TEXTILES, (2014) 16 SCC 212:

In **Paschimanchal Vidyut Vitran Nigam Ltd. v. Adarsh Textiles, (2014) 16 SCC 212**, the question involved was whether the policy decision issued by the Government of Uttar Pradesh regarding supply of the electricity to power-loom bunkers on the flat rate could have been applied by the U.P. Electricity Regulatory Commission to industries availing HV-2 category connection. The Commission had fixed the tariff for the year 2004-2005, whereby rebate of Rs 5000 per consumer was granted to power-loom bunkers availing LMV-2 and LMV-6 connections in accordance with the policy of the U.P. Government. LMV-2 was a non-domestic light, power and electricity connection, LMV-6 electricity connection was of small and medium power having connected load up to 100 HP for industrial/processing or agro-industrial purposes, power-loom, etc. HV-2 connection was provided for utilising large and heavy power for industrial and other purposes having contracted load of above 100 HP. Industries which were having load of more than 100 HP were covered by tariff HV-2.

The State Government had issued an Order dated 14-6-2006 to the Managing Director, U.P. Power Corporation Ltd which the Commission opined that it had the effect of altering the rate schedule approved by it. The Commission, in turn, issued order dated 3-7-2006 restraining all electricity supply undertakings in the State of U.P. from implementing the provisions of the State Government Order dated 14-6-2006. The Commission took up the matter to work out the modalities as per the government order. The Chairman of U.P. Power Corporation Ltd. filed an affidavit before the Commission providing a new scheme compatible with the legal framework along with a directive from the State Government issued under Section 108 of the Electricity Act, 2008. The scheme as

proposed in the affidavit stated that, despite the aforesaid order, the normal billing as per the applicable tariff shall be made but payment shall be collected as per the directions of the Government at normal billing cycle, and that advance subsidy shall be collected from the Government in one instalment or maximum two half-yearly instalments. Pursuant thereto the Commission on 11-7-2006 passed an order in which it had prescribed the rate for LMV-2 and LMV-6 consumers only. However, the Commission also opined that the State Government had permitted realisation on flat rate depending upon reed space, number of looms, etc. It appeared to be the case of altering the rate schedule of the tariff order fixed by it which was not permissible within the legal framework to be attempted by the State Government. The State Government also did not spell out compliance with the advance subsidy payment as envisaged under Section 65 of the Electricity Act, 2003. While dealing with the matter, the Commission observed that billing of the power-loom be done strictly in accordance with the prevalent schedule.

The tariff order 2004-2005 was issued by the Commission for providing benefit to LMV-2 and LMV-6 consumers, it admittedly did not cover HV-2 consumers. The Commission ultimately directed that billing of the power-loom consumers shall be done strictly in accordance with the prevalent rate schedule of tariff order 2004-2005 on monthly basis. It issued further directions with respect to the collection of the subsidy. It directed that payment from the power-loom consumers shall be collected as per the policy direction of the Government on monthly basis. It also directed that the Government should earmark capital subsidy for providing free of cost meters to power-loom consumers in case of new connections.

Later on, industries enjoying HV-2 connection approached the Commission to clarify whether its order dated 11-7-2006, in the matter of subsidised electricity rates for power-loom consumers, was applicable to

them also, as the benefit of the said order was not extended to them by the authorities concerned. The Commission passed an order on 14-9-2006/15-9-2006 that the order dated 11-7-2006 shall apply mutatis mutandis to even HV-2 power-loom consumers irrespective of their load. It also directed that subsidy provision shall accordingly apply to them also.

The Secretary, Government of U.P. wrote to the Chairman, U.P. State Electricity Regulatory Commission on 6-10-2006 drawing their attention to the Commission's letter dated 14-9-2006/15-9-2006 clarifying that only those consumers to whom the State Government was giving subsidy under Section 65 of the Electricity Act, 2003 were entitled for the benefit of Government Order dated 14-6-2006. The scheme to supply electricity on flat rate to the power-loom bunkers had been made for LMV-2 and LMV-6 consumers for whom earlier also provision of subsidy had been made. The U.P. Government had not made provision of any subsidy for industries availing HV-2 category connection. Therefore, distributing companies of U.P. could not give facility of flat rate tariff to HV-2 consumers. The aforesaid communication was not dealt with by the Commission but the Secretary of the Commission, vide letter dated 18-10-2006, advised the Principal Secretary, Energy, Government of U.P to amend the Government Order dated 14-6-2006 so as to confine subsidy to LMV-2 and LMV-6 consumers only.

On 24-2-2007, the Chief Engineer (Commercial), U.P. Power Corporation Ltd., wrote to the Chief Engineer (Distribution), Purvanchal Vidyut Vitran Nigam Ltd., Varanasi that the present tariff was applicable to LMV-2 and LMV-6 consumers, and subsidy was not admissible to HV-2 consumers. On 1-5-2007, the Secretary to the Government of U.P. wrote to the Managing Director of U.P. Power Corporation Ltd. that only the weaver consumers falling under rate schedule LMV-2 and LMV-6 would be covered by the flat rate for the supply of electricity to bunkers.

One of the industry, namely, M/s Hiltrex Industrial Fabrics Pvt. Ltd., availing HV-2 connection, filed WP No. 2204 (M/B) of 2007 before the High Court of Allahabad. The writ petition was dismissed. It was held by the Division Bench that subsidy paid by the Government was to help person or class of persons by keeping the prices down. The earlier decision dated 14-6-2006 was intended to give benefit to weavers who were members of the weaker section of society, not to consumers like the petitioners. Thereafter, the Commission issued letter dated 10-10-2007 in the matter of extension of rebate/subsidised power-loom flat rate tariff to HV-2 category consumers, duly noticing the decision of the Allahabad High Court rendered in the aforesaid writ petition, it clarified that the provision of tariff for 2006-2007 shall not be attracted in case of HV-2 power-loom consumers in consonance with the findings of the High Court. Thereafter, in the instant matters, writ petitions were filed by the industries seeking extension of benefit for HV-2 power-loom consumers questioning the aforesaid adverse decisions. A Division Bench of the High Court of Allahabad allowed the writ petitions holding that the Corporation shall charge the petitioners in accordance with the Government Order dated 11-7-2007. The petitioner shall not be entitled to the relief provided by the Government Orders dated 14-6-2006 and 31-3-2007. Aggrieved thereby, the appellant invoked the jurisdiction of the Supreme Court.

It is in this context that the Supreme Court held that, from the provisions of the Electricity Act, 2003 and the Reforms Act, 1999, it was clear that, in the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing; such decision/direction of the State Government in the matter of policy, subsidy and public interest shall be final; under Section 65, it was the prerogative of the State Government to grant any subsidy to any consumer or class of consumers

in the tariff determined by the Commission under Section 62; it was apparent from the provisions contained in Sections 65 and 108 of the 2003 Act that, to grant subsidy to any consumer or class of consumers, was the prerogative of the State Government and such other direction issued in the public interest shall be binding upon the Commission; from the policy decision of the State Government it was clear that the State Government never intended to extend the benefit of subsidy to HV-2 category consumers; it had not made any provision for extending subsidy to HV-2 consumers; in its order, the Commission itself had confined the tariff respite to LMV-2 and LMV-6 consumers; it was not open to the Commission to issue clarification, as the matter of providing subsidy was clearly the prerogative of the State Government under the provisions of Section 65 read with Section 108 of the 2003 Act and Section 12 of the Reforms Act, 1999; and, hence, the Commission could not have accepted on its own, or directed the State Government to release the subsidy to HV-2 consumers, and that too unilaterally.

4.DWARAKA RESORTS LTD VS STATE OF ORISSA: (2014) SCC ONLINE ORISSA 498:

In **Dwaraka Resorts Ltd vs State of Orissa: (2014) SCC OnLine Orissa 498**, the petitioner had filed the writ petition to (i) quash the disconnection notice; (ii) direct the opposite parties to bill the petitioner hotel at Medium Industrial Tariff as per the Industrial Policy 2001; (iii) to quash the order of the O.E.R.C. dated 22.3.2005, and direct CESU to supply power to the petitioner-hotel under Industrial Tariff.

The dispute between the Petitioner, a hotel registered under the Companies Act, 1956, and the electricity distribution licensee CESU was regarding consumption of electricity by the petitioner exceeding the

contract demand. The Petitioner instituted proceedings which was disposed of by the Orissa High Court directing CESU to look into the petitioner's grievances upon filing of representation. Pursuant to such direction, an enquiry committee was constituted and upon enquiry the committee passed a resolution. Pursuant thereto, the Superintending Engineer issued a letter to the writ petition to execute fresh agreement for 95 KW of load with retrospective effect from the month of January, 1999 and for recasting the bills accordingly. It was also mentioned in the letter that tariff of Medium Industries category would be applicable, and continue after execution of fresh agreement with retrospective effect from January, 1999. In accordance with the directions contained in the letter, the petitioner sent the standard agreement duly signed by the petitioner with a request to the Executive Engineer to execute agreement and to send the duplicate copy to them, The Executive Engineer-cum-Manager (Electrical) is said to have insisted on the petitioner executing a fresh agreement for contract load of 100 KW contrary to the specific direction in the resolution. The petitioner preferred a Writ Petition with a prayer to quash the order passed by the Executive Engineer-cum-Manager(Electrical). The writ petition was disposed of allowing the prayer of the petitioner to quash the order of the Executive Engineer-cum-Manager(Electrical) and directing the CESU authorities to implement the orders contained in the resolution.

In response to the representation filed by the petitioner to implement the order of the Orissa High Court, a letter was issued intimating the petitioner that agreement would be executed for contract load of 95 KW in the General Purpose Tariff Category and not in the Medium Industrial Tariff Category. Thereafter, a notice was issued calling upon the petitioner to pay the differential amount of the current dues for the months of May,

2007 and June, 2007 within 15 days specifically indicating therein that the petitioner was liable to pay electricity dues at General Purpose Tariff Category and not at Medium Industrial Tariff Category under threat of disconnection of electricity supply. Aggrieved thereby the Petitioner again invoked the jurisdiction of the Orissa High Court.

It is in this context that the Orissa High Court held that Section 108 of the Electricity Act, 2003 not only mandates that, in the discharge of its functions, the State Electricity Commission is to be guided by the directions issued by the State in matters of policy involving public interest, but also recognizes the dominant position of the State Government in deciding as to whether any direction issued by the State Government relates to a matter of policy involving public interest; in other words, in the matter of policy involving public interest, decision of the State Government is final; in the present case, the petitioner, as a hotel, was entitled to avail power at industrial rate of tariff as a matter of industrial policy of the State as provided under IPR-1996 and IPR-2001; the Orissa State Electricity Board as well as Grid Corporation of Orissa Limited, the entities which regulated electricity supply earlier, had allowed the petitioner hotel to avail power at the industrial rate of tariff; the concession in the tariff rate granted to hotels under IPR-1996 and IPR-2001 has, thus, not been withdrawn by the State Government till IPR-2001 was in force; the State Government had made it clear that concession granted to Hotels under IPR-2001 had not been abridged, modified or altered; in *Kusumam Hotels(P) Ltd.* v. *Kerala State Electricity Board* (supra), it was held that the policy decision adopted by the State, on the basis of which the electricity licensee is obliged to grant tariff concession in favour of the petitioner on industrial rate, must be understood in the context of Section 108 of the Electricity Act, 2003; there being no doubt that the petitioner was entitled

to concessional rate of tariff as a matter of policy of the State involving public interest, even the State Government had no authority to deny the petitioner such concession in an arbitrary manner or retrospectively; a specific stand had been taken by the State that the petitioner was entitled to concessional rate of electricity tariff under IPR-1996 and IPR-2001 as a matter of policy directives of the State Government involving public interest in exercise of power under Section 12 of the Orissa Electricity Reform Act, 1995 and Section 108 of the Electricity Act, 2003; in such view of the matter, there appeared no cogent reason to direct the petitioner to approach the authorities or to exhaust the alternative statutory remedies at this stage; as laid down in *Kusumam Hotels(P) Ltd.* v. *Kerala State Electricity Board* (supra), concession granted subsequent upon the policy directives of the State either under Section 12(1) of the Orissa Electricity Reform Act, 1995 or under Section 108(1) of the Electricity Act, 2003 cannot be withdrawn with retrospective effect; by setting up the plea of non-granting of subsidy by the State Government as a ground to deny the benefit of having power at concessional rate to the petitioner, the CESU and OERC appear to have made malfusion between the provisions under sub-Section (1) of Section 12 of the Orissa Electricity Reform Act, 1995 and Section 108 of the Electricity Act, 2003 on the one hand and sub-Section (3) of Section 12 of the Orissa Electricity Reform Act, 1995 and Section 65 of the Electricity Act, 2003 on the other; the State Government had made its stand clear that the policy decision of the State was to provide power to Tourism related activities at the rate of industrial tariff; such being the stand of the State Government, as provided under sub-Section (2) of Section 108 of the Electricity Act, 2003, the decision of the State Government is undoubtedly final; the State Government had taken the stand that the policy decision for grant of concessional rate of tariff to hotels issued in exercise of the power under

Section 12(1) of the Orissa Electricity Reform Act, 1995 had not been altered, amended or rescinded during the period in which IPR-2001 was in force; as observed in *Kusumam Hotels(P) Ltd.* v. *Kerala State Electricity Board* (supra), the direction of the State was to apply a particular category of tariff to the petitioner; such direction could have been withdrawn by the State; the State indisputably had the power to grant subsidy from its own coffers instead of directing grant of concession; the licensee (i.e. CESU in this case) having regard to its financial constraints, could have brought its financial stringency to the notice of the State; the CESU could have moved the State for grant of subsidy; and denial, of entitlement of having power at concessional rate of industrial tariff, to the petitioner without withdrawal of the directive of the State Government under the IPR, that too at a belated stage on the eve of coming into force of IPR-2007, was not sustainable.

F. ANALYSIS:

Part X of the Electricity Act relates to Regulatory Commissions. Under the sub-head "Grants, Fund and Accounts, Audit and Report" are Sections 98 to 109. Section 108 of the Electricity Act relates to directions by the State Government, and under sub-section (1) thereof, in the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. Section 108(2) stipulates that, if any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final. Section 108 of the Electricity Act is in pari-materia with Section 107 of the Act, except that Section 108 relates to 'Directions by the State Government' to the 'State Commission', and Section 107 relates to 'Directions by the Central Government' to the Central Commission. What Section 108 (1) requires is for the State Commission,

in the discharge of its functions, to be guided by the directions issued by the State Government, in writing under Section 108, in matters of policy involving public interest.

While Section 108 is in Part X of the Electricity Act which relates to the Regulatory Commissions, both Sections 62 and 63, which fall in Part VII of the Electricity Act, relate to determination of tariff. Determination of tariff, by the Appropriate Commission under Section 62, must be in accordance with such tariff regulations as are made on being guided by matters referred to in Section 61. Determination of tariff under Section 63 is, however, by way of adoption of the tariff determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. While determining the tariff, both under Section 62 and 63, the Appropriate Commission is required to exercise its regulatory functions strictly in terms of what is stipulated in the said provisions, and not be guided by any policy directive issued by the State Government contrary to the express stipulation in the aforesaid Sections.

As noted hereinabove the Appropriate Commission can adopt the tariff under Section 63 only if such tariff has been determined through a transparent process of bidding, and such a bidding process is in accordance with the guidelines issued by the Central Government. The Section 108 directives issued by the State Government on 10.10.2023 does not touch upon issues of lack of transparency and violation of the Central Govt guidelines, which issues were considered and conclusively dealt with by the KSERC in its earlier order in OP No. 5 of 2021 dated 10.05.2023 holding that the bidding process undertaken by KSEBL was neither transparent nor did it accord with the Central Government guidelines.

While calling upon KSERC to reconsider/review its order in OP No.5 of 2021 dated 10.05.2023, the reasons recorded by the Government of Kerala, in its Section 108 Order dated 10.10.2023, are wholly extraneous to the issues determined by the KSERC in its order dated 10.05.2023. Since elaborate reasons have been assigned by the KSERC, in its order in OP No. 5 of 2021 dated 10.05.2023, in support of its conclusion that the tariff (adoption of which was sought in OP No. 5 of 2021) could not be adopted, it is only if the KSERC, while exercising its review jurisdiction, had held that it had earlier erred in holding that the bidding process did not comply with the Section 63 requirements, could it then have, that too after setting aside the said order in OP No.5 of 2021 dated 10.05.2023, adopted the tariff and approved the PPAs, and then directed the Appellants to supply electricity in terms of the approved PPAs signed by them earlier. That an inquiry is now being caused into the earlier procedural deviations by the Government of Kerala, matters little, since what the Central Government guidelines stipulate is for prior approval to be obtained from the Central Government for the proposed deviations from the guidelines, and not either the approval of the State Government or the subsequent ratification by the Central Government of such deviations. It is clear that the KSERC has erred in directing the Appellants to supply electricity based merely on the Section 108 directives issued by the State Government without interfering with the order passed earlier in OP No. 5 of 2021 dated 10.05.2023 which order appears to continue to remain in force.

The oft repeated reference to “Public Interest”, both in the Section 108 order issued by the Government of Kerala and in the impugned order dated 29.12.2023 by the KSERC, overlooks the fact that public interest is best served in complying with the law which, in the present case, is

Section 63 of the Electricity Act. As the earlier order of the KSERC dated 10.05.2023 establishes that the bidding process undertaken by KSEBL was neither fair and transparent nor in compliance with the Central Government Guidelines, public interest is best served in ensuring that the tariff determined by such an illegal process is not adopted and approval of PPAs, executed pursuant thereto, is not granted.

Reliance placed on behalf of the Respondents on the Judgment of the Supreme Court in **UPPCL vs. NTPC (2009 6 SCC 235)** is of no avail. The question which arose for consideration, in **U.P. Power Corpn. Ltd. v. NTPC Ltd., (2009) 6 SCC 235,** was as to whether the amount required to be paid by National Thermal Power Corporation towards revision of scales of pay of its employees in terms of the recommendations made by the High-Level Committee with retrospective effect, from 1-1-1997 can be the subject-matter of revision in tariff for the tariff years 1997-1998, 1998-1999 and 1999-2000. It is evident, from a perusal of the impugned order, that the power exercised by the KSERC was in a petition filed by KSEBL seeking review of the earlier order dated 10,05.2023, unlike in **UPPCL vs. NTPC** where the power to revise the tariff on a continuous basis was in issue.

In any event, since the KSERC has not found any error in its earlier order dated 10.05.2023 whereby they had declined to adopt the tariff under Section 63 of the Electricity Act or to approve the PPA executed by KSEBL with the Appellants herein, the impugned order cannot be said to be an exercise of the revisionary powers. Neither does the impugned order record nor has any statutory provision, other than Section 94(1)(f), as the source of power to review the earlier order even been urged before us. As shall be detailed later in this order, the validity of the impugned order cannot be justified even if it is held to be an exercise of the regulatory

power available to the KSERC under Section 86(1)(b) of the Electricity Act.

In **Paschimanchal Vidyut Vitran Nigam Ltd. v. Adarsh Textiles, (2014) 16 SCC 212**, the question involved was whether the policy decision issued by the Government of Uttar Pradesh regarding supply of the electricity to power-loom bunkers at a flat rate could have been applied by the U.P. Electricity Regulatory Commission to industries availing HV-2 category connection ie those having a load of more than 100 HP. Rebate of Rs 5000 per consumer was granted to power-loom bunkers availing LMV-2 and LMV-6 connections, of a much smaller load, in accordance with the policy of the U.P. Government. The Supreme Court held that, under Section 65, it was the prerogative of the State Government to grant any subsidy to any consumer or class of consumers in the tariff determined by the Commission under Section 62; Sections 65 and 108 of the 2003 Act made it clear that it was the prerogative of the State Government to grant subsidy to any consumer or class of consumers, and such other direction issued in the public interest shall be binding upon the Commission; providing subsidy was the prerogative of the State Government under Section 65 read with Section 108 of the 2003 Act; and, hence, the Commission could not have unilaterally directed the State Government to release subsidy to HV-2 consumers even though no policy decision had been taken by the State Govt to extend the benefit of subsidy to such a category of consumers.

In **Dwarka Resorts Private Limited (2014 SCC OnLine Orissa 498),** the petitioner was called upon to pay electricity dues at General Purpose Tariff Category and not at Medium Industrial Tariff Category under threat of disconnection. The Orissa High Court held that the petitioner, as a hotel, was entitled to avail power at industrial rate of tariff

as a matter of industrial policy of the State as provided under IPR-1996 and IPR-2001 which had not been withdrawn by the State Government till IPR-2001 was in force; the policy decision adopted by the State, on the basis of which the electricity licensee is obliged to grant tariff concession in favour of the petitioner on industrial rate, must be understood in the context of Section 108 of the Electricity Act, 2003; and, as the State had the power to grant subsidy from its own coffers instead of directing grant of concession, the CESU could have moved the State for grant of subsidy.

Both in **Paschimanchal Vidyut Vitran Nigam Ltd. v. Adarsh Textiles, (2014) 16 SCC 212**, and in **Dwarka Resorts Private Limited (2014 SCC OnLine Orissa 498)**, the issue involved related to the power of the State Govt to grant concession/ subsidy to a particular section of consumers. Section 65 of the Electricity Act relates to subsidy granted by the State Government and thereunder, if the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62, the State shall, notwithstanding any direction which may be given under Section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the license or any other person concerned to implement the subsidy provided by the State Government.

An order passed by the State Government under Section 108 with reference to grant of subsidy would be in furtherance of the statutory power conferred on the State Government under Section 65 of the Electricity Act. Unlike grant of subsidy/concession, the State Government has no role to play in the exercise of determination of tariff undertaken by the State Commission under Sections 62 and 63 of the Electricity Act. In

Section 63 proceedings, the State Commission is required to independently satisfy itself that the tariff, adoption of which is sought in the petition filed before it, has been determined through a transparent process of bidding in accordance with the Central Government guidelines. It is only if these twin tests are satisfied, can the Commission adopt the tariff, determined through the said bidding process, in exercise of its powers under Section 63, and then approve the PPA in exercise of its regulatory powers under Section 86(1)(b) of the Electricity Act.

Among the objects sought to be achieved by enacting the Electricity Act 2003, as can be seen from the Statement of Objects and Reasons for introduction of the Electricity Bill, (which culminated in the Electricity Act, 2003 being passed), was to distance the Government and prevent it from interfering with the determination of tariff and from the regulatory responsibilities of the Regulatory Commissions. Permitting the State Government to interfere with the tariff adoption powers of the State Commission under Section 63, or with its regulatory responsibilities under Section 86(1)(b), would defeat the very purpose for which the Electricity Act was enacted.

As noted hereby above, the KSERC in its order dated 10.05.2023 has, after a detailed examination and elaborate consideration of the bidding process undertaken by KSEBL, unequivocally held that the said bidding process was not in accordance with the guidelines issued by the Central Government. It is not even stated in the impugned order, passed by the KSERC on 39.12.2023, that the findings recorded by the KSERC, in its earlier order dated 10.05.2023, is either erroneous or that they were now satisfied that the bidding process undertaken by KSEBL was in compliance with the Central Government guidelines.

Initiation of an enquiry by the State Government to fix accountability of those involved in the procedural irregularities of the earlier bidding process, which was faulted by the KSERC in its order dated 10.05.2023, matters little, since the statutory requirement of Section 63 is for the Commission to satisfy itself that the process of bidding is in compliance with the Government of India's guidelines. Neither the Section 108 Order issued by the Government of Kerala nor the impugned order passed by the KSERC on 29.12.2023 even state that the bidding process is now found to be in compliance with the Government of India's bidding guidelines.

While the State Commission is required to be guided by the directions issued under Section 108 of the Electricity Act, 2003, in matters of public interest, the said directions of the State Government are not binding on them. **(Fatehgarh Bhadla Transmission Co. Ltd. v. CERC: 2023 SCCOnLine APTEL 16).** For the State Commission to be guided by the directions issued under Section 108(1) of the 2003 Act, such directions should have been issued by the State Govt, in writing, on a policy matter involving public interest. Firstly, not every direction issued by the State Govt would fall within the ambit of Section 108(1). The directions in writing must relate to a matter of policy. Again not all matters of policy, but only those policy directives which involve public interest fall within the ambit of the said provision. Further Section 108(1) only requires the State Commission, in the discharge of its functions, to be guided by such directives. The words "guided by" means to be "assisted by in reaching a conclusion". The directives of the State Govt, under Section 108(1), can only be of assistance to the State Commission in taking a decision, and it is not bound by such guidance. **(Fatehgarh Bhadla Transmission Co. Ltd. v. CERC: 2023 SCCOnLine APTEL 16).** As the

directives issued under Section 108 are not binding on the State Commissions, it may, for just and valid reasons, take a view different therefrom.

(a). CAN THE COMMISSION BE DIRECTED TO EXERCISE ITS STATUTORY/QUASI-JUDICIAL POWER IN A PARTICULAR MANNER?

Yet another question which would necessitate examination is whether the Government of Kerala, claiming to have issued a direction allegedly on a matter of policy, can direct the KSERC to exercise its statutory/quasi-judicial power, of reviewing or amending its earlier order, in a particular manner?

The statutory functions, which the State Commission is required to discharge, are those specified in clauses (a) to (k) of Section 86(1) of the Electricity Act. While the functions of the State Commission, as referred to in Clause (a) of Section 86(1), is to determine the tariff for generation of electricity within the State, its function, under Clause (b) of Section 86(1), is to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. The regulatory function stipulated in Section 86(1)(b), to regulate the price at which electricity should be procured by distribution licensees from generating companies, is in terms of Sections 62 and 63 of the Electricity Act, both of which relate to determination of tariff. While the only restriction on the Appropriate Commission under Section 62 is that it shall determine the tariff in accordance with the provisions of the Electricity Act, the power to determine tariff under Section 63 is distinct from that of Section 62. Under Section 63, the tariff

is determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. Section 63 obligates the Appropriate Commission to adopt the tariff only on its being satisfied that the twin tests stipulated in the said Section, of the tariff being determined (1) through a transparent process of bidding and (2) in accordance with the guidelines issued by the Central Government, are satisfied.

The KSERC had, in the exercise of its power under Section 86(1)(b) read with Section 63 of the Electricity Act, earlier passed the Order in OP No.5 of 2021 dated 10.05.2023, declining to adopt the tariff or to approve the PPAs, since it was satisfied, on the basis of elaborate reasons assigned in the said order, that the tariff determined through such a process of bidding was not in accordance with the Central Government guidelines. The power of the State Government to issue directions is on a matter of policy and no policy directive can be issued contrary to the provisions of the Electricity Act, or to interfere with the statutory functions assigned to the State Commissions thereunder.

Relying on the judgment of the Supreme Court in **APTRANSCO vs Sai Renewable Energy Pvt. Ltd:(2011)11SCC 34,** and the judgment of this Tribunal, in **Polyplex (Order in Appeal No. 41,42 and 43 of 2010 dated 31.01.2011),** this Tribunal, in **Tamil Nadu Electricity Consumers' Association v. Tamil Nadu Electricity Regulatory Commission & Anr. (Order in Appeal No. 92 of 2013 & IA No.151 of 2013 dated 21.01.2014),** held that the Commissions are independent statutory authorities and are not bound by any policy direction which hamper its statutory functions.

All policy directions, issued by the State Govt, should be consistent with the objects sought to be achieved by the Electricity Act, and shall not adversely affect or interfere with the functions and powers of the Regulatory Commission. The State Govt is not expected to take any policy decision which would adversely affect the functioning of the Regulatory Commission or interfere with its functions. The State Commission is not bound by any policy directions issued by the State Government, if such directions hamper its statutory functions. (**APTRANSCO vs Sai Renewable Energy Pvt.Ltd: (2011) 11 SCC 34).**

The State Commission is an independent statutory body, and the policy directions issued by the State Government cannot curtail its powers in the matter of determination of tariff. (**Polyplex Corporation vs Uttarakhand Electricity Regulatory Commission (Order of Aptel in Appeal no. 41,42 and 43 of 2010 dated 31.01.2011)**. Determination of tariff is the function of the Regulatory Commission, and the State Govt. has little role to play in that regard. (**APTRANSCO vs Sai Renewable Energy Pvt.Ltd: (2011) 11 SCC 34).** Since the State Government cannot curtail the powers of the State Commission in the matter of determination of tariff, the policy directions issued by it in this regard are not binding on the State Commission. (**Kerala State Electricity Board v. Kerala State Electricity Regulatory Commission (Order of Aptel in Appeal No. 05 of 2009 dated 18.08.2010).**

The power to adopt tariff under Section 63, subject to fulfilment of the twin conditions referred to hereinabove, is conferred only on the State Commission and not on the State Government. A policy directive, which would require the State Commission to act contrary to the provisions of

Section 63 read with Section 86(1)(b) of the Electricity Act, could neither have been issued nor could the Commission have, following the said directive, set as naught in its earlier order dated 10.05.2023 as that would amount to abdication of the quasi judicial power conferred on it under the Electricity Act.

The statutory functions conferred on it under Section 63 read with 86(1)(b) of the Electricity Act can only be discharged by the KSERC independently and without being influenced by any extraneous considerations, including the policy directives issued by the State Government under Section 108 of the Electricity Act, for that would render the afore-said statutory provisions redundant.

(b). WAS THE IMPUGNED ORDER DATED 29-12-2023 PASSED BY THE KSERC IN THE EXERCISE OF ITS QUASI-JUDICIAL POWER?

In **Indian National Congress (I) v. Institute of Social Welfare, (2002) 5 SCC 685,** the Supreme Court held that there are cases where there is no *lis* or two contending parties before a statutory authority yet such a statutory authority has been held to be quasi-judicial, and the decision rendered by it is a quasi-judicial decision when such a statutory authority is required to act judicially.

The term judicial does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law. A judicial act is an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights. If there be a body *empowered by law to enquire into facts*, and to make estimates to impose a rate, the acts of such a body involving such consequence would be judicial acts. (**Indian National Congress (I) v. Institute of Social Welfare, (2002) 5 SCC 685; R. v. Dublin Corpn: (1878) 2 Ir R 371).**

When a body of persons has legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, such body of persons is a quasi-judicial body and decision given by them is a quasi-judicial decision. Where a statutory authority is empowered to take a decision which affects the rights of persons and such an authority is under the relevant law required to make an enquiry and hear the parties, such authority is quasi-judicial and the decision rendered by it is a quasi-judicial act, even if there be no contest or *lis* between the two contending parties before the Statutory authority. (**Indian National Congress (I) v. Institute of Social Welfare, (2002) 5 SCC 685; R. v. Electricity Commrs: 1923 All ER Rep 150).**

If a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority, and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially. While the presence of two parties besides the deciding authority will prima facie, and in the absence of any other factor, impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially. (**Indian National Congress (I) v. Institute of Social Welfare, (2002) 5 SCC 685; Province of Bombay v. Khushaldas S. Advani: AIR 1950 SC 222).**

The legal principles laying down when an act of a statutory authority would be a quasi-judicial act are : (*a*) where a statutory authority empowered under a statute to do any act (*b*) which would prejuicially affect the subject (*c*) although there is no *lis* or two contending parties and

the contest is between the authority and the subject and (*d*) the statutory authority is required to act judicially under the statute, the decision of the said authority is quasi-judicial. (**Indian National Congress (I) v. Institute of Social Welfare, (2002) 5 SCC 685).** The presence of a *lis* or contest between the contending parties before a statutory authority, in the absence of any other attributes of a quasi-judicial authority, is sufficient to hold that such a statutory authority is a quasi-judicial authority. However, in the absence of a *lis* before a statutory authority, the authority would be quasi-judicial authority if it is required to act judicially. (**Indian National Congress (I) v. Institute of Social Welfare, (2002) 5 SCC 685).** It is therefore not necessary, in all cases for an order to be held to be a quasi-judicial order, for a dispute to exist between two or more parties. It would suffice for a lis to exist for its determination to constitute a quasi-judicial exercise. Where the law requires that an authority, before arriving at a decision, must make an enquiry, such a requirement of law makes the authority a quasi-judicial authority. (**Indian National Congress (I) v. Institute of Social Welfare, (2002) 5 SCC 685).**

In the present case, the impugned order passed by the KSERC on 29.12.2023 was on a petition filed by KSEBL seeking review of the earlier order passed by it on 10.05.2023. The power to review its earlier order is statutorily conferred on the Commission by Section 94(1)(f) of the Electricity Act. The Appellants herein were parties to the review proceedings before the KSERC which had issued notice to them and had given them an opportunity of being heard, which the Appellants availed by filing their submissions and by contesting the claim of KSEBL that the earlier order of the KSERC dated 10.05.2023 should be reviewed. The lis, in the review proceedings, saw a contest between KSEBL and the appellants herein.

As the presence of a *lis* or contest between the contending parties before a statutory authority, in the absence of any other attributes of a quasi-judicial authority, is sufficient to hold that such a statutory authority is a quasi-judicial authority, and the order passed by it to be a quasi-judicial order, it is evident that the impugned order passed by KSERC satisfies the test of being a quasi-judicial order.

(C.) QUASI-JUDICIAL POWER MUST BE EXERCISED INDEPENDENTLY:

In the exercise of its quasi-judicial power, the authority must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party and decide the matter consistent with principles of natural justice. The authority cannot permit its decision to be influenced by the dictation of others as this would amount to abdication and surrender of its discretion. It would then not be the authority's discretion that is exercised, but someone else's. If an authority “hands over its discretion to another body it acts ultra vires”. Such an interference by a person or body extraneous to the power would plainly be contrary to the nature of the power conferred upon the authority. **(State of U.P. v. Maharaja Dharmander Prasad Singh, (1989) 2 SCC 505).**

The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it. It must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be

swayed by irrelevant considerations, it must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories: failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive." **(State of U.P. v. Maharaja Dharmander Prasad Singh, (1989) 2 SCC 505).**

It is true that law can regulate exercise of judicial powers. It may indicate by specific provisions on what matters the tribunals constituted by it should adjudicate. It may by specific provisions lay down the principles which have to be followed by the tribunals in dealing with the said matters. The scope of the jurisdiction of the tribunals constituted by statute can well be regulated by the statute, and principles for guidance of the said tribunals may also be prescribed. But what law and the provisions of law may legitimately do, cannot be permitted to be done by administrative or executive orders. (**B. Rajagopal Naidu v. State Transport Appellate Tribunal: (1964) 7 SCR 1; Orient Paper Mills Ltd. v. Union of India: AIR 1969 SC 48)**.

Exercise of quasi- judicial power cannot be controlled by the directions issued by another. No authority, however highly placed, can control the decision of a judicial or a quasi-judicial authority. There is no provision in the Act empowering the State Government to issue directions to the State Commission in the matter of deciding disputes between persons. A quasi-judicial authority cannot be said to act independently if their judgment is controlled by the directions given by others. Then it is a misnomer to call their orders as their judgments; they would essentially

be the judgments of the authority that gave the directions. **(Orient Paper Mills Ltd. v. Union of India: AIR 1969 SC 48).**

It is legitimate to assume that the legislature intended to respect the basic and elementary postulate of the rule of law, that, in exercising their authority and in discharging their quasi-judicial function, the tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment. It is of the essence of fair and objective administration of law that the decision of the Judge or the Tribunal must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State. If the exercise of discretion, conferred on a quasi-judicial tribunal, is controlled by any such direction, that forges fetters on the exercise of quasi- judicial authority, the presence of such fetters would make the exercise of such authority completely inconsistent with the well-accepted notion of judicial process. While functioning as a quasi-judicial authority, the State Commission should not allow their judgment to be influenced by instructions or directions given by others. (**B. Rajagopal Naidu v. State Transport Appellate Tribunal: (1964) 7 SCR 1; Orient Paper Mills Ltd. v. Union of India: AIR 1969 SC 48).** In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. **(State of NCT of Delhi v. Sanjeev, (2005) 5 SCC 181).**

In **K.S. Ramamurthy Reddiar v. Chief Commissioner : AIR 1963 SC 1464,** the Supreme Court held that it was not open to the Government of India to control the functions of a quasi-judicial or judicial authority and direct it to decide a particular matter before it in a particular way; such control was possible in the case of a purely executive or administrative

authority; it was impossible in the case of a quasi-judicial or judicial authority, for in the very nature of things, where rule of law prevails, it is not open to the Government, be it the Government of India or the Government of a State, to direct a quasi-judicial or judicial authority to decide a particular matter before it in a particular manner.

In **Mahadayal Premchandra v. Commercial Tax Officer, Calcutta: (1959) SCR 551**, the Supreme Court held that the Commercial Officer while assessing certain transactions should not have solicited instructions from the Assistant Commissioner, nor should he have acted on the basis of those instructions; the instructions given by the Assistant Commissioner had vitiated the entire proceedings as "the procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the sales tax department."

In **S.B. Adityan v. First Income-Tax Officer, 1963 SCC OnLine Mad 388,** the Madras High Court observed thus:

"……..*We shall first take up the petition for the issue of a writ of certiorari. Without mincing matters we may straightaway say that the impugned order cannot stand. A worse specimen of a quasi-judicial order would be hard to find, Certiorari lies to quash the proceedings of a statutory authority which has erred in failing to conform to the statute.* ***It of course tries to set aside an order of the authority which makes no secret of the fact that the order emanated from another quarter and was not the result of its deliberations. Extraneous influence in passing quasi-judicial orders vitiates them.*** *If such a thing is manifest on the face of the record the court cannot stand idly by; its plain duty is to quash it. To listen to both sides fairly, to act in accordance with law and within the bounds of its jurisdiction and to reach an honest conclusion are*

the basic principles from which no judicial tribunal can depart. The intended purpose of writs is to direct observance of these principles in instances where they are overlooked or flouted,,,,,,,,,,,,,,,,,

……..The Central Board of Revenue which is constituted by the Central Board of Revenue Act, 1924 (IV of 1924), is at the apex of the hierarchy of executive authorities constituted under the Indian Income-tax Act. It has got powers of superintendence and control over the whole of the department. It has got powers to make rules and to issue orders, instructions and directions to all officers and persons employed in the execution of this Act. The Director of Inspection, which term includes the Additional Director, the Deputy Director and the Assistant Director of Inspection, is appointed by the Central Government and is subject to the control of the Central Board of Revenue. Section 5, sub-section (7B), in terms does not refer to the Central Board. It is not possible to equate the Director of Inspection to the Board as he is only a subordinate to the Board. Even the enumerated authorities mentioned in section 5, sub-section (7B), may only issue instructions for the guidance of Income-tax Officers in the matter of any assessment. They cannot get substituted for the Income-tax Officer and constitute themselves into the assessing authority. The nature of the jurisdiction contemplated under section 5, sub-section (7B), is only of an advisory character. Whatever may be the true position of the Board, as the top-most administrative authority, it cannot, in our opinion, tell the assessing authority, the Income-tax Officer, what to do and what not to do in regard to a particular assessment. It would not follow from section 5, sub-section (8), that except the Appellate Assistant Commissioner the other authorities would be subject to the control of the Board in the matter of any assessment. ***The Board with all the plenitude of its power cannot direct any Income-tax Officer to tax "A" or not to tax "B". Such a power if assumed to exist in the Board would be***

calculated to deprive the assessing officer of his statutory function and would be against the grain of the judicial powers which the officer is supposed to exercise. *If the Appellate Assistant Commissioner is not bound by the Board's orders, but the Income-tax Officer is so bound, does it mean that the appellate authority can sit in judgment over the Board's decision which the Income-tax Officer gave effect to? Surely that cannot be the correct position……..”* (emphasis supplied)

As the KSERC has, in exercising its power of review, passed the impugned order dated 29.12.2023 solely on the basis of the Section 108 Order issued by the Government of Kerala on 10.10.2023, it has abdicated its statutory powers under Section 94(1)(f) and has acted at the dictates of the State Government, though the latter could not have directed a quasi-judicial authority to decide a particular matter before it in a particular manner. Such orders vitiate the entire proceedings as the procedure adopted is unfair and is calculated to undermine the confidence of the public in the impartial and fair administration of justice by a quasi-judicial tribunal.

In any event, all that Section 108(1) stipulates is for the State Commission to be guided by the policy directive issued by the State Government in public interest. Public interest would be best served by ensuring compliance with the law and not in adhering to the alleged policy directive which is, ex-facie, contrary to the law i.e. Sections 63, 86(1)(b) and 94(1)(f) of the Electricity Act. As the said policy directive is not binding on them, and they are only required to be guided thereby, the KSERC ought to have refused to be guided by the Section 108 directive issued by the State Government on the ground that the said directive interferes with its statutory/quasi-judicial functions under the Electricity Act.

For the aforesaid reasons, we are of the view that the action of the Government of Kerala, in issuing the Section 108(1) order dated 10.10.2023 directing the KSERC to review its earlier order dated 10.05.2023 in terms of what the Section 108(1) order stipulated, and that of the KSERC in acting at the dictates of the State Government in passing the impugned order dated 29.12.2023, are both contrary to law.

Viewed from any angle, we are satisfied that the KSERC could not have, following the Section 108 directive issued by the State Government, reviewed its earlier order dated 10.05.2023 and, therefore, the impugned order dated 29.12.2023 should be set aside on this score.

IX.ARE THE APPELLANTS OBLIGATED TO SUPPLY POWER EVEN AFTER THE ORDER IN O.P.NO. 05 OF 2021 DATED 10.05.2023:

A.SUBMISSIONS OF THE APPELLANTS:

It is submitted, on behalf of the appellants, that KSERC erred in holding that the PSAs were operational subsequent to its order dated 10.05.2023; the Supreme Court, by its order in Civil Appeal No. 41 of 2021 dated 10.02.2023, restricted the interim arrangement of power supply till 31.05.2023; in fact, KSERC, in its reply affidavit dated 19.07.2023 filed in Appeal No. 572 of 2023, stated that there was no obligation on the generators to supply power to KSEBL under its order dated 07.06.2023; this Tribunal, vide its order dated 24.07.2023, held that there was no obligation on the generators to supply power; KSERC's remark that the generators were obligated to continue supplying power to KSEBL, during the pendency of Appeal No. 518 of 2023, is against the tests laid down by the Supreme Court in **Atma Ram (P) Ltd. v. Federal Motors (P) Ltd., (2005) 1 SCC 705,** ie mere preferring an appeal does not operate as a

stay on the Impugned order; in the impugned review order dated 29.12.2023, KSERC has passed unwarranted remarks on the conduct of the generators in supplying power to alternative procurers, after the PSAs stood rejected by its Order dated 10.05.2023; even the approval now given is without prejudice to any enquiries conducted by the State Government on the procedural irregularities that KSERC pointed out in its Order dated 10.05.2023; the approval granted by KSERC is purely conditional in nature; hence, the same is no approval in terms of Section 86(1)(b) of the Act; the irregularities pointed out by KSERC, which became the basis for rejection of approval of the PPAs vide its order dated 10.05.2023, have not been dealt with in the impugned order; on the contrary, such irregularities have been made subject to enquiries by the State Government on such irregularities/ mistakes/ deficiencies as pointed out vide order dated 10.05.2023; and KSERC has nowhere mentioned the mistakes/ errors corrected/ reviewed by it in the impugned order.

B.SUBMISSIONS URGED ON BEHALF OF KSERC:

It is submitted, on behalf of KSERC, that the only grievance articulated by the Appellants- generators, in filing the present Appeals, is that, during the intervening period between the Commission's order dated 10.05.2023 and the impugned review order dated 29.12.2023, they have already entered into agreements to supply power with certain third parties; these third party contracts are wholly irrelevant considerations in the context of Section 63 proceedings; in any event, these so-called third party agreements were entered into during the pendency of the appeal filed by KSEBL against the order dated 10.05.2023 (and thereafter when KSEBL withdrew its appeal with liberty to file review before the KSERC); hence, the principle of *lis pendens* is applicable to these transactions, and

the same cannot be sought to be made the basis of a legal injury; on a demurrer, at the highest, even if some pecuniary loss or damage may be caused to the Appellants-generators, on account of the higher tariff agreed in terms of the third party agreements, that cannot be the basis of a legal grievance; and in any event, without prejudice, the Appellants have not pleaded anything to the effect that their entire capacity is contracted, rendering them unable to fulfill the PPAs signed with KSEBL.

C.SUBMISSIONS URGED ON BEHALF OF KSEBL:

It is submitted, on behalf of KSEBL, that the public interest involved in the matter is far greater than the claim of the generators to get released from implementation of the PSAs, in view of the order dated 10.05.2023; KSEBL had always been willing to implement the PSAs, and the generators were supporting KSEBL, atleast till 10.05.2023; Jhabua Power Ltd, as well as JITPL, did not enter into any committed long term or short term power sale agreements with third parties till the issue of the policy directive and the order dated 31.10.2023 of this Tribunal; the Agreement which Jhabua claims to have entered into with NWN, its sister concern, is with an intermediary trader and not with any third party; similarly, there was no agreement by JITPL till the above date for sale of power to third parties; even otherwise, Appeals were pending before this Tribunal and, thereafter, the Review Petition before the KSERC at the relevant time; and, in any event, it would be unjust for the generators not to supply electricity in terms of the PSAs executed by them with KSEBL.

D.ANALYSIS:

As noted hereinabove, KSERC has passed final orders dated 10.05.2023 disposing of OP No.5 of 2021 holding that the bidding process undertaken by KSEBL was in flagrant violation of the Central Government

guidelines and, consequently, the PSAs signed by KSEBL with the Appellants, among others, could not be approved. Since KSERC had specifically rejected the petition filed by KSEBL seeking approval of the PSAs, the PSAs which KSEBL had executed with the Appellant ceased to operate, and thereafter they were under no obligation to supply electricity to KSEBL. Even in terms of the order of the Supreme Court in Civil Appeal No.41 of 2021 dated 10.02.2023, the interim arrangement of power supply was to continue only for a period of three weeks after final orders were passed in OP No.5 of 2021. Consequently, the earlier interim arrangement, requiring the Appellant to supply electricity to KSEBL, ceased to operate after 31.05.2023. While it is no doubt true that KSEBL had filed Appeal No. 518 of 2023 before this Tribunal against the order passed by KSERC in OP No.5 of 2021 dated 10.05.2023, no order of stay was passed in the said appeal and, consequently, the order of KSERC in OP No.5 of 2021 dated 10.05.2023 continued to remain in force.

OP No.24 of 2023, filed by KSEBL before KSERC on 02.06.2023 seeking continuation of the earlier interim arrangement, was allowed by KSERC by its order dated 07.06.2023, and KSEBL was permitted to procure power from the Appellants generators by continuing the interim arrangement, which existed prior to the order passed by it on 10.05.2023, for a period of 75 days. Aggrieved by the said order of KSERC dated 07.06.2023, the Appellants herein filed Appeal Nos. 572 and 583 of 2023.

In its order dated 24.07.2023, this Tribunal observed that, despite having passed an order on 10.05.2023 rejecting grant of approval for the PPAs entered into earlier between the Appellants and KSEBL, KSERC had thereafter, by the Order dated 07.06.2023, issued directions to the Appellants to supply power to KSEBL; in Para 19 of the reply filed on behalf of the Commission, it was stated that the directions issued on

07.06.2023 cannot be construed as compelling that generators to sell power to KSEBL at L1 rates; in the light of this specific averment in the reply filed by the Commission, it did appear that the directions issued by the Commission, by its order dated 07.06.2023, had been misconstrued by the Appellants as mandating them to sell power to KSEBL at L1 rates; since no such directions were issued compelling them to do so, it was for the Appellant to decide whether or not to supply power to KSEBL in terms thereof; and, in the light of this clarification from the Commission, the dispute no longer survived necessitating adjudication by this Tribunal. Both Appeal Nos. 572 and 583 of 2023 were, therefore, closed.

After the Section 108 directive was issued by the Government of Kerala on 10.10.2023, KSEBL sought permission from this Tribunal to withdraw its Appeal No. 518 of 2023 with liberty to file a review petition before the KSERC. The order of this Tribunal dated 31.10.2023, reads as under:

"Mr. Prabhas Bajaj, Learned Counsel for the Appellant, states that, subsequent to the passing of the order impugned in this Appeal, the Government of Kerala had issued a directive under Section 108 of the Electricity Act; in the light of the aforesaid directives issued by the Government of Kerala, the Appellant intends to move a petition before the Commission seeking review of the order under appeal; and as the review jurisdiction of the Commission cannot be invoked after the appellate remedy is availed, they be granted permission to withdraw the Appeal, with liberty to file a review petition before the Commission and, if need be later, to again approach this Tribunal against the original order passed by the Commission.

While Mr. Dhananjaya Mishra, Learned Counsel for the Respondent

Commission, conveys his consent for such an order to be passed, Ms. Swapna Seshadri, Learned Counsel for the 2nd Respondent, Ms. Ritika Singhal, Learned Counsel for the 3rd Respondent and Mr. Hemant Singh, Learned Counsel for the 4th Respondent, submit that, grant of liberty by thisTribunal, should not be construed as obligating the Commission to entertain a review petition on merits; and it be made clear that, in case the review jurisdiction of the Commission is invoked by the Appellant, it would be open to the Respondents herein to raise all such contentions as are available to them in law, including on the maintainability of the review petition.

We consider it appropriate, in such circumstances, to permit the Appeal to be withdrawn, with liberty to the Appellant to invoke the review jurisdiction of the Commission. It is made clear that the order now passed by us shall not disable the Appellant, if need be later, from availing their appellate remedy against the original order passed by the Commission dated 10.05.2023.

Needless to state that the order now passed by us shall also not disable the Respondents from raising all such contentions as are available to them in law before the Respondent Commission. The Appeal, and pending IAs, stand disposed of accordingly"

It is thereafter, by the impugned order dated 29.12.2023, that the Appellants have again been asked by KSERC to supply power to KSEBL. The mere fact that Appeal No. 518 of 2023 filed by KSEBL, against the order of KSERC in OP No.5 of 2021 dated 10.05.2023, was pending on the file of this Tribunal, did not obligate the Appellant to continue supplying power to KSEBL, since the order passed by KSERC in OP No.5 of 2021 dated 10.05.2023 continued to remain in force, as no stay was granted in Appeal No.518 of 2023. This Tribunal, in fact, by its order dated

24.07.2023 rejected the request of the appellant-KSEBL for grant of stay. The said order dated 24.07.2023, to the extent relevant, reads thus:-

"……*When we asked Mr. Prabhas Bajaj, learned Counsel for the Appellant, whether granting the interim relief sought for by them would not, in effect, amount to granting the final relief, which they may be entitled only if the main appeal were to be allowed later, learned Counsel would submit that the only consequence of an interim order being granted by this Tribunal would be to revive the earlier order of the Commission permitting the Appellant to procure power from the Respondents-Generators at L-1 rates.*

Accepting this submission, urged on behalf of the appellant, would result in this Tribunal violating the order of the Supreme Court in Civil Appeal No. 41 of 2021 dated 10.02.2023, whereby the interim order passed by the Commission earlier, (which the appellant in effect seeks continuation of during the pendency of this appeal), was to continue only till the Commission finally decided the petition, and for a period of three weeks thereafter. The said period of three weeks expired on 31.05.2023 nearly two months ago.

The power procured by the appellant, from the respondents-generators, was only in terms of the interim arrangement continued by the Commission for the past more than 7 years, even without approving the PPAs. The said interim arrangement was, evidently, put in place since the Commission had not taken a final decision on whether or not to accord approval for the subject PPAs. The Commission has now, by the impugned order, rejected the Appellant's request for according approval to the PPAs it had entered into with the respondents- generators.

It is only if the main appeal were to be allowed by this Tribunal later, would it result in the order of the Commission, rejecting grant of approval to the PPAs, being set aside; and it is only thereafter would the question of directing the Commission to re-examine the issue of according approval to the PPAs arise for consideration. It is only on the matter being remanded and in case the Commission, in terms of the remand order, approves the PPAs, would the appellant thereafter be entitled to procure power from the respondents-generators.

As held hereinabove, the earlier interim arrangement, for procurement of power at L-1 rates, was put in place only because the Commission had not taken a final decision on whether not to accord approval for the subject PPAs. Now that a final order has been passed by the Commission rejecting grant of approval, this Tribunal would not be justified in restoring the interim arrangement which existed prior to the final decision of the Commission.

*Interim relief is granted in aid of, and as ancillary to, the main relief which may be available to the party on the final determination of his rights in a suit or proceedings. (**State of Orissa Vs. Madan Gopal Rungta : AIR 1952 SC 12; Cotton Corporation of India Vs. United Industrial Bank, (1983) 4 SCC 625).** A relief which can be granted only at the final hearing of the matter, should not ordinarily be granted by way of an interim order. **(State of U.P. v. Desh Raj, (2007) 1 SCC 257).** The final relief, sought in a petition, cannot be granted at an interlocutory stage, that too without deciding the issues involved in the case. **(Union of India v. Modiluft Ltd., (2003) 6 SCC 65)***

Relying on its earlier decisions, in ***CCE v. Dunlop India Ltd. (1985) 1 SCC 260, State of Rajasthan v. Swaika Properties (1985) 3***

SCC 217, State of U.P. v. Visheshwar (1995 Supp (3) SCC 590), Bharatbhushan Sonaji Kshirsagar (Dr.) v. Abdul Khalik Mohd. Musa (1995 Supp (2) SCC 593), Shiv Shankar v. Board of Directors, U.P.SRTC (1995 Supp (2) SCC 726) and Commr/Secy to Govt. Health and Medical Education Deptt. Civil Sectt. v. Dr. Ashok Kumar Kohli (1995 Supp (4) SCC 214), *the Supreme Court, in* ***State of U.P. and others v. Ram Sukhi Devi, (2005) 9 SCC 733****, held that time and again the Supreme Court had deprecated the practice of Courts granting interim orders which practically give the principal relief sought in the petition.*

As the interim relief, sought by the Appellant, goes even beyond the final relief they are entitled to in case the main appeal were to be allowed later, we may not be justified in granting them the interim relief which, in effect, is to permit the appellant to procure power from the respondents-generators even without the PPAs, which the appellant had entered into with them, being approved by the Commission or to permit parties, by way of an interlocutory order, to enforce the terms and conditions of the PPAs, (albeit at slightly lower rates), despite the Commission having refused to accord approval thereto.

We are satisfied that the interim relief, which the appellant seeks, cannot be granted, and that the main appeal necessitates hearing……"

Mere preferring of an appeal does not operate as a stay on the order appealed against. To secure an order of stay merely by preferring an

appeal is not a statutory right conferred on the appellant. So also, an appellate court is not ordained to grant an order of stay merely because an appeal has been preferred, and an application for an order of stay has been made. A prayer, for the grant of stay of proceedings or on the order appealed against, has to be specifically made to the appellate court and the appellate court has the discretion to grant an order of stay or to refuse the same. **(Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd., (2005) 1 SCC 705).**

Since KSERC had specifically rejected the petition, in OP No.5 of 2021 filed by KSEBL seeking approval of the PSAs, by its order dated 10.05.2023, the PSAs which KSEBL had executed with the Appellants ceased to operate, and the Appellants-Generators were under no obligation to supply electricity to KSEBL after 31.05.2023 when the interim arrangement of power supply, which the Supreme Court had, in Civil Appeal No.41 of 2021 dated 10.02.2023, directed to be continued for a period of three weeks after final orders were passed in OP No.5 of 2021, came to an end.

The mere fact that Appeal No. 518 of 2023 filed by KSEBL, against the order of the KSERC in OP No.5 of 2021 dated 10.05.2023, was pending on the file of this Tribunal till 31.10.2023 did not obligate the Appellant to continue supplying power to KSEBL, since the order passed by KSERC in OP No.5 of 2021 dated 10.05.2023 continued to remain in force, as no stay was granted in Appeal No.518 of 2023. The consequences, of the possibility of Appeal No.518 of 2023 being allowed by this Tribunal, is now merely academic, as KSEBL sought permission of this Tribunal to withdraw the appeal, and this Tribunal permitted them to do so by its order dated 31.10.2023.

X.IS THE KSERC ISSUING CONTRADICTORY DIRECTIONS FROM TIME TO TIME?

A.SUBMISSIONS OF THE APPELLANTS:

It is submitted, on behalf of the appellants, that KSERC has been taking contradictory stands with respect to deviations from the Bidding Guidelines, ever since its Order dated 10.05.2023; after the 10.05.2023 Order, KSERC directed the generators, including the Appellants, to mandatorily supply power to KSEBL as an interim measure; however, before this Tribunal, it took a complete U-turn and stated that the direction was misconstrued by the generators and there was no obligation on them to supply power to KSEBL; it was only after this, that Jhabua Power Limited began to supply power to third parties; and, therefore, the contention of KSERC that the Appellant's conduct is questionable is untenable.

B.ANALYSIS:

The order of the Supreme Court, in Civil Appeal No.41 of 2021 dated 10.02.2023, while requiring KSERC to pass a final order in OP No. 5 of 2021 within three months, directed the interim arrangement to continue for a period of three weeks after the order was passed, which would be till 31.05.2023. The Appellants were not obligated to supply electricity to KSEBL from 01.06.2023 onwards as a consequence of the KSERC, by its order dated 10.05.2023, declining to grant approval of the PSAs and refusing to adopt the tariff under Section 63 of the Electricity Act. As there were no PSAs in existence, and the Appellants were not obligated by any order of the Court to supply electricity to KSEBL from 01.06.2023 onwards, they were free to supply electricity to third parties on entering into agreements/arrangements with them.

Curiously, the KSERC entertained the petition filed by KSEBL on 02.06.2023 seeking continuation of the interim arrangement which prevailed prior to the order in O.P. No.05 of 2021 dated 10.05.2023, and passed an order on 07.06.2023 extending the interim arrangement, which existed prior to its order dated 10.05.2023, for a further period of 75 days. On the Appellants' subjecting the said order dated 07.06.2023 to challenge by way of Appeals before this Tribunal, i.e. in Appeal Nos. 572 and 583 of 2023, KSERC, in its reply to the said appeal, stated that the Appellants had misunderstood its order dated 07.06.2023; and it was for the Appellants to choose whether or not to supply electricity to KSEBL. In the light of this submission of KSERC in its reply, Appeal Nos. 572 and 583 of 2023 were disposed of by this Tribunal by its order dated 24.07.2023.

The IAs filed by KSEBL, in Appeal No. 518 of 2023 for grant of interim relief, were rejected by this Tribunal, by its order dated 31.07.2023, holding that grant of the interim relief would, in effect, would go even beyond the main relief sought in the main Appeal. Appeal No. 518 of 2023 filed by KSEBL, against the order of the KSERC dated 10.05.2023, was permitted to be withdrawn by this Tribunal, by its order dated 31.10.2023, after recording the submission of KSEBL that they intended to file a review petition before the KSERC in the light of the Section 108 directions issued by the State Government on 10.10.2023.

However, by the impugned order dated 29.12.2023, KSERC, even without setting aside its earlier order dated 10.05.2023, has again directed the Appellants to supply power to KSEBL in terms of the PSAs signed by them despite its having rejected grant of approval of the said PSAs by its order in OP No. 5 of 2021 dated 10.05.2023. While it is clear that the Commission has been shifting its stand from time to time, their

justification, for passing the impugned order dated 29.12.2023, is the Section 108 directive issued by the State Government on 10.10.2023. As the effect of the said Section 108 Order is being examined in the present Appeals, we see no reason to dwell on the contradictory stands, taken by KSERC from time to time, any further.

XI.DO THE APPELLANTS NOT QUALIFY AS 'PERSONS AGGRIEVED' UNDER SECTION 111 OF THE ELECTRICITY ACT?

A.SUBMISSIONS OF THE APPELLANTS:

It is submitted, on behalf of the appellants, that the contention of KSERC is that, since KSERC has allowed the review filed against the order in OP 5/2021 dated 10.05.2023, and as the Appellants also wanted the bid tariff to be adopted, there is no grievance that the Appellants can now possibly have against the Impugned Order and, as the appellants are not "persons aggrieved", they are not entitled to file the present appeals; these contentions are not tenable; unlike an appeal, a review proceeding is not an extension of the original suit and, therefore, the prayer granted in favour of the Appellants would not, by itself, mean that they cannot be a "person aggrieved" under Section 111 of the Act; the Appellants are aggrieved because KSERC has been dilly dallying for 8 years before having rejected approval of the PSAs on 10.05.2023; the legal rights of the Appellants were severely affected by the impugned Order and that, by itself, is sufficient to qualify the Appellants as a 'person aggrieved' **(Municipal Corporation of Greater Bombay v. Lala Pancham and Ors. (1965) 1 SCR 542: Paras 19 and 20**).

B.SUBMISSIONS URGED ON BEHALF OF KSERC:

It is submitted, on behalf of KSERC, that the present Appeals are not maintainable as the generators do not qualify as 'persons aggrieved'

under Section 111 of the Act; the test for a “person aggrieved” is a legal grievance; as held in ***In Re: Sidebotham****,* LR (1959) 1 QBD 384, ***Adi Pherozshah Gandhi vs. H.M. Seervai****, (1970) 2 SCC 484*, and ***Grid Corporation of Orissa Limited vs. Gajendra Haldea***, (2008) 13 SCC 414, a ‘person aggrieved’ must be one who has suffered a legal grievance, a person against whom a decision has been pronounced which had wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something; the effect of the impugned order in review dated 29.12.2023 is that KSERC has adopted the tariff discovered under Section 63, and has approved the PSAs that the Appellants themselves were signatories to since 2014, and which they themselves had performed without demur or protest from 2017 till 2023; in the Section 63 proceedings, ie in OP No. 5 of 2021, the stand of the Appellant generators was that the PSAs and the tariff discovered should be approved by the KSERC; and, since the impugned review order has ultimately resulted in approval of the tariff, and the PSAs that the very Appellant generators were signatories to, it does not lie in their mouth to now claim that they are aggrieved by the impugned review order.

C.JUDGEMENT RELIED ON BEHALF OF KSERC:

In **Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra, (1970) 2 SCC 484,** on which reliance is placed on behalf of KSERC, the appellant was an advocate from Maharashtra. The Bar Council of the State of Maharashtra had, suo motu, called upon him to show cause why he should not be held guilty of misconduct. The appellant was earlier convicted before a Summary Court in London on a charge of pilfering some articles from departmental stores and was sentenced to a fine. The record of the proceedings in London was not before the Bar Council of the State, and action was taken on the basis of a brief report of

the incident in a newspaper. The appellant explained before the Disciplinary Committee of the Bar Council of the State that he was the victim of a misunderstanding but, as he had no means of defending himself effectively, he was found guilty and received a light sentence of fine. He explained how he had fallen into this unfortunate predicament and did not know how to extricate himself. The order of the Summary Court was not a speaking order and the proceedings were summary. The Disciplinary Committee was satisfied that there was no reason to hold him guilty of professional or other misconduct. They, therefore, ordered that the proceedings be filed. The Advocate-General of the State, who was sent a notice of the proceedings as was required by the second sub-section of Section 35 and had appeared before the committee, purporting to act under Section 37 of the Act, filed an appeal before the Bar Council of India. It was heard by the Disciplinary Committee of the Bar Council of India. The Advocate objected that the Advocate-General had no locus standi to file the appeal. The objection was overruled and the appeal was accepted. The advocate was held guilty of misconduct and suspended for a year from practice. The advocate appealed under Section 38 of the Act to the Supreme Court contending that the Advocate-General was not competent to file the appeal under Section 37 of the Act.

The Supreme Court held that the appeal must be held in favour of the advocate and the order of the Disciplinary Committee of the Bar Council of India, now under appeal, must be set aside on the short ground that the Advocate-General was not a person aggrieved.

D.ANALYSIS:

Section 111(1) of the Electricity Act enables *“any person aggrieved”*, by an order made by the Appropriate Commission under the Electricity Act, to prefer an Appeal to this Tribunal. To satisfy the test of a “person

aggrieved", one is required to establish that one has been denied or deprived of something to which one is legally entitled. A person can be aggrieved if a legal burden is imposed on him. The scope and meaning of the words "aggrieved person" depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him. As the expression "person aggrieved" has not been defined in the Electricity Act, it should be given its natural meaning, which would include a person whose interest is, in any manner, affected by the order, and these words are of the widest amplitude. **(Emmar MGF Construction Pvt. Ltd. v. Delhi Electricity Regulatory Commission : (Order of APTEL in APL No. 123 of 2008 dated 08.09.2009); Tata Power Delhi Distribution Ltd. v. Delhi ERC, 2023 SCC OnLine APTEL 14; Bar Council of Maharashtra v. Dabholkar (1975) 2 SCC 702, and J.M. Desai v. Roshan Kumar (1976) 1 SCC 671; Reliance Industries Ltd. v. PNGRB, 2014 SCC OnLine APTEL 5; and Rain CII Carbon (Vizag) Ltd. v. A.P. ERC, 2023 SCC OnLine APTEL 40).**

The natural meaning of the expression "person aggrieved" would certainly include a person whose interest is in any manner affected by the order. (**Municipal Corpn., Greater Bombay v. Lala Pancham, 1964 SCC OnLine SC 91).** Any person who feels disappointed with the result of the case is not a "person aggrieved". He must be disappointed of a benefit which he would have received if the order had gone the other way. The order must cause him a legal grievance by wrongfully depriving him of something, and his legal grievance must be a tendency to injure him. That the order is wrong does not by itself give rise to a legal grievance. (***Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra*, (1970) 2 SCC 484).**

The expression “any person aggrieved” would mean a person who suffered a legal grievance or legal injury or one who has been unjustly deprived and denied of something which he would have been entitled to obtain in the usual course. ***(*Grid Corpn. of Orissa Ltd. v. Gajendra Haldea, (2008) 13 SCC 414**). A ‘person aggrieved’ must be a man who had suffered a legal grievance, a man against whom a decision has been pronounced which had wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something”. (**In Re Sidebotham Ex p. Sidebotham: (1880) 14 Ch D 458 CA; Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra, (1970) 2 SCC 484).**

A “person aggrieved” is a person who is brought before the Court to submit to its decision, and not a person who is heard in a dispute between others. The words “brought before the court to submit to its decision” would mean a person who is in the nature of a party as contra-distinguished from “a person who is next described as a person who is heard in a dispute between others”. (**In Re Lamb, Ex p. Board of Trade: (1894) 2 QBD 805**; **Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra, (1970) 2 SCC 484).** The locus standi of the person aggrieved must be found from his position in the first proceeding, and his grievance must arise from that standing taken with the effect of the order on him. (**In Re Riviere, (1884) 26 Ch D 48; Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra, (1970) 2 SCC 484).** A person deprived of the fruits of litigation which he had instituted in the hope for them, is a “person aggrieved”. **(In Re Kitson, Ex f. Sugden (Thomas) and Sons Ltd: (1911) 2 KB 109**; **Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra, (1970) 2 SCC 484).** The person must himself suffer a grievance, or must be aggrieved by the very order because it

affects him. (**R. v. London County Keepers of the Peace and Justices: (1890) 20 QBD 357; Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra, (1970) 2 SCC 484).** A person who was a party to a *lis*, a controvery *inter partes* and had a decision given against him would be an "aggrieved person". (***Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra*, (1970) 2 SCC 484).** The words "person aggrieved" are of wide import and should not be subjected to a restricted interpretation. They include not a busy body but certainly one who had a genuine grievance because an order had been made which prejudicially affected his interests. (***Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra*, (1970) 2 SCC 484).**

As the words "any person aggrieved" are of the widest amplitude, the only question which necessitates examination is whether the Appellants can be said to have any grievance against the impugned order dated 29.12.2023. While it is no doubt true that they had also supported the petition filed by KSEBL, in O.P. No. 05 of 2021, seeking approval of the KSERC with respect to the four PSAs signed by KSEBL with the Appellants and others, the fact remains that KSERC had, by its order in OP No. 5 of 2021 dated 10.05.2023, rejected approval of the PSAs executed between the Appellants and KSEBL. While Appeal No. 518 of 2023 was no doubt preferred by KSEBL against the said order, the interim relief sought by KSEBL was rejected by this Tribunal by its order dated 31.07.2023, holding that grant of any such interim relief would go even beyond the relief sought by them in the main appeal.

As the PSAs executed by them with KSEBL were not approved by KSERC in its order dated 10.05.2023, the Appellant generators were no longer governed by the terms and conditions of the said PSAs which ceased to exist on and after 10.05.2023. As the interim arrangement, which was directed to be continued by the Supreme Court, expired on

31.05.2023 (three weeks after the final order was passed by KSERC on 10.05.2023), there was no fetter on the Appellants to sell the power generated by it to others. While the KSERC had, no doubt, passed an order on 07.06.2023 directing the appellants to supply power to KSEBL, it had, in its reply to the Appeals filed by the Appellants, acknowledged that its order dated 07.06.2023 could not be understood as compelling the Appellant to supply power to KSEBL. It is clear, therefore, that till the impugned order was passed on 29.12.2023, the Appellants were free to supply power to others after 10.05.2023.

It is useful in this context to note that among the objects sought to be achieved by the Electricity Act, as is evident from the Statement of Objects and Reasons, is for generation to be de-licensed and captive generation to be freely permitted. Section 7 of the Electricity Act enables any generating company to establish, operate and maintain a generating station without obtaining a license under the Electricity Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of Section 73. Except for this obligation to comply with the technical standards, there is no other fetter on a generating company to establish, operate and maintain a generation station. While the Appellants had no doubt entered into PSAs with KSEBL pursuant to a bidding process, the fact remains that, consequent to the order passed by KSERC on 10.05.2023, the PSAs executed by the Appellants with KSEBL ceased to remain in existence. As KSEBL had also withdrawn the Appeal, filed by them against the said order of KSERC dated 10.05.2023, on 31.10.2023, the Appellants were free to supply electricity to the third parties on or after 01.06.2023. It is only by way of the impugned order dated 29.12.2023 that they are now required to supply electricity to KSEBL, even though KSERC has not adopted the tariff which was

determined in the bidding process undertaken by KSEBL nor has it approved the PSAs.

As the review order dated 29.12.2023 does not so state, it is difficult to accept the submission, urged on behalf of KSERC, that the effect of the impugned order in review dated 29.12.2023 is that KSERC has adopted the tariff discovered under Section 63, and has approved the PSAs that the Appellants themselves were signatories to.

The Appellants are, undoubtedly, aggrieved by the impugned order dated 29.12.2023 whereby they are now required to supply power to KSEBL even though the KSERC had, by its order dated 10.05.2023, declined to either adopt the tariff or approve the Power Supply Agreements which they had earlier entered into with KSEBL. The Appellants' claim that the KSERC lacks jurisdiction to issue any such directions to them, as the Power Supply Agreements had ceased to exist on and after 10.05.2023, is a grievance which could only have been agitated by them, before this Tribunal, by way of an Appeal under Section 111 of the Electricity Act.

Even otherwise, the Appellants herein were arrayed as Respondents in Review Petition No. 3 of 2023 and were thus parties to the said proceedings before the KSERC which culminated in the impugned order dated 29.12.2023 being passed. As is evident from Para 3 of the impugned order dated 29.12.2023, KSERC had issued notice both to KSEBL and the Appellants-Generators in the said review petition. Written comments were also filed on behalf of the Appellants generators, and elaborate contentions were advanced, on their behalf, before the KSERC. As they were parties to the proceedings before the KSERC, and the impugned order obligates them to supply power to the KSEBL in terms of the non-existent PSAs, with immediate effect, it is evident that the

Appellants are *"persons aggrieved"*, and are entitled to prefer an appeal against the impugned order dated 29. 12,2023.

It is, indeed, disconcerting that the KSERC, despite having issued notice to them in Review Petition No. 3 of 2023 and having chosen to give them an opportunity to put forth their objections to the relief sought by KSEBL in the said review petition, should, that too in an appeal preferred against the order passed by it on 29.12.2023, raise objections to the Appellants locus standi to prefer these appeals, an objection which even KSEBL (which filed the review petition) has not taken. If their endeavour was to, thereby, avoid the validity of the order dated 29.12.2023 being examined by this Tribunal in appellate proceedings, it certainly does not show the KSERC in good light. Judicial decorum refrains us from saying anything more.

Viewed from any angle, the submission that the Appellants are not "*persons aggrieved*" necessitates rejection.

XII.IS THE POWER OF THE STATE COMMISSION TO REVIEW ITS ORDERS CIRCUMSCRIBED BY SECTION 94 OF THE ACT READ WITH SECTION 114 OF THE CODE OF CIVIL PROCEDURE?

A.SUBMISSIONS OF THE APPELLANTS:

It is submitted, on behalf of the appellants, that KSERC has erroneously contended that exercise of power under Section 63 of the Act is merely regulatory in nature; such a power should be exercised in public interest, market alignment of tariff and transparency, and therefore the power to review does not fall under Section 114 of the CPC, but under Section 21 of the General Clauses Act; a bare reading of Section 63 of the Act clearly showcases that the fulfilment of bidding guidelines is also a pre-condition for adoption of tariff; admittedly, the deviations from the

Bidding Guidelines was not ratified by the State Government; in fact, it was because of the deviation from the Bidding Guidelines that the PSAs were rejected in the first place; KSERC's counsel also relied on Para 18 of ***GUVNL v Tarini Infrastructure Limited (2016) 8 SCC 743*** to contend that Sections 14 and 21 of the General Clauses Act have been applied by the Supreme Court to recognise the power of re-determination of tariff by the State Commission; this means that the provisions of the General Clauses Act would be applicable instead of Section 94(1)(f) so far as exercise of review jurisdiction is concerned; the Supreme Court, in **GUVNL v Solar Semiconductor (2017) 16 SCC 498,** has conclusively held that the inherent power vested in the State Commission is narrower than the power under Section 151 of the CPC, and can be resorted to only if the Act is silent on how the power is to be exercised; KSERC has, since the very beginning, exercised its quasi-judicial powers under Section 63 of the Act, and the contention with respect to regulatory power is merely an afterthought; KSERC had conducted a public hearing, heard the objections at length and had given a reasoned order while rejecting approval to the PSAs vide Order dated 10.05.2023; when KSERC had exercised its powers judicially, such exercise cannot be now termed as regulatory in nature, merely to wriggle out of the restrictions placed on the exercise of review jurisdiction under the Code of Civil Procedure; if it is accepted that the KSERC has exercised its 'regulatory power' alone, matters would be worse since then the KSERC could not have reviewed its Order at all; the power of review has to be conferred statutorily and, in the Act, only Section 94(1)(f) incorporates the CPC provisions by reference; if not for Section 94(1)(f), there would be no power of review, and the petition of KSEBL would not be maintainable; KSEBL had, in fact, filed the review petition citing 'other sufficient reasons' under Section 94(1)(f), and even the Impugned Order allows the review on the very same

basis; it is settled law that when the authority is required to act judicially under the statute, the decision of the authority is quasi-judicial even if there is no lis between the parties (**Indian National Congress v. Institute of Social Welfare (2002) 5 SCC 685: Paras 21 to 27**); additionally, Section 95 of the Act stipulates that *all proceedings* before the State Commission must be deemed to be judicial proceedings; the KSERC exercises quasi-judicial power and not regulatory powers even while adopting tariff under Section 63 of the Act; Section 21 of the General Clause Act, 1897 has no application; the Supreme Court has interpreted the words 'order' in Section 21 to mean an executive or legislative order only and has held that, in cases where an authority is required to act judicially, Section 21 would have no application; and, therefore, the scope of review of the order by KSERC is limited to the grounds stipulated under Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure. (**Indian National Congress v. Institute of Social Welfare (2002) 5 SCC 685: Para 39**).

B.SUBMISSIONS URGED ON BEHALF OF KSERC:

Relying on ***Jaipur Vidyut Vitran Nigam Ltd,*** and ***Energy Watchdog,*** it is submitted, on behalf of KSERC that, under Section 63, there are two considerations: (1) Market alignment, and (2) Public interest (which has two facets): (a) Compliance with the Central Government guidelines, (b) Consumer welfare/interest; the question of market alignment is not in issue in the present case; ordinarily, both facets go hand in hand; in the present case, the Commission had pointed out certain procedural deviations from the Central Government guidelines in its order dated 10.05.2023; the State Government, in its policy direction under Section 108 dated 10.10.2023, has taken cognizance, and has communicated that an enquiry into the same is underway; in so far as

consumer welfare / interest is concerned, the State Government has, vide the Section 108 directions, communicated that it is in the best interests of the consumers and to avoid the impending power crisis, that the tariff be adopted and the PSAs be approved without prejudice to the enquiry on the procedural deviations; the KSERC has, after an independent analysis of the State Government's directions under Section 108, chosen to be guided by the same for the sake of consumer welfare and public interest; and this is permissible in the exercise of powers under Section 63.

It is further submitted, on behalf of KSERC, that, while exercising power under Section 63, the Commission exercises its regulatory functions and not an adjudicatory or a quasi-judicial function; therefore, *stricto senso*, the technical constraints of review jurisdiction under Order 47 CPC do not apply to the regulatory powers exercised under Section 63; the Supreme Court, in ***Jaipur Vidyut Vitran Nigam Ltd. & Ors. vs. MB Power (MP) Ltd.,* 2024 INSC 23**, as well as in ***Energy Watchdog vs. CERC & Ors****,* (2017) 14 SCC 80, has held that, when the Commission "adopts" tariff under Section 63, it is exercising its general regulatory power [referable to Section 79(1)(b) or Section 86(1)(b)]; in ***UP Power Corporation Ltd. vs. NTPC & Ors.***, (2009) 6 SCC 235, it was held, in the context of the Electricity Regulatory Commissions Act, 1998, that the Central Commission exercises diverse powers i.e., adjudicatory, legislative, regulatory and administrative powers; as a corollary, the State Commission under Section 86 also exercises similar diverse powers; it was also held, in ***UP Power Corporation*** *(supra),* that, while exercising the power of review in so far as alterations or amendment of tariff is concerned, the Central Commission is not *stricto senso* bound by Section 114 of CPC or Order 47 of CPC, but rather has a plenary power; in ***Gujarat Urja Vikas Nigam Limited vs. Tarini Infrastructure Ltd. &***

Ors.,* (2016) 8 SCC 743,** the Supreme Court held that, while Section 61 r/w Section 62 and Section 64 deals with determination of tariff, the exercise of regulatory power under Section 86 stands on a different footing, the power of regulation is of wide import, and Section 14 and Section 21 of the General Clauses Act, 1897 would apply to such exercise of regulatory power; in ***Shree Sidhbali Steels Ltd. vs. State of UP, (2011) 3 SCC 193, it was held that Section 21 would be inapplicable only where the decision in question is a judicial decision; in ***KSEB vs. Sir Syed Institute for Technical Studies***, (2021) 14 SCC 118, it has been held that the Commission's role as a quasi-judicial body or it having the trappings of a court would emerge only if it was called upon to adjudicate a dispute; it is true that, in ***PTC India Ltd. vs. CERC***, (2010) 4 SCC 603, the Supreme Court observed that the exercise of price-fixation under Section 62 is quasi-judicial in character; however, this observation was made specifically in the context of Section 62 because the Supreme Court took note of the specific scheme of Section 61 r/w Sections 62 and 64 which partakes an adjudicatory or legislative character; the same principle does not apply to a Section 63 exercise which has been specifically held, in ***Jaipur Vidyut Vitran Nigam Ltd.*** *(supra)* and ***Energy Watchdog*** (*supra*), to be regulatory in character; and, when the power exercised is regulatory, technical considerations of review under Section 114 or Order 47 would not apply, as held in ***UP Power Corporation*** (*supra*).

C.SUBMISSIONS URGED ON BEHALF OF KSEBL:

It is submitted, on behalf of KSEBL, that, in the present case, there were good and sufficient reasons for the State Commission to exercise the review jurisdiction and pass the Impugned Order, as summarized herein below:- (a) admittedly, the PSAs which have been approved by

the Impugned Order were entered into in pursuance of a Tariff Based Competitive Bidding Process. The State Commission had found the tariff given by the L1 Bidders in the two streams respectively to be conducive for approval, and had approved the same. The L1 Bidders, in respect of which approval for procurement was allowed by the State Commission, had quoted for only 300 MW in aggregate, whereas KSEBL had initiated the process to procure 850 MW. KSEBL therefore negotiated with other bidders i.e. L2 in the first stream (whose tariff was lesser than L1 in the second stream), and L2, L3 and L4 (who matched the L1 tariff in the second stream) to procure an aggregate of 865 MW, including **L**1 procurement of 300 MW (the L5 bidder in the second stream also matched the L1 tariff and executed a PSA, however, subsequently the PSA was terminated as COD was not achieved); (b) Pursuant to the bidding process in 2014, PSAs were entered into with the aforesaid generators in the same year; (c) the State Commission found that in respect of L2, L3, L4 bidders, being negotiated to match the L1 bidders, there were deviations from the bidding guidelines / documents issued by the Central Government under Section 63 of the Act. Such deviations were not of material nature, for the State Commission to have rejected the approval. The State Commission had asked KSEBL / Government of Kerala to obtain clarifications from the Central Government. Pending the clarifications, the State Commission had allowed procurement of power from the four PSAs which are the subject matter of approval under the Impugned Order. Such procurement continued from 2016 till 10.05.2023 and even thereafter, till 21.08.2023 by the generators. All generators were *ad-idem* with KSEBL that procurement of power ought to be approved by KSERC. (d) the Central Government by its letter dated 18.11.2016 inter-alia opined that the Govt.

of Kerala/KSEB Ltd may take action as appropriate in consultation with KSERC.

It is further submitted, on behalf of KSEBL, that the purported deviations were not of material nature and were only procedural for the persons handling the bidding process of having not taken approval of the Central Government for such procedural deviations at the relevant time; in ***Tata Motors Limited Vs. BEST & Ors, 2023*** **SCC** ***Online*** **SC** ***671,*** dealing with a tender process, the Supreme Court has reiterated that every mistake should not be taken to vitiate the tender selection without considering the consequences; and, in the policy directive dated 10.10.2023, the State Government stated that a Committee would deal with the causes why deviations had taken place, while placing on record the necessity for procuring power under the PSAs, considering the acute shortages in the State.

It is also submitted, on behalf of KSEBL, that there is no necessity to consider the nature of the powers exercised by the State Commission in passing the earlier order dated 10.05.2023 or the Impugned Order, while considering the scope of Section 108, namely, whether it is regulatory or quasi judicial or administrative or even adjudicatory; and neither Section 108 nor any other provision of the Electricity Act provides for any such limitation.

D.ANALYSIS:

Be it an order passed in the exercise of the regulatory powers, or an adjudicatory order passed in exercise of the quasi-judicial powers, of the Appropriate Commission, such an order can be subjected to an appeal under Section 111(1) of the Electricity Act before this Tribunal. Ordinarily, the original authority, against whose order an appeal is preferred, would have little role to play in appellate proceedings since the order passed by

it must be examined in terms of what the order records. In the light of the law declared by the Supreme Court, in **Mohinder Singh Gill Vs Chief Election Commissioner: AIR 1978 SC 851** and **Gordhan Das Bhanji Vs State: AIR 1952 SC 16,** it may not be open to the original authority, against whose order an appeal has been preferred, to supplement the reasons, recorded by it in the impugned order, with fresh reasons at the appellate stage. Ordinarily the original authority is arrayed as a proforma Respondent in an appeal only to enable the Appellate Tribunal to call for information/records from it, as and when it considers it necessary to do so. As the Appropriate Commission, besides exercising adjudicatory functions, also exercises regulatory powers, and an appeal would also lie to this Tribunal against a regulatory order passed by the Appropriate Commission, we refrain from expressing any conclusive opinion in this regard, as these aspects may require detailed examination.

What is however disconcerting is that the KSERC, in the present case, has sought to put forth a completely new case before this Tribunal at the appellate stage of these proceedings, though several of the contentions raised by them, during the course of hearing of this appeal, have not even been referred to, much less considered, in the impugned order dated 29.12.2023.

While the Respondent in an appeal is entitled, in view of Order 41 Rule 22 CPC, to sustain the order passed by the original Tribunal on grounds on which the said Tribunal had held against them during the course of the original proceedings, in the present case Shri Dhananjay Mishra, Learned Counsel for the KSERC, has put forth submissions which did not even form part of the review proceedings before the KSERC, and were not considered by it while passing the order impugned in this appeal. While we are of the view that it is impermissible for the Commission to put

forth or seek to make out a completely new case at the appellate stage, wholly distinct from that which is reflected in the impugned order, we do not wish to shy away from dealing with these submissions, since we had afforded Mr. Dhananjay Mishra, Learned Counsel appearing on behalf of the KSERC, an opportunity to put forth such contentions during the course of hearing of these appeals.

(a).SECTION 63: ITS SCOPE:

The Procurer has the choice of the process for procurement of power ie either through bilateral PPA with the tariff determined by the Appropriate Commission under Section 62 or tariff discovered through a transparent process of competitive bidding in accordance with the Central Government's Guidelines under Section 63. After electing the 2nd route, i.e. procurement of power through the competitive bidding process, the procurer has to finalize the complete bidding process, including RFP and other related documents, with the approval of the State Commission. After the bidder, who has quoted the lowest levelised tariff, is declared the successful bidder, a Letter of Intent (LoI) is issued in his favour, and this is followed by the filing of a Petition, before the Appropriate Commission under Section 63, for adoption of the tariff of the successful bidder. **(Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission, 2011 SCC OnLine APTEL 185).**

Section 62 bestows the Commission with wide discretion to determine tariff. Section 63 seeks to curtail this discretion where a bidding process for tariff determination has already been conducted. The Appropriate Commission, while ‘adopting’ the tariff determined through bidding, is not a mere ‘post office’. The Commission is mandated by Section 63 to adopt the tariff determined through bidding only if the bidding process was transparent, and such a process has been held in

accordance with the guidelines issued by the Central Government under Section 63. If the bidding process does not satisfy these checks, then the Commission does not adopt the tariff under Section 63. (**Energy Watchdog v. CERC: 2017 14 SCC 80; Tata Power Co. Ltd. Transmission v. Maharashtra ERC, 2022 SCC OnLine SC 1615**).

If the tariff is discovered through a Bidding Route, under Section 63 of the Electricity Act, the appropriate Commission is required to adopt the tariff discovered, and the scope of enquiry under Section 86(1)(b) is limited to considering the merits of the case vis-à-vis the Central Govt guidelines. In such a situation, the State Commission is required to ascertain whether the bidding process was initiated in accordance with the Central Govt guidelines, and whether the said process was complied with strictly adhering to the Central Govt guidelines. **(Aayan Anthapuramu Solar Private Ltd. V. Andhra Pradesh Electricity Regulatory Commission & Ors. (Judgme nt of APTEL in Appeal Nos.368, 369, 370, 371, 372 and 373 of 2019 dated 27.2.2020).**

The Appropriate Commission can reject the tariff, determined through the bid, if the tariff process is not (i) transparent; and (ii) in accordance with the guidelines issued by the Central Government. Thus, if the Commission does not adopt the tariff determined through bidding, and if the decision is challenged, the bidding process can be reviewed substantively (on the ground of transparency) and procedurally (on the ground of compliance with Central Government guidelines). **(Tata Power Co. Ltd. Transmission v. Maharashtra ERC, 2022 SCC OnLine SC 1615**).

Section 63 has five significant features: (i) Section 63 begins with a non-obstante clause. The non-obstante provision overrides Section 62 alone and not all the provisions of the Act; (ii) as opposed to Section 62

where the Commission is granted the power to determine the tariff, under the Section 63 route - the bidding process determines the tariff. (iii) Section 63 indicates that the provision would be invoked only after the tariff has been determined by the bidding process. The Commission is mandated to adopt such tariff that is determined by the bidding process; (iv) the Commission has the discretion to not adopt the tariff determined through the bidding process only if the twin conditions as mentioned in the provision are not fulfilled; and (v) the twin conditions are that (a) the bidding process must have been transparent; (b) the bidding process must have complied with the guidelines issued by the Central Government.(**Tata Power Co. Ltd. Transmission v. Maharashtra ERC, 2022 SCC OnLine SC 1615**).

As noted hereinabove, the Section 63 bid process was undertaken by KSEBL for long-term procurement of 865 MW of electricity. Two separate bids, the first of 450 MW, and the second of 400 MW were invited. On completion of the bid process, KSEBL filed OP No. 13 of 2015 before the KERC for adoption of the tariff under Section 63 of the Electricity Act, 2003.

In its order, in OP No. 13 of 2015 dated 30.08.2015, the KSERC noted several deviations from the Government of India guidelines including, among others, that (i) the KSEBL had awarded power purchase contract to the second lowest bidder in Bid 1 at its quoted rate of Rs. 4.15 per kWh which was higher than the lowest rate quoted by L 1 of Rs. 3.60 per kWh, though the Government of India guidelines provided only for selection of the lowest bidder; (ii) KSEBL had not invited all the remaining bidders, other than L1, to match their rates with that of L1; (iii) as against the tendered quantity of 400 MW in Bid 2, KSEBL had purchased 550 MW of power; prior approval of the Government of India was not obtained

for these deviations from the standard bidding documents and the guidelines; KSEBL had also not obtained approval from the Commission before executing the Power Purchase Agreement; and there was also no clause stipulated in the PPA that the PPAs would be effective only after approval by the Commission.

In the light of the afore-said deficiencies, the KSERC, in its order in OP No. 13 of 2015 dated 30.08.2016, approved procurement of 200 MW of power from the lowest bidder in Bid 1 and 100 MW of power from the lowest bidder in L 2. With regards approval of purchase from the other bidders, KSERC opined that such approval would be considered after KSEBL obtained approval from the Government of India for the deviations from the guidelines, and on obtaining the views of the Government of Kerala.

The request made by the Government of Kerala, in its letter dated 15.09.2016 for grant of approval for the deviations, was, in effect, rejected by the Government of India which, by its letter dated 18.11.2016, informed that approval from the Central Government ought to have been obtained for such deviations before issuance of RfP and PSA and not at a later stage. There is nothing, in the letter of the Government of India dated 18.11.2016, to indicate that, despite the deviations, KSEBL could act upon the PPAs it had signed with the bidders, other than the lowest bidders in Bid 1 and Bid 2.

After the Government of Kerala issued a G.O. on 13.11.2016 granting them permission to procure 115 MW of power from Jhabua Power Limited from 01.12.2016, KSEBL again approached the KSERC and informed that no formal communication had been received in respect of approval from the Government of India. In the light of the GO issued by the Government of Kerala, KSERC, vide its order in OP No. 13 of 2015 dated 22.12.2016,

provisionally approved purchase of 115 MW of power by KSEBL from Jhabua Power Limited at Rs. 4.15 per kWh as per the Power Purchase Agreement dated 31.12.2014, and subject to clearance from Government of India.

The legality of this order passed by the KSERC in OP No. 13 of 2015 dated 22.12.2016, is not free from doubt since the KSERC had itself opined, in its earlier order dated 30.08.2016, that the Section 63 bid process undertaken by KSEBL was in deviations of the Central Government guidelines; and the Government of India had informed that the deviation, from the prescribed bidding documents, required its prior approval. Neither was prior approval of the Government of India sought nor was it granted. Even post facto approval was not accorded by the Government of India, and yet KSERC, vide its order in OP 13 of 2015 dated 22.12.2016, accorded provisional approval for procurement of power from the L 2 bidder, though the bid submitted by L 2 was in deviation of and contrary to the Central Govt bidding guidelines. It is unnecessary for us to delve on this aspect any further since the said order of KSERC, in OP No. 13 of 2015 dated 22.12.2016, was never subjected to challenge.

The fact, however, remains that it was only after the Supreme Court, by its order in Civil Appeal No. 41 of 2021 dated 10.02.2023, had directed KSERC to decide the subsequent petition filed by KSEBL in OP 5 of 2021, seeking adoption of tariff of the unapproved PSAs under Section 63, within three months, that KSERC passed a final order in OP 5 of 2021 on 10.05.2023 (on the last day before expiry of the three month period stipulated by the order of Supreme Court dated 10.02.2023).

(b). DEVIATIONS FROM THE CENTRAL GOVT GUIDELINES AS RECORDED IN THE ORDER OF KSERC DATED 10.05.2023:

In its order, in OP 5 of 2021 dated 10.05.2023, KSERC, after relying on the judgments of the Supreme Court in **Energy Watchdog** and **Tata Power Company Limited** and the judgment of this Tribunal in **ESSAR Power Limited** as also the 2013 Government of India guidelines and to its earlier order in OP 13 of 2015 dated 30.08.2016, noted that KSEBL had decided to procure 850 MW of power in two bids, the first for 450 MW and the second for 400 MW; the bidding process and the selection of the bidders was in violation of the Government of India guidelines; and the deviations, in the bidding process from the Central Govt guidelines, as classified under different heads were (i) deviation in the tendering process (ii) deviation in the selection process ie selection of lowest bidder (iii) deviation in L 1 matching (iv) deviation for changes made in purchase of bid quantity (v) enhancement in fixed charges, and (vi) additional quantity of power procurement.

The deviations found by KSERC, under the first head ie deviation in the tendering process, was that there was no provision in the bidding guidelines for splitting up of the bids without prior approval of the Central Government and without permission from the Commission, despite which KSEBL had invited two separate bids; it was only after completion of the bid process that KSEBL had informed the Commission, and had filed a petition for adoption of tariff; and some of the bidders had quoted two different tariffs in the two separate bids for supply of power from the same plant.

Under the second head, ie deviation from the selection process, KSERC noted that the bidding guidelines required that, if more bidders quoted the same tariff, the bidder was to be selected through drawl of lots and thus one bidder could be selected in this process, despite which KSEBL had selected L 2 bidder in addition to L 1 in Bid 1, and 5 bidders

in Bid 2, violating the said guidelines; and KSEBL had also altered the PSAs without approval of the Commission.

Under the third head, ie deviation in L 1 matching, KSERC noted that the bidding guidelines required bidders to match the lowest bidder; however, KSEBL, in addition to selecting L 1 bidder in Bid 1, had also selected L 2 bidder even though L 2 did not match the tariff of L 1; further, KSEBL had agreed to take their tariff of Rs. 4.15 per kWh which was higher by Rs. 0.55 per kWh than L 1's rate of Rs. 3.60 per kWh; this had resulted in a monetary loss to KSEBL of Rs.1477 Crores over 25 years; and, similarly in Bid-2 KSEBL, instead of replying to all the remaining bidders, had selectively invited L 2 to L 4 to match L 1 bid which was in violation of para 3.3 of the RfP.

Under the fourth head, ie changes in purchase of bid quantity, KSERC noted that, while the bids invited was for purchase of 450 MW and 400 MW respectively in Bids 1 and 2, KSEBL had contracted for 315 MW in Bid 1 and 550 MW in Bid 2; 150 MW was contracted to be purchased at a higher rate of Rs. 4.29 per kWh as against the lowest bid of Rs. 3.60 per kWh which resulted in additional liability of Rs. 1926.50 Crores on the consumers over 25 years.

With respect to the fifth head, regarding enhancement in fixed charges, KSERC noted that Jhabua Power Limited had quoted Rs. 2.39 per kWh as fixed charges in Bid 1, whereas in Bid 2, Jhabua Power Limited had increased the fixed charges from the quoted Rs. 2.65 per kWh to Rs. 2.97 per kWh during L1 matching, resulting in increase in fixed charges by Paise 32 per kWh in Bid 2; this resulted in consumers suffering a monetary loss of Rs. 595.75 Crores for 25 years; likewise, M/s. Jindal Power Limited, which had quoted a fixed charge of Rs. 2.74 per kWh and variable charge of Rs. 0.6 per kWh as L 1 in Bid 1, had offered to supply

150 MW at Rs. 4.29 per kWh comprising of fixed charges of Rs. 3.43 per kWh and variable charges of Rs. 0.86 per kWh; both the bids of M/s Jindal Power Limited was for supply of power from the same plant at different fixed charges; no reasons were forthcoming as to why Jindal Power Limited, which had quoted a fixed charge of Rs. 2.74 per kWh in Bid 1, should be quoting a higher fixed charge of Rs. 3.43 per kWh in Bid 2, though power was to be supplied from the same plant, the same location and using the same machinery; this had resulted in KSEBL suffering additional expenditure of Rs. 1927.50 Crores.

With regards the sixth head, ie additional quantity of power procurement, KSERC opined that KSEBL had proceeded to purchase 865 MW power which was in excess of the tendered quantity of 850 MW, though the 2013 guidelines did not provide for purchase of additional quantity in excess of the tendered quantity.

While noting that the aforesaid deviations were significant, and the process was not fair and transparent, KSERC observed that it could adopt the tariff, under Section 63 of the Electricity Act, only if such tariff had been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government; KSEBL had significantly deviated from, and had violated, the guidelines issued by the Ministry of Power which required prior approval of the Central Government; KSEBL had executed the PSAs without obtaining approval of the Commission as stipulated in Regulation 78 of the 2014 Regulations; the deviations noted in the order showed lack of transparency which required prior approval of the Central Government; the letters of the Ministry of Power dated 18.11.2016 and 11.12.2019 showed that the Central Government had rejected the request for approval of the deviations made by KSEBL; clause 4 of the guidelines expressly stipulated that any deviation from the

standard bidding documents shall be made only with the prior approval of the Central Government; and what was stipulated was *"prior approval"* and not subsequent ratification.

KSERC concluded that the tariff determined by KSEBL, with respect to these unapproved PSAs, was not in a fair, transparent and equitable process, and they had grossly deviated from the guidelines issued by the Government of India under Section 63 of the Electricity Act; such deviations were against public interest and created long term financial implications on the consumers and the State, and hence the petition for approval of the unapproved PSAs was liable to be rejected. The petition filed by KSEBL in OP 5 of 2021, seeking approval of the four unapproved PSAs for procurement of power, was rejected.

While KSEBL had no doubt preferred Appeal No. 518 of 2023 against the said order of the KSERC, they chose to withdraw the said appeal and this Tribunal, by its order dated 31.10.2023, dismissed Appeal No. 518 of 2023 as withdrawn with liberty to KSEBL to file a review petition before the KSERC.

It is relevant to note that, in the impugned review order dated 29.12.2023 passed by the KSERC, the deviations recorded by it in its earlier order dated 10.05.2023 has neither been faulted nor interfered with. No finding has even been recorded by the KSERC in the review order, that, while passing the earlier order dated 10.05.2023, it had erred in holding that the subject bidding process was in deviation of the Central Government guidelines. The Section 108 directive, issued by the Government of Kerala on 10.10.2023, does not also state that KSERC had erred in passing in its earlier order dated 10.05.2023. It is solely on the basis of the Section 108 order, passed by the Government of Kerala on 10.10.2023, that KSERC allowed the review petition on 29.12.2023,

and directed the Appellants herein to supply power to KSEBL in terms of the PSAs signed by them.

Section 63 of the Electricity Act obligates the Appropriate Commission to adopt only such tariff as has been determined through a transparent process of bidding and in accordance with the guidelines issued by the Central Government. In case the tariff, adoption of which is sought, has not been determined through a transparent process of bidding or is in violation of the Central Government guidelines, the Appropriate Commission would neither adopt such tariff nor approve such PSAs. In the present case the KSERC has, while passing the final order in OP No. 05 of 2021 dated 10.05.2023, specifically held that the tariff, of which KSEBL has sought adoption of, was not determined through a transparent process of bidding and that the bidding process was in blatant violation of the Central Government guidelines. It is only if the KSERC, while reviewing the said order, had specifically held that the findings recorded by it earlier, in its order in OP No, 5 of 2021 dated 10.05.2021, suffered from an error, and that the tariff (adoption of which was sought) was in fact determined through a transparent process of bidding and was in conformity with the guidelines issued by the Central Government, would it then have been justified in adopting the tariff, in approving the PSAs, and thereafter in directing the generators (who were parties to those PSAs) to abide by the terms and conditions of the PSAs to supply electricity to KSEBL.

The impugned review order dated 29.12.2023 does not reflect the KSERC having held that the subject bidding process was both fair and transparent and in conformity with the Central Government guidelines; and that the requirements of Section 63 of the Electricity Act have been satisfied. Without disturbing any of the findings recorded by it, or the

conclusions arrived at in its earlier order dated 10.05.2023, KSERC has, curiously, relied only on the Section 108 order, issued by the Government of Kerala on 10.10.2023, to pass the review order dated 29.12.2023 directing the Appellants to supply electricity to KSEBL.

Without either recording a finding that the conclusions therein were contrary to law, or setting aside the order date 10.05.2023 for valid reasons, it was impermissible for KSERC to direct the Appellants to supply power in terms of the PSAs signed by them, approval for which the KSERC had refused to grant by its order in OP 5 of 2021 dated 10.05.2023.

(c.). JUDGEMENT IN TATA MOTORS LIMITED VS. BEST: 2023 SCC ONLINE SC 671:

The facts, in **Tata Motors Limited Vs. BEST: *2023* SCC *Online* SC *671*,**, were that BEST had floated a tender for the supply, operation and maintenance of 1400 Single Decker AC Electric Buses with driver, for the purpose of public transport service within the city of Mumbai along with other civil infrastructure development at the BEST depots for a period of 12 years. The Tender document provided for Technical specifications as stipulated under Clause 3.5(e) and Clause 12 of Section 2 of Schedule IX, under which the bidders were required to provide Single Decker Buses which can run 200 Kms in single charge without interruption in actual conditions for the relevant Gross Vehicle Weight (GVW) with air conditioning with not more than 80% battery being consumed; eight market players participated in the Tender process, including EVEY and TATA Motors; in the pre-bid meeting held on 11.03.2022, TATA Motors submitted its pre-bid points, wherein, under Point 1, it requested BEST to consider its bid for 200 Kms per day with 75-minutes of opportunity charging time during the day operations, and range testing conditions as

per AIS 040/FAME II. BEST published the minutes of the pre-bid meeting. While it revised certain specifications, however the modifications as requested by TATA Motors were rejected. BEST opted for a specific reference to “in actual conditions” and excluded any reference to “AIS 040” or “Standard Conditions” in the Tender specifications. BEST, in its technical suitability evaluation, held TATA Motors along with four other bidders, to be “technically non-responsive”. TATA Motor's bid was rejected on account of technical deviation with respect to the operating range in its Annexure F and Annexure Y, respectively. The bid offered by EVEY in the said report was deemed to be “technically responsive”.

Aggrieved by the technical suitability evaluation issued by BEST, by which it rejected the bid of TATA Motors, the latter approached the Bombay High Court by way of a writ petition. During the pendency of the said writ petition, BEST awarded the Tender in favour of EVEY. An agreement, for operation of Stage Carriage Services for public transport of Single Decker AC Electric Buses with Driver in the city of Mumbai and its extended suburbs on Gross Contract Cost (GCC) model, for 12 years was entered into between the EVEY and BEST. The Bombay High Court took the view that the requirement for the operating range to be more than 200 Kms in a single charge in “actual conditions” was unambiguous. Accordingly, the High Court upheld the disqualification of TATA Motors and rejected their claim from being considered as an eligible bidder as they failed to comply with the technical requirements of the Tender. The High Court proceeded further to discuss as to why the bid of EVEY also should have been rejected, and thought it fit to declare EVEY also as an unsuccessful bidder. All the three parties approached the Supreme Court.

The Supreme Court only examined the question whether the High Court, after upholding the disqualification of TATA Motors from the Tender, was justified in undertaking a further exercise to ascertain whether EVEY also stood disqualified, and that BEST in its discretion may undertake a fresh tender process. The Supreme Court held that courts must realise the havoc which needless interference in commercial matters can cause; in contracts involving technical issues the courts should be even more reluctant because they do not have the necessary expertise to adjudicate upon technical issues beyond their domain; the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder; courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract, and must also not interfere where such interference will cause unnecessary loss to the public exchequer.

The Supreme Court further held that BEST committed no error and could not be held guilty of favouritism in allowing EVEY to submit a revised Annexure Y as the earlier one was incorrect on account of a clerical error; this exercise itself was not sufficient to declare the entire bid offered by EVEY as unlawful or illegal; ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out; the court ordinarily should not interfere in matters relating to tender or contract; to set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest; initiating a fresh tender process at this stage may consume a lot of time and also loss to the public exchequer to the tune of crores of rupees; and the financial burden/implications on the public exchequer that the State

may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind.

Reliance placed on behalf of KSEBL on the judgment of the Supreme Court, in **Tata Motors Limited Vs. BEST: *2023* SCC *Online* SC *671*,** is wholly misplaced. Firstly, because the said judgement did not arise under the Electricity Act. Secondly, unlike in **Tata Motors,** the KSERC, in the present case, could only have adopted the tariff and approved the PSAs if the twin tests stipulated in Section 63 of the Electricity Act were satisfied. Further, the deviations from the Central Govt guidelines, as highlighted by the KSERC in its order dated 10.05.2023, are grave and serious, unlike in **Tata Motors** where the error was found to be clerical in nature. Lastly, unlike a Writ Court exercising jurisdiction under Article 226 of the Constitution of India where the scope of interference with the tender process is extremely limited, Section 63 requires the Commission to adopt the tariff only if the bidding process is found to be transparent and in accordance with the Central Govt Guidelines.

The numerous deviations from the Central Govt guidelines, as highlighted in the order of the KSERC dated 10.05.2023, can neither be considered as mere technical errors nor as minor mistakes as they are grave deviations which, even according to the KSERC, sufficed to vitiate the bidding process necessitating KSERC to decline to adopt the tariff and to approve the PSAs executed by the Appellants and KSEBL.

As has been observed, earlier in this order, the State Government could not have issued any policy directions to interfere with the statutory functions which the KSERC is required to discharge in terms of the Sections 63 and 86(1)(b) of the Electricity Act. Whatever be the difficulties the State of Kerala may be facing, the fact remains that neither the bidding process undertaken by the distribution licensee (in the present case the

KSEBL) nor the tariff determined by such a bidding process was adopted by the KSERC in its Order dated 10.05.2023 as it was satisfied that the twin tests stipulated in Section 63 were not satisfied by the bidding process undertaken by KSEBL.

(d).IS SECTION 21 OF THE GENERAL CLAUSES ACT ATTRACTED?

Section 94(1)(f) of the Electricity Act does not confine the Commission's power of review only to the orders passed by it, but also extends to its decisions and directions. Even if , as contended on behalf of KSERC, it is presumed that the order passed by KSERC on 10.05.2023, is only a regulatory order and nothing more, even then the decisions taken by, and the directions issued under, the said order dated 10.05.2023 can be set at naught by the Commission only in the exercise of its powers of review under Section 94(1)(f) of the Electricity Act. As the said provision confers the power of review not only with respect to orders but also to decisions and directions issued by the Commission, any exercise by the Commission, of altering/varying or modifying such decisions and directions, can only be undertaken in accordance with the said provision, and resort to Section 21 of the General Clauses Act is impermissible. In this context, it must be remembered that, where there is repugnancy or conflict as to the subject or context between the General Clauses Act and a statutory provision which falls for interpretation, the Court must necessarily refer to the provisions of the Statute **(Commissioner of Customs (Mumbai), vs Dilip Kumar And Company & Others: (2018) 9 SCC Page 1),** which in the present case is Section 94(1)(f) of the Electricity Act.

The expression "order", employed in Section 21 of the General Clauses Act, shows that such an order must be in the nature of a

notification, rules and bye-laws etc. The order, which can be modified or rescinded on the application of Section 21 is either a legislative or an executive order. Section 21 of the General Clauses Act has no application where a statutory authority is required to act quasi-judicially. **(Indian National Congress (I) v. Institute of Social Welfare, (2002) 5 SCC 685).** The impugned order dated 29.12.2023 passed by the KSERC, on its review jurisdiction being invoked by KSEBL, is a quasi-judicial order. In that view of the matter, the provisions of Section 21 of the General Clauses Act cannot be invoked by the KSERC, that too when it has not even held, in the impugned order passed by it on 29.12.2023, that it was exercising its regulatory powers and not its power of review.

Let us now examine the submission, urged on behalf of KSERC, that, since the earlier order passed by it on 10.05.2023 was in the exercise of its regulatory powers under Section 86(1)(b), it has the power to amend, vary or modify the said order in terms of Section 21 of the General Clauses Act.

(e.).”REGULATE”: ITS SCOPE:

The word “regulate” is difficult to define as having any precise meaning, and cannot have any rigid or inflexible meaning. It is a word of broad import, having a broad meaning, and is comprehensive in its scope. **(K. Ramanathan v. State of T.N., (1985) 2 SCC 116; V.S. Rice and Oil Mills v. State of A.P: AIR 1964 SC 1781).** ‘Regulate’ is defined in *Corpus Juris Secundum*, Vol. 76 at p. 611 as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations. **(K. Ramanathan v. State of T.N., (1985) 2**

SCC 116). ‘Regulate’ is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict.” (**Webster's Third New International Dictionary, Vol. II, p. 1913 and Shorter Oxford Dictionary, Vol. II, 3rd Edn., p. 1784; K. Ramanathan v. State of T.N., (1985) 2 SCC 116).** The *Shorter Oxford English Dictionary*, 3rd Edn., defines the word “regulate” as meaning “to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings”. **(K. Ramanathan v. State of T.N., (1985) 2 SCC 116),** and as meaning “the act of regulating, or the state of being regulated”. **(D.K. Trivedi & Sons v. State of Gujarat, 1986 Supp SCC 20).**

The word “regulation” has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy. **(K. Ramanathan v. State of T.N., (1985) 2 SCC 116).** The power to regulate carries with it full power over the thing subject to regulation and, in the absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances. **(K. Ramanathan v. State of T.N., (1985) 2 SCC 116).**

(f).JUDGEMENTS RELIED ON BY BOTH PARTIES:

In **Kerala SEB v. Sir Syed Institute for Technical Studies, (2021) 14 SCC 118,** the Supreme Court held that, once the Division Bench observed that publication in the website was sufficient, the writ petitioners

may not have had forfeited their right to challenge the tariff notification in the writ court or the appellate forum; but having failed to generate any lis on the tariff proposal by not raising any kind of objection, it would not be open to them to demand disclosure of reasons along with publication of the tariff rates; the Commission's role as a quasi-judicial body or it having trappings of a court would emerge only if it was called upon to adjudicate a dispute; no dispute had been generated by the writ petitioners on the basis of the Commission's proposal which would have required it to undertake some form of adjudicatory exercise; in such a situation, the exercise of fixing tariff has to be undertaken as a quasi-legislative act only, which ordinarily a tariff-fixing exercise is; issue of the subject tariff notification unaccompanied by reason thus cannot be faulted for having breached the principles of natural justice; the forum of appeal was open to them; but mere existence of an appellate forum in the statute would not require a tariff-fixing body to disclose the reason for stipulating tariff rate in each individual case.

In **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603,** the Supreme Court held that the price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC; and, if one takes “tariff” as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff.

In **Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd., (2016) 8 SCC 743**, the Supreme Court held that Section 86, which deals with the functions of the Commission, reiterates determination of tariff to be one of the primary functions of the Commission, which determination includes a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s); the power of tariff determination/fixation is undoubtedly statutory as held in **A.P. TRANSCO v. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34**; this is subject to determination of price of power in open access (Section 42) or in the case of open bidding (Section 63); in the present case, admittedly, the tariff incorporated in PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers; in such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent; it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved; and Section 86(1)(*b*) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply.

After referring to its earlier judgements in **V.S. Rice & Oil Mills v. State of A.P., AIR 1964 SC 1781, K. Ramanathan v. State of T.N., (1985) 2 SCC 116, and D.K. Trivedi & Sons v. State of Gujarat, 1986 Supp SCC 20,** the Supreme Court, in **Tarini Infrastructure Ltd**, further held that the power of regulation is of wide import; in view of Section 86(1)(*b*), the Court must lean in favour of flexibility and not read

inviolability in terms of PPA insofar as the tariff stipulated therein as approved by the Commission is concerned; it would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff; and the facts of the present case would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898.

After referring to its earlier judgements, in **Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd., (2016) 11 SCC 182** and **Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd., (2016) 8 SCC 743,** the Supreme Court, in **Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd., (2017) 16 SCC 498**, held that an amendment to tariff by the Regulatory Commission is permitted under Section 62(4) read with Section 64(6) of the Electricity Act; Section 86(1)(*a*) clothes the Commission with the power to determine the tariff and under Section 86(1)(*b*), it is for the Commission to regulate the price at which electricity is to be procured from the generating companies; power is conferred on the Commission with regard to fixation of tariff for the electricity procured from the generating companies or amendment thereof in the given circumstances; Part X of the Act from Sections 76 to 109 deals with "Regulatory Commissions" providing for their constitution, powers and functions; Section 92 read with Section 94 provides for the proceedings and power of the Commission while exercising its functions and powers; under Section 92, the proceedings of the Commission are to be governed by what is specified in the appropriate Regulation with regard to the transaction of business at its meetings; Section 94 provides that the appropriate Commission shall be vested with certain powers as are vested in a civil court, only in six specified areas; under Section 94(1)(*g*), the

Commission has the powers of a civil court in respect of “any other matter which may be prescribed”; under Regulation 82, the Commission has powers to deal with any matter or exercise any power under the Act for which no Regulations are framed, meaning thereby where something is expressly provided in the Act, the Commission has to deal with it only in accordance with the manner prescribed in the Act; the only leeway available to the Commission is when the Regulations or proceedings are silent on a specific issue; in case a specific subject or exercise of power by the Commission on a specific issue is otherwise provided under the Act or the Rules, the same has to be exercised by the Commission only taking recourse to that power and in no other manner; there cannot be any exercise of the inherent power for dealing with any matter which is otherwise specifically provided under the Act; exercise of power which has the effect of amending the PPA by varying the tariff can only be done as per statutory provisions and not under the inherent power referred to in Regulations 80 to 82; there cannot be any exercise of inherent power by the Commission on an issue which is otherwise dealt with or provided for in the Act or the Rules; courts should be careful in dealing with matters of exercise of inherent powers when the interest of consumers is at stake; under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public; and, hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure.

(g).APPLICATION OF SECTION 21 OF THE GENERAL CLAUSES ACT TO REGULATORY ORDERS PASSED BY THE COMMISSION:

Without expressing any opinion on the contention of the Respondents that Section 21 of the General Clauses Act confers power on the

appropriate Commission to amend a regulatory order, we shall, for the purposes of the contentions urged on behalf of KSERC under this head, proceed on the premise that it does

Section 21 of the General Clauses Act, 1897 reads as under:

> **"*21. Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws.***
>
> *Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and* conditions *(if any), to add to, amend, vary or rescind any, orders, rules or bye-laws so issued".*

Section 21 of the General Clauses Act is based on the principle that the power to create includes the power to destroy and also the power to alter what is created. Section 21, amongst other things, specifically deals with power to add to, amend, vary or rescind the notifications. The power to rescind a notification is inherent in the power to issue the notification without any limitations or conditions. Section 21 embodies a rule of construction. The nature and extent of its application must be governed by the relevant statute which confers the power to issue the notification, etc. An administrative decision is revocable while a judicial decision is not revocable except in special circumstances. ***(*Shree Sidhbali Steels Ltd. v. State of U.P., (2011) 3 SCC 193).** The power of regulation takes within its sweep the power, in appropriate cases, to revoke or cancel the permission as incidental or supplemental to the power to grant. Otherwise, the plenitude of the power to regulate would be whittled down or even frustrated. **(State of U.P. v. Maharaja Dharmander Prasad Singh, (1989) 2 SCC 505).**

Section 21 of the General Clauses Act stipulates that, where the power to issue an order is conferred by a Central Act, then that power includes the power, exercisable in the like manner and subject to the like sanction and conditions, to amend, vary or rescind any order issued. As noted hereinabove Section 63 of the Electricity Act requires the Appropriate commission to adopt the tariff only if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. As the original order dated 10.05.2023 was passed by the KSERC while considering the petition filed by KSEBL seeking adoption of tariff under Section 63, application of Section 21 of the General Clauses Act (even if it is presumed to apply) required the KSERC to exercise its powers to amend sanctions and conditions, ie in strict compliance with Section 63 of the Electricity Act.

Even if Section 21 of the General Clauses Act were presumed to apply, the KSERC was nonetheless obligated, in terms thereof, to again verify and satisfy itself that the tariff, adoption of which was sought in OP No. 05 of 2021, fulfilled the tests stipulated in Section 63. In other words, the KSERC should have satisfied itself that the tariff was in fact determined through a transparent process of bidding and in accordance with the guidelines issued by the Central Government, and should have recorded a finding in the impugned order dated 29.12.2023 that it is only because the conclusions arrived at in its earlier order are now found to be erroneous, that the said order dated 10.05.2023 necessitates being amended or varied.

It is only if the KSERC had inquired into these aspects and had recorded its satisfaction, in the impugned order dated 29.12.2023, that the twin tests stipulated in the Section 63 of the Electricity Act are in fact

satisfied, and that the earlier order dated 10.05.2023 erroneously records that it has not, would it then have been justified in passing the impugned order dated 29.12.2023, tracing its powers to do so to Section 21 of the General Clauses Act. As the order dated 29.12.2023 does not either state that the twin tests stipulated in Section 63 are satisfied or that the earlier order dated 10.05.2023 erroneously records that the said twin tests are not fulfilled, the impugned order cannot be justified on the touchstone of Section 21 of the General Clauses Act.

XIII.CONCLUSION:

For the reasons afore-mentioned, we are of the view that the impugned order passed by the KSERC dated 29.12.2023 is not in accordance with law. The said order must be, and is accordingly, set aside. The Appeals are allowed. IAs, if any pending, shall also stand disposed of.

Pronounced in the open court on this ***26th day of July, 2024.***

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

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REPORTABLE/NON-REPORTABLE