

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 239 OF 2015 & IA NO. 885 OF 2017,  
APPEAL NO. 203 OF 2015, APPEAL NO. 240 OF 2015  
AND APPEAL NO. 241 OF 2015**

**Dated:** 5<sup>th</sup> February, 2020

**Present:** HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER  
HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

**APPEAL NO. 239 OF 2015 &  
IA NO. 885 OF 2017**

**IN THE MATTER OF**

**Indian Wind Power Association**

Rep. by its Secretary General  
Door No. E, 6<sup>th</sup> Floor, Shakti Towers-II  
766, Anna Salai  
Chennai-600002

..... Appellant

**VERSUS**

**1. Tamil Nadu Generation & Distribution Corporation Limited**

Rep. by its Managing Director  
5<sup>th</sup> Floor, NPKKR Maligai  
144, Anna Salai  
Chennai – 600 002

..... Respondent No.1

**2. State Load Despatch Centre TANTRANSCO Ltd.**

144, Anna Salai  
Chennai- 600 002

..... Respondent No.2

**3. TANTRANSCO Ltd.**

Rep. by its Director  
144, Anna Salai  
Chennai- 600 002

..... Respondent No.3

**4. Tamil Nadu Electricity Regulatory Commission**

TIDCO Office Building  
No. 19A, Rukmani Lakshmi pathy Salai  
Marshalls Road, Egmore,  
Chennai – 600 008

..... Respondent No.4

Counsel for the Appellant ... Mr. M.G. Ramachandran, Sr. Adv.  
Mr. Anand K. Ganesan  
Mr. Senthil Jagadeesan

Counsel for the Respondent(s) ... Mr. Ganesan Umapathy  
Mr. S. Vallinayagam for R-1 to R-3

## **APPEAL NO. 203 OF 2015**

### **IN THE MATTER OF**

1. **TANTRANSCO Limited**  
Rep. by its Superintending Engineer  
State Load Dispatch Centre  
144, Anna Salai  
Chennai- 600 002 ..... Appellant No.1
2. **TANGEDCO Ltd.**  
Rep. by its Chairman and Managing Director  
144, Anna Salai  
Chennai- 600 002 ..... Appellant No.2
3. **TANTRANSCO Limited**  
Rep. by its Director  
144, Anna Salai  
Chennai- 600 002 ..... Appellant No.3

### **VERSUS**

1. **Indian Wind Power Association**  
Door No. E, 6<sup>th</sup> Floor, Tower-I,  
Shakti Tower, No. 766, Anna Salai  
Chennai-600002 ..... Respondent No.1
2. **The Tata Power Company Limited**  
A 34, Corporate Centre,  
Sant Tukaram Road, Carnac Bunder  
Mumbai – 400 009 ..... Respondent No.2
3. **M/s Ushdev Power Holidayhs Private Ltd.**  
Apeejay Premises Co-op Society Ltd.  
Apeejay House, 6<sup>th</sup> Floor,  
130, Mumbai Samachar Marg, Fort,  
Mumbai – 400 001 ..... Respondent No.3
4. **M/s Green Infra Wind Power Projects Limited**  
2<sup>nd</sup> Floor, Tower II,  
NBCC Plaza, Pushp Vihar, Sector-5, Saket,  
New Delhi-110 017 ..... Respondent No.4
5. **Tamil Nadu Spinning Mills Association.**  
No. 2, Karur Road, Near Beschi College  
Modern Nagar,

- Dindigul – 624 001 ..... Respondent No.5
6. **Arasan Syntex Limited**  
Eppodumvendran  
Tuticorin District 628 712 ..... Respondent No.6
7. **Tamil Nadu Electricity Regulatory Commission**  
Rep. by its Secretary  
No. 19-A, Rukmani Lakshmi pathy Salai  
(Marshalls Road)  
Egmore,  
Chennai – 600 008 ..... Respondent No.7

Counsel for the Appellant ... Mr. Ganesan Umapathy  
Mr. S. Vallinayagam

Counsel for the Respondent(s) ... Mr. M.G. Ramachandran, Sr. Adv.  
Mr. Anand K. Ganesan  
Mr. Senthil Jagadeesan for R-1 & R-4

Mr. Amit Kapur  
Mr. Apoorva Misra for R-2

**APPEAL NO. 240 OF 2015**  
**AND**  
**APPEAL NO. 241 OF 2015**

**IN THE MATTER OF**

**Indian Wind Power Association**  
Rep. by its Secretary General  
Door No. E, 6<sup>th</sup> Floor, Shakti Towers-II  
766, Anna Salai ..... Appellant  
Chennai-600002

**VERSUS**

1. **Tamil Nadu Generation & Distribution Corporation Limited**  
Rep. by its Managing Director  
5<sup>th</sup> Floor, NPKKR Maligai  
144, Anna Salai ..... Respondent No.1  
Chennai – 600 002
2. **State Load Despatch Centre TANTRANSCO Ltd.**  
144, Anna Salai  
Chennai- 600 002 ..... Respondent No.2
3. **TANTRANSCO Ltd.**  
Rep. by its Director  
144, Anna Salai

4. **Tamil Nadu Electricity Regulatory Commission**

TIDCO Office Building  
No. 19A, Rukmani Lakshmi Pathy Salai  
Marshalls Road, Egmore,  
Chennai – 600 008

..... Respondent No.4

Counsel for the Appellant ... Mr. M.G. Ramachandran, Sr. Adv.  
Mr. Anand K. Ganesan  
Mr. Senthil Jagadeesan

Counsel for the Respondent(s) ... Mr. Ganesan Umapathy  
Mr. S. Vallinayagam for R-1 to R-3

## **J U D G M E N T**

### **PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER (ORAL)**

1. These Appeals arise out of proceedings before Tamil Nadu Electricity Regulatory Commission (hereinafter variously referred to as “TNERC” or “State Commission”) on Petitions registered as M.P. No. 14 of 2012 and D.R.P. No. 28 of 2012, M.P. Nos. 21 to 23 of 2014 and D.R.P. No. 45 of 2014, which concluded on 01.07.2015. The Appellants in second captioned appeal i.e. Appeal No. 203 of 2015 are Distribution Companies operating in the State of Tamil Nadu. The other three Appeals have been preferred by an entity which describes itself as an Association of Wind Energy Generators (WEGs) having more than 1100 members on its roll. The Appellants in these matters were parties to the proceedings before the State Commission. The prime question which plagues these appeals meriting a clear decision, however, concerns the maintainability, it being dependent upon answer to the issue as to whether what is challenged herein constitutes “an order” of the State Commission passed

under the Electricity Act, 2003 in which respect an appeal may be entertained by this Tribunal under Section 111.

2. Given the limited scrutiny of the matters presently required from the perspective set out above, we need not capture here the background facts in detail. Suffice it to note that the dispute requiring adjudication by the State Commission, in terms of its jurisdiction under Section 86(1)(f) of Electricity Act, 2003, had been primarily referred to it by Madras High Court by its order passed in writ jurisdiction, some connected petitions having been directly instituted before the State Commission, all such matters eventually clubbed and taken up together for consideration.

3. When the proceedings arising out of the dispute brought before the Commission (under directions of the Writ Court or directly) came up for consideration, the forum comprised of two members only – both members, (we are so informed) being Finance Members. It is admitted case of all sides, including the State Commission (which is a party here), that there was vacancy in the office of the Chairperson of the State Commission at the relevant point of time.

4. The two members of the State Commission recorded the impugned proceedings of 01.07.2015 (and we are using this expression consciously), the document running into ninety one pages. After the introductory para (indicating the manner in which the dispute had come up before the Commission), its substantial part was recorded as “*common*

*order*” (covering para numbers 1 to 6). This was followed by rest of the proceedings which may be bifurcated into two parts, the first captioned as “*findings of the Commission*” and the second beginning with the heading “*Appeal*”. The portion labelled as “*findings of the Commission*” is also in two parts, one under the heading “*Findings of Thiru S. Nagalsamy, Member*” and the other beginning with the heading “*Findings of Thiru G. Rajagopal, Member*”, each of the said sections having been authenticated only by the respective Members under their signatures. The concluding part under caption “*Appeal*” signed by both the Members, only informed the parties that appeal could be preferred by a person aggrieved, under Section 111 of Electricity Act, before this Tribunal, referring to what had preceded such advisory as an “*order*”.

5. Learned counsel on all sides are unanimous in their submission that the findings returned by the two Members, by their respective observations in the aforementioned proceedings, are diverse on substantive issues particularly the two major issues constituting the dispute they pertaining to “*Must Run*” norm and “*cost component*” *vis-à-vis* the operations concerning generation of electricity by wind energy.

6. Since this fact was mentioned while addressing the arguments on the issue of maintainability, it may be noted at this stage itself that Tamil Nadu Spinning Mills Association, a party to the proceedings before the State Commission, had brought Writ Petition No. 20336 of 2015 before the Madras High Court referring, *inter alia*, to the disposition dated 01.07.2015

of the State Commission (as is impugned here). It appears that it was submitted before the Madras High Court in the Writ Proceedings that though the findings returned by the two Members of the State Commission were “*different*”, the views recorded by the “*senior member*” was “*enforceable*” under Section 92(3) of Electricity Act, 2003 and consequently the distribution licensees (Appellants in Appeal No. 203 of 2015) were “*bound to implement*” it in letter and spirit. It appears that a learned single judge of the Madras High Court passed an ex-parte ad-interim order on 08.07.2015. The writ petition, we are informed, remains pending consideration for final adjudication before the Madras High Court till date.

7. The distribution licensees preferred Appeal No. 203 of 2015 before this Tribunal seeking setting aside of “*Impugned Order dated 01.07.2015*” seeking an answer to the question of law as to “*what is the effect of the judgment passed by the State Commission in the light of separate findings recorded by the two members of the TNERC*”.

8. The three other appeals were preferred by Indian Wind Power Association, the first and foremost prayer made having been formulated thus:-

“a. set aside the impugned order of Ld. Member G. Rajagopal in its entirety and the order of the Ld. Member S. Nagalsamy in so far it fails to provide the consequential relief of compensation and declare that the backing down of Wind Energy Generators by the 3<sup>rd</sup> Respondent, SLDC from the date of filing of petitions by appellants with the TNERC in the impugned case is not legally valid.”

[Emphasis supplied]

9. These four appeals came up together before this Tribunal for the first time on 11.01.2016. It is necessary to quote the proceedings that came to be then recorded, common to all appeals, by the learned Members of the Bench then having *seisin*, as under:

*Appeal Nos. 239 of 2015, 240 of 2015 and 241 of 2015 are the Appeals filed by the Indian Wind Power Association. Cross Appeal being Appeal No.203 of 2015 has been filed by TANTRANSO Limited & Ors. Pleadings in these Appeals are said to be not complete. Since these Appeals are Cross Appeals, the parties are directed to file their respective Counter Affidavit/reply and Rejoinder Affidavit as the need be. The Counter Affidavit/Reply be filed within two weeks from today and Rejoinder within one week thereafter. We may mention here that two Member Bench of the TNERC has given dissenting judgment, consequently, there being no judgment in operation. Both the parties have challenged the dissenting views of the Bench comprised of Two Members. We have been told that the some Chairperson was in the office of the State Commission. The parties are directed to inform in writing to this Tribunal before the next date whether there is some kind of impediment or hurdle in the discharge of the functioning of the Chairperson of the State Commission. Also we call a report from the Secretary of the State Commission to inform this Tribunal before the next date of hearing about any kind of impediment or hurdle in the discharge of the functioning of the Chairman of the State Commission. Post the matter for hearing on 8.2.2016.*

*[Emphasis supplied]*

10. What stands out from the above is that the tentative view formed then was that there was no decision that could be challenged in appeal. Be that as it may, in the wake of report that was received in due course from the Secretary to the State Commission, as called for by directions noted above, and on the basis of submissions of the parties initially for reference of the dispute to arbitration, by Order dated 18.02.2016, the learned Members of the Bench of the Tribunal observed that the appeals

could be taken up for decision. The Order dated 18.02.2016 forming such view reads thus :-

*“We have heard Mr. G. Umapathy, learned counsel appearing for TANTRANSCO, a transmission licensee, and Mr. M.G. Ramachandran and Mr. Amit Kapur, learned counsel appearing for Power Generators on the point of reference of the matter for arbitration. This is a case where cross appeals have been filed against the orders of 2 Members of the State Commission where each Member has given dissenting judgment on some aspects. Mr. G. Umapathy says that though, the State Commission is fully competent to refer any dispute to arbitration but, this Appellate Tribunal is not empowered. Without deciding this controversy, we deem it proper to keep this point open for future consideration of the matter before this Appellate Tribunal. Thus, Mr. G. Umapathy is against the appointment of some arbitrator by this Appellate Tribunal, so now, we think it proper not to appoint any arbitrator to resolve the dispute because the apprehension of the rival parties is that once the arbitrator give some award, the said award may be challenged in some Civil Court and that may take further a long time. Now, after hearing both the parties and see the nature of the dispute in the cross appeals, we deem it proper to decide these appeals ourselves. Since, these are the cross appeals, which are four in numbers, we direct both the parties to complete the pleadings in these matters within two weeks positively and no more. Post these cross appeals for hearing on 31st March, 2016.”*

*[Emphasis supplied]*

11. These appeals could not be taken up for hearing for final disposal ever since and have remained pending for some reason or the other. They came up before us on 17.01.2020 when learned counsel for the Distribution Companies (appellant in Appeal No. 203 of 2015) re-agitated the question of maintainability arguing that since it concerns jurisdiction, the matter cannot be put under the carpet.

12. On some submissions heard on that day (17.01.2020), we found *prima-facie* merit in the request and set down these appeals for hearing on the question of maintainability, our proceedings reading thus:

*“From the submissions made by the learned counsel on both sides and a perusal of record, particularly the proceedings recorded in these four connected appeals, we find that the "order" under challenge is essentially two dissenting opinions - described as totally contradictory to each other - on crucial issues rendered by two different Members of the State Commission. It appears that the question of maintainability of these appeals against such backdrop was considered, to an extent, by the previous Bench which was in seisin of these matters in 2016. At that stage, it was brought out that there was probably a vacancy in the office of the Chairman of the State Commission which possibly could have been the reason why the matter was not referred to a third Member of the State Commission for final adjudication. A report was also called for, and received, from the Secretary to the State Commission and taken note of at that stage. At the same time, a suggestion seems to have been considered for reference of the dispute to arbitration. One of the parties, however, was not agreeable to the said suggestion and, therefore, such alternative mode of resolution did not work out. It is submitted today by learned counsel on both sides that the State Commission is now fully functional with Chairman and two Members as required being in position. The prime issue, however, persists as to whether two dissenting opinions rendered by the Members of the State Commission in the matter, and which are impugned can be considered as a "decision" rendered on which this Tribunal can sit in appeal. The learned counsel for one of the Appellants i.e. Indian Wind Power Association seeks adjournment for the above issue to be addressed. Be listed for hearing on 05.02.2020.”*

*[Emphasis supplied]*

**13.** The learned senior counsel representing Appellant Indian Wind Power Association has canvassed before us that the Appeals have been properly instituted the challenge (in his submission) being to an “order” properly passed by the State Commission, it being his argument that the diverse opinion of the two Members of the State Commission is inconsequential, the view taken by the senior Member “*bound to prevail*”. In this context, for clarity, we asked him as to whether challenge by the appeals of the party he represents could be restricted to the conclusions (and resultant directions) on which both the Members (of the Commission)

were *ad idem*. He submitted that such approach would not be possible for him to adopt in as much as the grievances raised here primarily concern issues on which contrarian view has been taken, there being no consensus, the result emanating therefrom leaving the appellant dissatisfied.

14. We have heard the learned counsel on both sides at length. We find that appeals are not maintainable as proceedings before the State Commission were not concluded in accordance with law and remain inchoate. We set out our reasons hereinafter.

15. The State Commission is constituted by the State Government in terms of Section 82 of Electricity Act, 2003. It is envisaged as a body corporate consisting of *‘not more than three Members, including the Chairperson’*. It discharges functions set out in Section 86 which include the function to *“adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration”*. The proceedings in context of which the present appeals arise concerned the said adjudicatory function of the State Commission. Such proceedings before the State Commission are governed primarily by the procedure stipulated in Section 92 of Electricity Act, 2003 which reads thus:

“92. **Proceedings of Appropriate Commission.** – (1) *The Appropriate Commission shall meet at the head office or any other place at such time as the Chairperson may direct, and shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meetings) as it may specify.*

(2) *The Chairperson, or if he is unable to attend a meeting of the Appropriate Commission, any other Member nominated by the*

Chairperson in this behalf and, in the absence of such nomination or where there is no Chairperson, any Member chosen by the Members present from amongst themselves, shall preside at the meeting.

(3) All questions which come up before any meeting of the Appropriate Commission shall be decided by a majority of votes of the Members present and voting, and in the event of equality of votes, the Chairperson or in his absence the person presiding shall have a second or casting vote.

(4) Save as otherwise provided in sub-section (3) , every Member shall have one vote.

(5) All orders and decisions of the Appropriate Commission shall be authenticated by its Secretary or any other officer of the Commission duly authorised by the Chairperson in this behalf.”

[Emphasis supplied]

16. Though the rules of procedure for transaction of the business do refer to “quorum”, it is clear even from the bare reading of sub-section (2) of Section 92, as quoted above, that the State Commission may sit to discharge its adjudicatory function, in certain situations, as a Bench of only two Members. This impression is gathered from the permissibility of the two Members sitting “in the absence of” the Chairperson. But, the statutory provision mandatorily expects either the Chairperson or, in his absence, one of the Members to “preside”. This is crucial because it is desirable that the proceedings are productive and decisive. Ordinarily, the Commission would sit with entire composition duly represented and that includes the Chairperson. But, in the event of Chairperson being unavailable, one of the other Members would officiate, in his lieu, and “preside” over the proceedings. Sub-section (3) of Section 92 requires that all decisions be taken “by a majority of votes”, of the Members present and voting. With the Commission working at its full strength –

Chairperson and two Members – decision by “*majority*” is not difficult to achieve. The difficulty, however, would arise if there is a difference of opinion. It is to meet such eventuality where the Bench of the State Commission hearing the matter in adjudication comprises only two Members (irrespective of the fact whether such composition includes the Chairperson or not) who do not concur – such situation bringing about “*equality of votes*”, the law confers upon the “*Chairperson*” or, in his absence, “*the person presiding*” to have a “*second or casting vote*”. This is to ensure that proceedings before the Commission do not end in an impasse. It is clear from this that the casting vote would decide the dispute one way or the other, such “*order*” or “*decision*” required to be authenticated by the Secretary or authorized officer as the case may be.

17. It is trite that when an adjudicatory body comprises of more than one Member, the opinion of each matters and the decision which is rendered is the product of such opinions. Ordinarily speaking, if the views of both Members (we are talking of a two member adjudicatory body) coincide, the decision is unanimous and becomes the decision of the forum. But, there can be situation where the Members of the forum do not agree with each other and decide the *lis* in different ways. So long as the diversion of opinion does not affect the operative part (the directions that eventually emanate), different articulation of reasoning though arriving at the same conclusion would be inconsequential. But, if the divergence of opinion is such that there cannot be a common consensual order as to the relief

granted (or denied), the stalemate has to be broken. In order to obviate occurrence of such situation, there are provisions in certain *fora* for the Bench to comprise of Members in odd numbers (three, five and so on). But, in case, the forum consists of Members in even number (two, four and so on), the matter necessarily requires a third opinion.

18. The provision for meeting last abovementioned contingency in the context of this Tribunal would be an appropriate illustration. We quote Section 123 of Electricity Act, 2003 which reads thus:

*“123. Decision to be by majority. – If the Members of the Appellate Tribunal of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the Appellate Tribunal who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it.”*

19. Something similar happens, under the general civil jurisprudence and to buttress the point we may refer to Section 98 of The Code of Civil Procedure, 1908 which runs thus:

*“98. Decision where appeal heard by two or more Judges. – (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges. (2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:*

*Provided that where the Bench hearing the appeal is composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of*

*the other Judges, the such point shall be decided accordingly to the opinion of the majority (if any) of the Judges who have heard the appeal including those who first heard it.*

*(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters patent of any High Court.*

**20.** Similarly, to take some cue from the criminal law, we may also extract the provision contained in Section 392 of The Code of Criminal Procedure, 1973 which reads thus:

**“392. Procedure where Judges of Court of Appeal are equally divided.** – *When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion:*

*Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges.”*

**21.** What stands out from the statutory provisions of the Electricity Act as indeed the general procedural law, quoted above, is that in a multi-member adjudicatory body, the dispensation of each Member is treated as ‘*opinion*’. It is the “*opinion*” of each Member when joined together, upon convergence, becomes the “*order*” or “*judgment*” of the forum. It is not the “*opinion*” of singular member which prevails. It is the “*opinion*” of each Member, knit together, which constitutes the “*decision*”.

**22.** The Electricity Regulatory Commission is conceived by the law to be a three member body, one of them being the Chairperson. Given the limited strength with which it works, it is quite obvious that in case of a vacancy, or in the event of unavailability of even one Member (not

necessarily the Chairperson) the Commission would be expected to function with reduced strength. It must, however, continue to function effectively. In such a scenario, it is not possible, in the case of divergence of opinion between two members, for the matter to be referred to a third Member. Bearing this in mind, the legislature has chosen the solution of “*casting*” or “*a second*” vote. The philosophy behind this provision remains the same. Two diverse opinions cannot constitute an enforceable decision. Ordinarily, each member has “*one vote*”. But, in case of a stalemate, the Chairperson or, in his absence, the person presiding, is entrusted with a “*second vote*” which would have the effect of “*casting vote*”. This procedure, prescribed by the law, however, must be strictly adhered to.

**23.** It was submitted by learned senior counsel for the Appellant Indian Wind Power association that since the impugned proceedings dated 01.07.2015 concluded with the portion under the heading “*appeal*” referring to what had been set out anterior thereto as an “*order*”, giving the advice of availability of appeal to such person as may feel aggrieved, the said portion having been signed by both the Members holding dissenting opinions, it must be inferred or implied that one of them – the senior one – had exercised second or casting vote in favour of his own opinion, within the meaning of Section 92(3) of Electricity Act, 2003.

**24.** We do not agree with the above line of reasoning. In such matters, virtually concerning interpretation of a quasi-judicial order, there can be no

liberty taken for reading into the document what is not indicated there expressly. The counsel submitted that Mr. S. Nagalsamy was “perhaps” the Member senior to Mr. G. Rajagopal, this being inferred from the fact that the name of the former appears ahead of the latter in the Coram indicated on the opening sheet of the impugned proceedings. We assume what is submitted by the learned counsel to be the correct factual position. But then, nothing turns on this. Section 92(2) & (3) of Electricity Act, 2003 does not refer at all to any larger-than-life role vested in a Member who is senior to the other. Both Members are co-equals. The law, however, stipulates that in the absence or unavailability of the Chairperson, they have to make a choice amongst themselves to decide as to who would “preside”. Generally speaking, the junior Member should have no difficulty in agreeing with the proposition that the senior ought to preside. But then, the choice is theirs to make and this choice has to be recorded formally in the proceedings. In absence of such choice being made, or recorded, one cannot infer only by the test of seniority that the senior Member must have been the one “chosen” to “preside”.

**25.** The proceedings of 01.07.2015 do not indicate in any manner whatsoever that the two Members of the State Commission, faced with the situation of vacancy in the office of Chairperson, had considered the issue as to which of them would “preside”. The proceedings impugned before us are also deficient in as much as there is nothing indicated on record to show that one of the said two Members had cast the “second vote” in

terms of Section 92(3). As said before, we cannot assume that the Member whose opinion is favourable to one side or the other had exercised the casting vote in favour of his own opinion. This is also not the way the appellant understood the proceedings since the prayer (quoted earlier) in the three appeals of Indian Wind Power Association is for the “*order*” of one Member to be “*set aside*” in entirety. If we may add, the casting of second vote also cannot be treated as a mere formality. It would mean considering the divergent view of the other Member and setting out some reasons as to why they were found to be persuasive. After all, reasons are the hallmark of judicious disposition.

**26.** In the above facts and circumstances, the proceedings of 01.07.2015 comprise only of divergent opinions of the two Members. They together cannot constitute an “*order*” within the meaning of the expression used in Section 111 of Electricity Act, 2003. The proceedings before the State Commission, thus, in the matters at hand never came to an end. They remain inchoate.

**27.** The learned senior counsel for the Appellant Indian Wind Power Association has referred to the judgment dated 20.12.2012 in batch of appeals led by Appeal No. 150 of 2011 in the matter of *M/s SLS Power Limited v Andhra Pradesh Electricity Regulatory Commission and Ors.* It was pointed out (from para 2 & 3 of) the said judgment that a similar situation was found to be prevailing (*vis-a-vis* Andhra Pradesh Electricity Regulatory Commission) and that this Tribunal had proceeded to hear the

parties and take a decision on merits of the dispute. The relevant portion of the said judgment reads thus:

“...

2. *When these matters came up before us, the learned counsel for the distribution licensees argued that the appeals filed by the generators were not maintainable as there was no single or majority order by the State Commission and under these circumstances the Tribunal had no alternative but to remand the matter back to the State Commission. On the other hand, the renewable energy generators wanted the Tribunal to decide the matter and fix the tariff.*

3. *We felt that remanding the matter to the State Commission would have meant reconsideration of the matter by the State Commission and possible re-hearing. Further the Technical Member of the State Commission who had passed one of the orders had since retired. In the meantime if the new Technical Member has been appointed then the entire case has to be reheard. The tariff pertains to the period 2004-2009. Even after long drawn legal proceedings right upto the Apex Court resulting in order of remand to the State Commission by the Apex Court the matter has not been resolved as the State Commission has given orders with three different tariffs issued by the three members of the State Commission which could not be implemented. We, therefore, decided to hear the parties and pass necessary directions so that the State Commission could determine a single tariff for each type of renewable energy source.*

...”

*[Emphasis supplied]*

**28.** The learned senior counsel submitted that we must adopt the same course as above particularly because it was with similar view that the Bench earlier dealing with these appeals had decided, by Order dated 18.02.2016 (quoted earlier) to “*decide these appeals ourselves*”.

**29.** We are not persuaded to adopt the course suggested. We note that in the proceedings of 18.02.2016 recorded in these appeals by the previous Bench there are no reasons recorded for deviating from the initial tentative view, as recorded on 11.01.2016 (also quoted earlier), that there

is “no judgment in operation”. In the case of *M/s SLS Power Limited (supra)*, which has been cited before us, we find the prime reason which weighed with the learned Members of the Bench of this Tribunal to proceed to hear and pass necessary directions in the said dispute was the long drawn legal proceedings that the parties had undergone prior to such appeals coming up for adjudication in this forum.

**30.** With respect, we beg to differ. The law has created the adjudicatory machinery and a hierarchy. The adjudicatory forum at each level must discharge its responsibilities in accordance with law. If the course suggested were to be followed, and adopted, or shall we say become the norm, it would amount to permitting abdication of responsibility. What has to be done by Forum of first instance must be done by that Forum alone. If it fails to exercise its jurisdiction, this Tribunal is vested with the power to correct the course.

**31.** We may quote sub-section (6) of Section 111 and Section 121 of Electricity Act, 2003 hereunder:

***“111. Appeal to Appellate Tribunal. --***

...

*(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.”*

***“121. Power of Appellate Tribunal. – The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act.”***

**32.** The jurisdiction conferred by Section 111(6) is akin to the power of revision and that given by Section 121 is of general superintendence. If we find that the State Commission has failed to render final decision as expected of it in law, it is not for us to take over the responsibility and decide the dispute at the stage of appeal. That would not only be improper usurpation of jurisdiction but also set a bad precedent countenancing abdication. Moreover, it would result in a situation where this Appellate Tribunal would be reduced to the status of the forum of first instance rendering the appeal before the Supreme Court (under Section 125 of Electricity Act, 2003) as virtually the first appeal wherein questions of facts could also be raised. That is not a desirable interpretation to adopt.

**33.** To recapitulate, we find that there is no “*order*” rendered by the State Commission in the dispute brought before it. The proceedings of 01.07.2015 which are sought to be impugned by these appeals only consist of two divergent opinions. The two Members are not shown to have taken a call as to which of them is the one chosen to preside. It was thus not decided as to which of the two Members would have the second or casting vote. The proceedings of the State Commission are totally silent and, thus, it has to be concluded that no second or casting vote was ever exercised in these matters. In this view, the proceedings in dispute

before the State Commission remain inconclusive or inchoate and they are yet to be disposed of in accordance with law.

**34.** For the foregoing reasons, we hold that the appeals are not maintainable and must be disposed of accordingly.

**35.** The present proceedings have brought to our notice deficiency in the procedure adopted by the State Commission. In this view, in exercise of the power vested in us by Section 111(6) read with Section 121 of Electricity Act, 2003, we direct the State Commission to take up the matters from which these appeals arose for further proceedings and adjudication in accordance with law. Needless to add, given the time that has lapsed, rendering the dispute a protracted one, it is desirable that the State Commission renders an appropriate decision in the dispute expeditiously.

**36.** In view of the above, we direct the parties to appear before the State Commission for further proceedings as per law on 01.04.2020. The State Commission will be expected to hear the parties and then take an appropriate decision in the dispute at the earliest, preferably within three months of the date fixed by us for the first appearance.

**37.** The issues that came up before us in these appeals are of general importance. In this view, we direct the Registry to transmit copies of this judgment for information and guidance not only to the State Commission

whose decision was impugned herein but also to all other Electricity Regulatory Commissions.

**38.** The appeals are disposed of in above terms. Applications, if any pending, are rendered infructuous and stand disposed of accordingly.

**PRONOUNCED IN THE OPEN COURT ON THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2020.**

**(Justice R.K. Gauba)**  
Judicial Member

**(Ravindra Kumar Verma)**  
Technical Member

*vt*