

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

**Appeal No.183 of 2011**

**Dated 14<sup>th</sup> December, 2012**

**Coram** : Hon'ble Mr. Justice P.S. Datta, Judicial Member  
Hon'ble Mr. V.J. Talwar, Technical Member

**In the matter of:**

1. Bhakra-Beas Management Board (BMBM)  
Sector 19-B, Madhya Marg,  
Chandigarh – 160 019.
2. Punjab State Power Corporation Limited (PSPCL)  
The Mall, Patiala – 147 001.
3. Haryana Vidyut Prasaran Nigam Limited (HVPNL)  
Shakti Bhawan, Sector-6,  
Panchkula, Haryana – 134 109.
4. Himachal Pradesh State Electricity Board Limited (HPSEB)  
VidyutBhwan, Shimla – 171 004.  
Himachal Pradesh.
5. Rajasthan RajyaVidyut Prasaran Nigam Limited (RRVPL)  
VidyutBhawan, Janpath,  
Jaipur – 302 005.

...Appellant(s)

Versus

1. Central Electricity Regulatory Commission  
3<sup>rd</sup>& 4<sup>th</sup> Floor, Chanderlok Building,  
36, Janpath, New Delhi – 110 001.
2. The Finance Secretary (Engineering)  
Union Territory of Chandigarh,  
Sector 9, UT Secretariat,  
Chandigarh – 110009.

...Respondent(s)

Counsel for the Appellant(s) : Mr. M.G. Ramachandran,  
Mr. Anand K. Ganesan and  
Ms. Swapna Seshadri

Counsel for the Respondent(s) : Mr. Jayant Bhushan,  
Mr. Manu Seshadri and  
Ms. Ritu Randeve for R-1

## **JUDGMENT**

### **HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER**

1. **Introduction:-** The appeal presents no complex facts. With a legal history in the background which we will start narrating, it presents a question of law : whether the Central Electricity Regulatory Commission has regulatory powers under Section 79 or any other provisions of the Electricity Act, 2003 (hereinafter to be called as the Act, 2003) of which it is the creation with regard to the generation of electricity from the generating projects and transmission thereof through the transmission lines under the management of the Bhakra-Beas Management Board (hereinafter to be called as the BBMB), the appellant herein. The Central Electricity Regulatory Commission by the order dated 15.9.2011 held that it has jurisdiction under the Act which the appellant contradicts in the present appeal.

2. **Legal History**:- A little over a decade after partition of India, India and Pakistan signed a treaty called Indus Water Treaty, 1960 in terms of which the three eastern rivers namely the Sutlej, the Beas and the Ravi were allotted to India for her exclusive use. A master plan was drawn up to harness the potential of these rivers for irrigation, power generation and flood control. Bhakra and Beas Projects formed the major part of the plan and were established as a joint-venture of the erstwhile state of Punjab and the State of Rajasthan. On reorganisation of the erstwhile State of Punjab on 1<sup>st</sup> November, 1966, Bhakra Management Board (BMB) was constituted under Section 79 of the Punjab Reorganisation Act, 1966(hereinafter to be called as the Act,1966). Later, the administration, maintenance and operation of Bhakra Nangal Project were handed over to Bhakra Management Board (BMB) with effect from 1.10.1967. The Beas Project works were transferred by the Govt. of India from Beas Construction Board (BCB) to Bhakra Management Board (BMB) under Section 80 of the said Act, 1966. As a result of this, Bhakra Management Board (BMB) came to be known as Bhakra-Beas Management Board (BBMB) with effect from 15.5.1976. Since then the BBMB is engaged in regulation of the supply of water and power from Bhakra-Nangal and Beas Projects to the States of Punjab, Haryana, Rajasthan, Himachal Pradesh and the Union Territory of Chandigarh. The appellant no.2 to 5 and the respondent No.2 are the successor

entities of the respective participating States which contributed to the generation and transmission assets forming part of the generation and transmission projects and these assets are now being operated and managed by the BBMB. According to the appellant, the status of the generation and transmission assets, their ownership, the interest of the participating States, the role of the BBMB in managing the assets, the ownership in the units of electricity are statutorily determined under the Punjab Reorganisation Act, 1966 of which Sections 78, 79 and 80 are reproduced below for ascertaining the merits of the appeal.

***“78. Rights and liabilities in regard to Bhakra- Nangal and Beas Projects.***

***(1) Notwithstanding anything contained in this Act but subject to the provisions of sections 79 and 80, all rights and liabilities of the existing State of Punjab in relation to Bhakra- Nangal Project and Beas Project shall, on the appointed day, be the rights and liabilities of the successor States in such proportion as may be fixed, and subject to such adjustments as may be made, by agreement entered into by the said States after consultation with the Central Government or, if no such agreement is entered into within two years of the appointed day, as the Central Government may by order determine having regard to the purposes of the Projects: Provided that the order so made by the Central Government may be varied by any subsequent agreement entered into by the successor States after consultation with the Central Government.***

***(2) An agreement or order referred to in sub- section (1) shall, if there has been an extension or further development of either of the projects referred to in that sub- section after the appointed day, provide also for the rights and liabilities of the successor States in relation to such extension or further development.***

*(3) The rights and liabilities referred to in sub-sections (1) and (2) shall include—*

*(a) the rights to receive and to utilise the water available for distribution as a result of the projects, and*  
*(b) the rights to receive and to utilise the power generated as a result of the projects, but shall not include the rights and liabilities under any contract entered into before the appointed day by the Government of the existing State of Punjab with any person or authority other than Government.*

*(4) In this section and in sections 79 and 80,--*

*(A) " Beas Project" means the works which are either under construction or are to be constructed as components of the Beas-Sutlej Link Project (Unit I) and Pong Dam Project on the Beas river (Unit II) including--*

*(i) Beas- Sutlej Link Project (Unit I) comprising--*

*(a) Pandoh Dam and works appurtenant thereto,*

*(b) Pandoh- Baggi Tunnel,*

*(c) SundernagarHydel Channel,*

*(d) Sundernagar- Sutlej Tunnel,*

*(e) By- pass Tunnel,*

*(f) four generating units each of 165 M. W. capacity at Dehar Power House on the right side of Sutlej river,*

*(g) fifth generating unit of 120 M. W. capacity at Bhakra Right Bank Power House,*

*(h) transmission lines,*

*(i) Balancing Reservoir;*

*(ii) Pong Dam Project (Unit II) comprising--*

*(a) Pong Dam and works appurtenant thereto,*

*(b) Outlet Works,*

*(c) Penstock Tunnels,*

*(d) Power plant with four generating units of 60 M. W. each;*

*(iii) such other works as are ancillary to the works aforesaid and are of common interest to more than one State;*

*(B) " Bhakra- Nangal Project" means--*

*(i) Bhakra Dam, Reservoir and works appurtenant thereto;*

*(ii) Nangal Dam and Nangal- Hydel Channel;*

- (iii) Bhakra Main Line and canal system;*
- (iv) Bhakra Left Bank Power House, Ganguwal Power House and Kotla Power House, switchyards, sub- stations and transmission lines;*
- (v) Bhakra Right Bank Power House with four units of 120 M. W. each.*

**79. Bhakra Management Board.**

*(1) The Central Government shall constitute a Board to be called the Bhakra Management Board for the administration, maintenance and operation of the following works, namely:--*

- (a) Bhakra Dam and Reservoir and works appurtenant thereto;*
- (b) Nangal Dam and Nangal- Hydel Channel up to Kotla Power House;*
- (c) the irrigation headworks at Rupar, Harike and Ferozepur;*
- (d) Bhakra Power Houses: Provided that the administration, maintenance and operation by the said Board of the generating units of the Right Bank Power House as have not been commissioned shall commence as and when any such unit has been commissioned;*
- (e) Ganguwal and Kotla Power Houses;*
- (f) Sub- stations at Ganguwal, Ambala, Panipat, Delhi, Ludhiana, Sangrur and Hissar and the main 220 KV transmission lines connecting the said sub- stations with the power stations specified in clauses (d) and (e); and*
- (g) such other works as the Central Government may, by notification in the Official Gazette, specify.*

*(2) The Bhakra Management Board shall consist of--*

- (a) a whole- time Chairman and two whole- time members to be appointed by the Central Government;*
- (b) a representative each of the Governments of the States of Punjab, Haryana and Rajasthan and the Union territory of Himachal Pradesh to be nominated by the respective Governments or Administrator, as the case may be;*
- (c) two representatives of the Central Government to be nominated by that Government.*

*(3) The functions of the Bhakra Management Board shall include--*

*(a) the regulation of the supply of water from the Bhakra-Nangal Project to the States of Haryana, Punjab and Rajasthan having regard to--*

*(i) any agreement entered into or arrangement made between the Governments of the existing State of Punjab and the State of Rajasthan, and*

*(ii) the agreement or the order referred to in sub-section (1) of section 78;*

*(b) the regulation of the supply of power generated at the power houses referred to in sub-section (1) to any Electricity Board or other authority in charge of the distribution of power having regard to--*

*(i) any agreement entered into or arrangement made between the Governments of the existing State of Punjab and the State of Rajasthan,*

*(ii) the agreement or the order referred to in sub-section (1) of section 78; and*

*(iii) any agreement entered into or arrangement made by the existing State of Punjab or the Punjab Electricity Board or the State of Rajasthan or the Rajasthan Electricity Board with any other Electricity Board or authority in charge of distribution of power before the appointed day in relation to the supply of power generated at the power houses specified in sub-section (1);*

*(c) the construction of such of the remaining works connected with the Right Bank Power House as the Central Government may specify;*

*(d) such other functions as the Central Government may, after consultation with the Governments of the States of Haryana, Punjab and Rajasthan, entrust to it.*

*(4) The Bhakra Management Board may employ such staff as it may consider necessary for the efficient discharge of its functions under this Act:*

*Provided that every person who immediately before the constitution of the said Board was engaged in the construction, maintenance or operation of the works in sub-section (1) shall continue to be so employed under the Board in connection with the said works on the same terms and conditions of service as*

*were applicable to him before such constitution until the Central Government by order directs otherwise:*

*Provided further that the said Board may at any time in consultation with State Government or the Electricity Board concerned and with the previous approval of the Central Government return any such person for service under that Government or Board.*

*(5) The Governments of the successor States and of Rajasthan shall at all times provide the necessary funds to the Bhakra Management Board to meet all expenses (including the salaries and allowances of the staff) required for the discharge of its functions and such amounts shall be apportioned among the successor States, the State of Rajasthan and Electricity Boards of the said States in such proportion as the Central Government may, having regard to the benefits to each of the said States or Boards, specify.*

*(6) The Bhakra Management Board shall be under the control of the Central Government and shall comply with such directions, as may from time to time, be given to it by that Government.*

*(7) The Bhakra Management Board may with the approval of the Central Government delegate such of its powers, functions and duties as it may deem fit to the Chairman of the said Board or to any officer subordinate to the Board.*

*(8) The Central Government may, for the purpose of enabling the Bhakra Management Board to function effectively, issue such directions to the State Governments of Haryana, Punjab and Rajasthan and the Administrator of the Union territory of Himachal Pradesh or any other authority, and the State Governments, Administrator or authority shall comply with such directions.*

*(9) The Bhakra Management Board may, with the previous approval of the Central Government and by notification in the Official Gazette, make regulations consistent with this Act and the rules made thereunder, to provide for--*

*(a) regulating the time and place of meetings of the Board and the procedure to be followed for the transaction of business at such meetings;*

- (b) delegation of powers and duties to the Chairman or any officer of the Board;*
- (c) the appointment, and the regulation of the conditions of service, of the officers and other staff of the Board;*
- (d) any other matter for which regulations are considered necessary by the Board.*

#### *80. Construction of Beas Project.*

*(1) Notwithstanding anything contained in this Act or in any other law, the construction (including the completion of any work already commenced) of the Beas Project shall, on and from the appointed day, be undertaken by the Central Government on behalf of the successor States and the State of Rajasthan:*

*Provided that the Governments of the successor States and the State of Rajasthan shall at all times provide the necessary funds to the Central Government for the expenditure on the project[ including the expenses of the Board referred to in sub- section (2)] and such amounts shall be apportioned among the successor States and the State of Rajasthan in such proportion as may be fixed by the Central Government after consultation with the Governments of the said States.*

*(2) For the discharge of its functions under sub- section (1), the Central Government may—*

- (a) by notification in the Official Gazette and in consultation with the Governments of the successor States and the State of Rajasthan, constitute a Board to be called the Beas Construction Board with such members as it may deem fit and assign to the Board such functions as it may consider necessary; and*
- (b) issue such directions to the State Governments of Haryana, Punjab and Rajasthan and the Administrator of the Union territory of Himachal Pradesh or any other authority, and the State Governments, Administrator or other authority shall comply with such directions.*

*(3) The notification constituting a Board under clause (a) of sub-section (2) may empower the Board to appoint such staff as may be necessary for the efficient discharge of its functions:*

*Provided that every person who immediately before the constitution of the Board was engaged in the construction or any work relating to the Beas Project shall continue to be so employed by the Board in connection with the said works on the same terms and conditions of service as were applicable to him before such constitution until the Central Government by order directs otherwise:*

*Provided further that the Board may at any time in consultation with the State Government or the Electricity Board concerned and with the previous approval of the Central Government return any such person for service under that Government or Board.*

*(4) Nothing contained in this section shall be construed as enabling the Central Government to reduce or enlarge the scope of the Beas Project as agreed to between the Governments of the State of Rajasthan and the existing State of Punjab except after consultation with the Governments of the States of Haryana, Punjab and Rajasthan.*

*(5) Any component of the Beas Project in relation to which the construction has been completed after the appointed day may be transferred by the Central Government to the Board constituted under section 79 whereupon the provisions of that section shall apply as if it were a work included in sub-section (1) of that section.*

*(6) The Bhakra Management Board constituted under section 79 shall be re-named as the Bhakra Beas Management Board when any of the components of the Beas Project has been transferred under sub-section (5), and the Beas Construction Board shall cease to exist when all the components of the Beas Project have been so transferred.*

3. Further, the Act, 1966 gives a statutory division of the public debt of the existing State of Punjab attributed to the Bhakra Nangal and Beas Projects as under:-

*“The public debt of the existing State of Punjab attributable to loans taken from the Central Government for the Beas Project and the Bhakra-Nangal Project as defined in sub-section (4) of section 2007-08 shall be divided between the successor States in such proportion as maybe agreed upon between them, or if no agreement is entered into within two years from the appointed day, as may be fixed by order of the Central Government”.*

4. **Case of the Appellant:-** In the conspectus of the aforesaid legal position, it is the case of the appellant that the BBMB is only an agent of the participating Governments and their Electricity Boards to manage, maintain and operate the generating station as also the transmission lines together with assets as provided for in sections 78 to 80 of the said Act, 1966. In other words, the ownership of the generating stations and the transmission assets belong to the participating States and the BBMB is not the owner thereof. The ownership of the assets belongs to the participating States and also in some respects to the State of Rajasthan by operation of law. The beneficiaries of the electricity generated by the generating stations and the transmission lines and assets have been the Electricity Boards or such entities of the participating States. In the circumstance, it is contended that the BBMB does not generate

electricity, nor does it supply electricity to the participating States, nor does it conduct or undertake business of inter-state transmission of electricity on a principal to principal basis but acts only as an agent of the States. The BBMB as such is not concerned with financial gain or financial loss; it is not concerned with financial risk because all expenses are met by the participating States. Neither there is gross block of assets of the BBMB nor does it incur any capital expenditure or additional capitalization. The capital expenditure is to the account of the participating States. Evidently, the concepts of Return on Equity or interest on loan or depreciation or incentives which are the essential components of a generation company or a transmission licensee do not apply to the BBMB. No equity capital is contributed by the participating States to the BBMB. The expenses incurred by the BBMB are paid for by the participating States. So far as the transmission network is concerned, the BBMB only manages the transmission network and ensures its connectivity to the generating stations for the purpose of evacuation of power up to the periphery of the participating States; even the consultancy work undertaken by the BBMB is only with the approval of the participating States and the revenues earned is accounted for towards the benefit of the participating States. Thus, the unit of energy generated does not belong to the BBMB which is merely an operating and management entity. The transmission lines are primarily dedicated

transmission lines connected to the generating stations for evacuation of power up to the periphery of the participating States and such transmission lines do not require any license and they are not subjected to regulatory control under Section (79) (1) (c ) and (d) of the said Act. In so far as the transmission of electricity for the above purpose is concerned it is contended that the use of such transmission lines for others such as the transmission of power of the Central Public Sector Utilities is in regard to the surplus capacity available in the transmission system after meeting the dedicated use of the appellants nos. 2 to 5 and respondent No.2 and revenues from such use is accounted for the benefits of appellants 2 to 5. The BBMB does not have any claim to appropriate the revenues to its favour. It is the case of the appellant that to the extent the surplus capacity of the transmission lines is utilized for the transmission of the power for the Central Public Section Utilities such lines can be considered as inter-state transmission system as a result of which the appellants nos. 2 to 5 and the respondent No.2 may be considered as deemed transmission licensees and the use of such intervening transmission lines is by virtue of Section 34 and Section 35 of Electricity Act, 2003. It is only in terms of the decision of the participating States that power is given to National Fertilizers Ltd., Nangal fertilizer factory in Punjab, Union Territory of Chandigarh and the old Himachal Pradesh out of the common pool and the revenues

accrued therefrom are duly accounted for to the credit of the appellants nos. 2 to 5 and not to the BBMB. It is contended that the status of the generating stations and transmission assets operated and maintained by the BBMB have been considered and decided by the Hon'ble Supreme Court in Original Suit no. 2 of 1996 decided on 27.9.2011. The generating station and the transmission system under the management of the BBMB are in the nature of group captive and group transmission systems of which the participating States are co-owners or joint owners and are entitled to the proportionate share in the electricity so generated. In Petition No.116 of 2006, the Central Commission had occasion to consider as to whether it would be proper to bring the power stations under the management of the BBMB within the purview of Unscheduled Inter-change Mechanism. The Central Commission by order dated 25.9.2007 took cognizance of the special status of the BBMB and observed that "*We clarified that the BBMB power stations are owned by partner states and availability based tariff cannot be implemented on the BBMB power stations as these stations do not have fixed and variable charges.*" In terms of Section 79 of the Act, the Central Commission has notified the Indian Electricity Grid Code whose objective and purpose are reproduced below:-

*"The Indian Electricity Grid Code (IEGC) is a regulation made by the Central Commission in exercise of powers under clause (h) of sub-section (1) of Section 79 read with clause (g) of sub-section*

*(2) of Section 178 of the Act. The IEGC also lays down the rules, guidelines and standards to be followed by various persons and participants in the system to plan, develop, maintain and operate the power system, in the most secure, reliable, economic and efficient manner, while facilitating healthy competition in the generation and supply of electricity.”*

Thus, the IEGC applies to all entities irrespective of whether they are under the regulatory control of the Central Commission, but for that it cannot be said that the dedicated transmission system, the generating stations and the transmission systems which are owned by the participating States and not by the BBMB do come under the regulatory control and supervision of the Central Electricity Regulatory Commission. Thus, to the limited extent and purpose as noted above, the BBMB's transmission system has been treated as Inter-State Transmission System while the generating stations under the management of the BBMB have been treated as Intra-State Generating System. Moreover, the BBMB is essentially an irrigation project, generation being incidental to irrigation. Without going into and appreciating the salient aspects as above, and without issuing any notice to the appellants and giving them an opportunity of being heard, the Commission by initiating a *suo-motu* proceeding being Petition No.181 of 2011 passed the order impugned dated 15.9.2011 holding therein that the appellant no.1 comes under the jurisdiction of Central Electricity Regulatory Commission. Hence, the appeal.

5. **Reply of the CERC**:- The respondent no.1, the Central Electricity Regulatory Commission in its reply first refers to the objective of the Electricity Act, 2003 by quoting the preamble of the Statute and then refers to the decision of the Hon'ble Supreme Court in *PTC India Ltd. vs. Central Electricity Regulatory Commission {JT2010 (3) SC 1}* to submit that the Electricity Act, 2003 is an exhaustive code on all matters concerning electricity. As such, all aspects relating to generation, transmission, distribution and trading of electricity are governed by the provisions of the Act and section 173 of Act gives the Statute an overriding power. It quotes sections 174 and 175 in support of its contention that whatever has been provided for in any other law for the time being in force or in any instrument having the force of law will not take effect when they would be found inconsistent with and repugnant to the provisions of the Electricity Act, 2003 in respect of which the Central Commission has predominant role to play. A decision of the Hon'ble Supreme Court in *Gujarat UrjaVikas Nigam Ltd. Vs. Essar Power Ltd. (2008) 4 SCC 755* has been quoted very extensively. When any other Statute or any instrument having the force of Statute is not in conflict with the Electricity Act, 2003 then both the Acts will have their corresponding role to play in their respective spheres. Then the Commission in paragraph 7 of the reply reproduces section 79 of the Act

wherein the powers and functions of the Central Commission have been delineated. Paragraph 8 refers to section 178 of the Act to say that it has the power to make Regulations to carry out the provisions of the Act. It then refers to sections 61 and 62 of the Act somewhat in great details to aver that it has powers to determine tariff consonant with the provisions of section 178 (2) (s) of the Act and it has also power to determine tariff for Inter-State Transmission of electricity under section 79 (1)(d) of the Act.

6. Then the Commission turns to Section 79 and 80 of the Punjab Reorganisation Act, 1966 relating to the constitution of Bhakra Management Board and then the BBMB. It is now contended that under section 79 (3) of the 1966 Act, the BBMB has been vested with the power to regulate supply of power generated at its power houses to any Electricity Board or such other authority in charge of distribution of electricity having regard to the agreements by the participating States and the Electricity Boards. Thus, the function of regulation of supply of power by the BBMB to the electricity Boards or distribution companies is relatable to the regulation of power under section 79(1) (a) of the Act read with section 62(1) (a) thereof. Therefore, section 79 (3) of the 1966 Act being inconsistent with the provision of section 79 (1) (a) read with section 62(1) (a), the provisions of the Electricity Act, 2003 shall prevail

by virtue of section 174 of the Electricity Act, 2003. Accordingly, the Central Commission is the competent authority to regulate and determine the tariff of the generating stations of the BBMB, notwithstanding anything contrary in 1966 Act.

7. The BBMB has a transmission network of 3705 circuit km of 400 kV, 220 kV, 132 kV and 66 kV transmission lines and 400 kV and 220 kV sub-stations for supply of power from the power houses to the States of Punjab, Rajasthan, Haryana, Himachal Pradesh, Delhi and Union Territory of Chandigarh. Therefore, these lines are in the nature of Inter-State Transmission System which has been defined in section 2(36) of the 2003 Act. Since the transmission lines of the BBMB are carrying the power from the territory of one State to another, they are covered under section 2 (36) (1) of the Act. Therefore, determination of transmission tariff of such transmission system of the BBMB is within the exclusive domain of the Central Electricity Regulatory Commission under section 79 (1)(c) & (d) of the Act.

8. It is the understanding of the Central Commission that after the Act, 2003 came into operation with effect from 10.6.2003, all the matters of regulation and determination of tariff of the generating stations and transmission systems shall be carried out by the Appropriate

Commission in accordance with the said Act. Accordingly, the tariff of the generating stations and transmission systems of the appellant no.1 should be determined by the Appropriate Commission and in the light of the averments made in the foregoing paragraphs by the Central Commission it is submitted that the impugned order has been validly passed by the Central Commission directing the appellant no.1 to file the tariff petitions before it.

9. The violation of natural justice as alleged by the appellant is misnomer as no prejudicial order has been passed as yet and simply the appellant has been asked to file tariff application.

10. **Rejoinder of the Appellant**:- The appellant filed a rejoinder to the reply of the Central Commission but the said rejoinder only recapitulated and reiterated what has been averred in the Memorandum of Appeal and what will be found from the oral submission of Mr. Ramachandran, learned advocate appearing for the appellant which will be in the paragraphs below narrated.

11. **Issue for consideration**:- Upon the pleadings as aforesaid, the only point for consideration is whether the Central Electricity Regulatory Commission has jurisdiction under the Electricity Act, 2003 over the

matters relating to generation and transmission of electricity under the management of the appellant, the BBMB. The question of natural justice as has been raised by the appellant because of the order having been passed admittedly without hearing the appellant will also be dealt with at the appropriate place of this judgement.

12. **Oral submissions of the Appellant** :- Now, Mr.M.G. Ramachandran, learned advocate appearing for the appellant makes the following submissions which are quite elaborative of what have been averred in the Memorandum of Appeal:-

- a) The BBMB as such is neither a generator, nor a transmitter, nor a distributor nor a trader or user of electricity within the meaning of the Electricity Act, 2003. The role of the BBMB can be conceived of being an agent or a trustee appointed under the Punjab Reorganisation Act, 1966 for the purpose of Operation and Maintenance of the generating station and transmission lines for and on behalf of and also at the cost of the participating States who really are the legal owners thereof.
- b) The Central Electricity Regulatory Commission has overlooked and rather misunderstood the provisions of sections 78, 79 and 80 of the Act, 1966 which conclusively establish that the BBMB had not been vested with the ownership of the generating station and the transmission lines.
- c) It is not that the BBMB is supplying, that is, selling electricity generated as the owner of electricity to the participating States.

- d) The Central Electricity Regulatory Commission has now taken a stand contradictory to its order dated 25.9.2007 in connection with the proceeding relating to unscheduled inter-change where it observed inter alia as follows:-
- “ We clarified that the BBMB power stations are owned by partner states and availability based tariff cannot be implemented on the BBMB power stations as these stations do not have fixed and variable charges.”*
- e) Similarly, in a letter dated 29.8.2003 in connection with Sardar Sarovar Case, the Central Commission had specifically stated that it had no jurisdiction over the matter.
- f) Sub-section (1) of section 78 of the Act,1966 specifically provides that all rights and liabilities of the existing State of Punjab in relation to Bhakra Nangal Project and Beas Project shall be the rights and liabilities of the successor States and the expression “existing State of Punjab” means the State of Punjab as was existing immediately before the appointed day which is the date of coming into effect of the Act,1966.Now, the successor States extend to the State of Haryana, the State of Punjab as at present, the State of Himachal Pradesh, the State of Rajasthan and to the Union Territory of Chandigarh. Obviously, as on the date of the reorganisation, the BBMB was not in existence and on the date of reorganisation, the ownership of these projects with all rights and liabilities vested in the existing State of Punjab and Rajasthan. The rights and liabilities as also the ownership of the Bhakra-Nangal Project and the Beas Project were not established or acquired for the first time after coming into force of the Act, 1966. Thus, the BBMB cannot be said to be the owner of the generation

project or the transmission lines. Section 78(1) of the Act did not vest any ownership into the BBMB. This section provides for substitution of the successor States for the existing State of Punjab to the extent of ownership, rights and liabilities in relation to the Bhakra-Nangal Project and the Beas Project.

- g) On the date of the reorganisation, the BBMB was not in existence as it was created and constituted only under the Reorganisation Act. Thus, admittedly the rights and liabilities in respect of Bhakra-Nangal Project and Beas Project existing on the date of reorganisation had vested in the then existing States of Punjab and Rajasthan and not in the BBMB. In terms of section 78(1) of the Act, the rights and liabilities of the existing State of Punjab became the rights and liabilities of the successor States by the operation of law on the appointed date. By virtue of section 78(1) of the Act, the BBMB did not acquire any right, interest or liability in respect of the said projects. Thus so far as the ownership of generating station and the transmission lines are concerned, the BBMB was/is not the owner thereof.
- h) Section 78(3) of the Act deals with right to receive and utilize water or power from the projects but it does not imply that the generating project or the assets relating to the water management belong to the BBMB. It is the successor States alone who have the entitlement to the electricity and the water. Thus sub-sections (1) & (2) of section 78 have to be read in conjunction with sub-section (3) of that section because the latter sub-section cannot be interpreted to mean that the BBMB is the owner of the generating station and the transmission lines.

- i) The BBMB is virtually the creature of section 79 (1) of the Act by virtue of which administration, maintenance and operation of the generating station were entrusted with the BBMB.
- j) The term 'regulation of supply of power generated' cannot be read independent of the reference to sub-section (1) of section 79 and, therefore, the term 'supply of power' cannot be construed as transfer of ownership of power generated by the BBMB to the successor States. Sub-section (3) (b) cannot again be construed in isolation. If the BBMB was never the owner of the generating station or the power houses, there cannot be any sale of power by the BBMB as owner or transfer of power to the successor States.
- k) The reference in section 79 (3) (b) to the Electricity Board or other Authority in charge of the distribution of power does not mean that there is a sale of power by the BBMB to the successor States. The States are entitled to nominate or authorise its entity which is undertaking the distribution of power to utilise the power generated at the power houses for maintaining the supply to the public at large. It is in this context that there is reference to the Electricity Board or the Authority in charge of the distribution of power in sub-section (3) (b) of section 79. Even before the Reorganisation Act, the power generated at Bhakra-Nangal Project was being given to the Punjab State so long the distribution of power was undertaken by the Department of the Government of Punjab and subsequently to Punjab State Electricity Board, the functions were taken over by the Punjab State Electricity Board upon the constitution under the Electricity (Supply) Act, 1948.
- l) The allocation of the right to receive electricity by the States or the State instrumentality was by the State Governments having the right under the Act read with the provisions of the Electricity

(Supply) Act, 1948. The contention of Central Commission that there is possibly a transfer of power generated by the State to the State instrumentality is factually wrong.

- m) Sub-section (5) of section 80 providing for transfer by the Central Government of the Beas project to the Board does not imply vesting in the BBMB of the rights and liabilities of the Beas Project.
- n) The contention of the Central Commission that the BBMB incurs expenditure on operation and maintenance of the various projects and transmission lines and accordingly the BBMB is the owner of the generating station and the transmission lines is misconceived in view of sub-section (5) of section 79. In terms of section 79(5) the successor States including the State of Rajasthan are required to provide necessary funds to meet all the expenses including salaries and allowances of the staff for discharge of its functions. The amount to be paid by the successor States and the State of Rajasthan are allocated to the States in a specified proportion. If there was a consideration for sale of power and, therefore, the supply of power by the BBMB, there was no necessity to have a provision such as sub-section (5) of section 79. Thus, the status of the BBMB is like an agent or a trustee to look after the interest of the successor States. There is only reimbursement of the actual cost and expenditure incurred by the BBMB.
- n) The BBMB has so far not incurred any capital expenditure or expenditure in the nature of renovation, modernisation, O & M etc. from its own resources. The BBMB's statement of assets and liabilities does not have any of the power houses or transmission lines as part of their assets. The BBMB does not borrow any money from the banks or financial institutions.

- o) Each of the successor States in their respective statement of account filed before the respective State Commission clearly account for the assets and the liabilities in the form of expenditure contribution to the BBMB. Section 80 of the Act provides for the capital expenditure of the uncompleted Beas Project to be made available by the successor States. Section 54 of the Act speaks about the allocation of the existing debt.
- p) Most of the Class I and Class II members of the staff serve the BBMB on deputation made by the State Utilities and only a few members of the staff have been recruited on the role of the BBMB, but the salaries and allowances of all such members of the staff are made by the successor States according to the ratio of proportion.
- q) The regulatory jurisdiction of the Commission does not extend to the situation where a generation company supplies electricity to a consumer direct, and the contention of the Central Commission that the provisions of section 54 of the transfer of Property Act dealing with sale can be invoked is wrong because of the fact that section 54 pre-supposes existence of an owner which undoubtedly the BBMB is not in respect of the generating station and the transmission lines. The re-imbusement of the expenses does not amount to payment of consideration for the sale of property. For example, if a person engages a contractor to construct and make available certain facilities and is reimbursed expenses, the contractor does not become the owner or it does not amount to sale of property by the contractor. Above all, section 54 of the Transfer of Property Act applies to immovable property and not to movable property.

- r) The concept of the word 'supply' as used in section 79 (3) (b) of the Reorganisation Act is not the same concept as is found in section 2(70) of the Electricity Act, 2003 because in the latter the word is synonymous with sale which is not attracted in the former as in the former no sale happens and what happens is availability of supply to the participating States from the generating station and use of the word 'supply' here means supply as is understood in common parlance.
- s) The Commission has wrongly contended that there is sale of electricity by the BBMB to the consumers like Nangal Fertilizers Ltd.. Supply to this project had been continuing prior to the coming into force of the Act, 1966 and is protected by section 78 (3) (b) of the Act, 1966. Such supply to Nangal Fertilizers Ltd. became the supply by the participating States when the Act, 1966 came into force and prior thereto it was actually a supply by the erstwhile State of Punjab. Thus, the supply to Nangal Fertilizers Ltd. is not by the BBMB by virtue of the Reorganisation Act, 1966, and moreover, the total revenue realised from Nangal Fertilizers Ltd. is apportioned to and accounted for the participating States in the same manner as in the case of liabilities, expenses etc. Again, the quantum of sale to Nangal Fertilizers Ltd. is less than 0.2% of the installed capacity of the generating stations maintained by the BBMB.
- t) Except for the O&M expenses format, no other component of tariff is involved in the case of the BBMB and such O&M expenses are by virtue of reimbursement.
- u) The BBMB cannot be compared to the Damodar Valley Corporation (DVC) because the DVC is a deemed licensee selling electricity not only to the States of West Bengal and Jharkhand but

also to the States of Madhya Pradesh, Delhi etc.. The DVC has the equity capital of the participating States of West Bengal and Jharkhand. Sections 12 (b), 20, 22 (2), 27, 28, 29 30, 35, 37, 40, 42 and 43 of the DVC Act will clearly bring out the distinction between the functional approach of the DVC and that of the BBMB.

- v) So far as the transmission lines are concerned, they are akin to the dedicated transmission lines connected to the generating station for evacuation of power up to the periphery of the participating States. Such transmission lines are not inter-state transmission lines requiring license under the Act, 2003. The ownership of the lines also rests with the participating States. In any event such lines are owned by the participating states and not by the BBMB. The flow of power on such transmission lines for others after meeting the dedicated use of Appellants 2 to 5 and respondent No.2 is due to the integrated nature of the grid. If any revenues from such use are received, it is accounted for the benefits of appellants 2 to 5. The BBMB does not have any claim to appropriate the revenues to its favour. This aspect has also been recognised by the Central Commission in the Order dated 14.3.2002 where the network of lines from the BBMB to the State periphery has been treated as one and the Central Commission has only directed the BBMB to file petition for determination of POC charges for the lines which are not part of this network.
- w) While making the impugned order the Commission has absolutely given goodbye to the principle of natural justice in as much as the question of jurisdiction has been finally decided without hearing the appellant and the order does not even provide for a post decisional opportunity to the appellant of being heard on the issue of

jurisdiction. Mr. Ramachandran has in this connection referred to the decisions of the Hon'ble Supreme Court in *Shekhar Ghosh vs. Union of India & Anr. (2007) 1 SCC 33*.

- x) The Commission after perusal of the Memorandum of Appeal has taken a stand different from what was observed in the impugned order. Now they say that since the BBMB has been vested with the power to regulate supply of power generated to the Electricity Boards in terms of section 79 (3) of the Act, 1966 and since such supply is akin to the generation and supply of electricity in terms of the Electricity Act, 2003 the BBMB falls within the jurisdiction of the Central Commission. The impugned order proceeded on the footing that the BBMB was the owner of the generating station and the transmission lines. So far as the transmission lines are concerned, they are dedicated transmission lines belonging to the participating States.

13. **Oral submission of the CERC:-** Mr. Jayant Bhushan, learned senior advocate appearing for the Commission makes the following submissions:-

- a) The question of violation of natural justice is misnomer because by the impugned order the appellant has been simply asked to put in a tariff application in respect of which opportunity of hearing to the appellant would automatically follow and at that time the appellant will not lose any opportunity of making the submission that the authority asking it to file tariff application is without any jurisdiction to do so on the ground that the Commission does not have jurisdiction to regulate the functions of the BBMB and further

that the provisions of the Electricity Act, 2003 have no manner of application to the BBMB and that the BBMB is to be governed by the Punjab Reorganisation Act, 1966. It is not that the Commission had in its mind to deny opportunity of hearing to the appellant. The Commission has jurisdiction to initiate *suo-motu* proceeding and pass appropriate order accordingly as it may deem fit and proper. Moreover, the question of denial of natural justice as raised in course of submission by the appellant loses all its force and the entire question has now become academic at the end of the day because of the fact that the Tribunal has comprehensively heard both the parties covering aspects of both law and facts in respect of the question of the jurisdiction of the Central Commission over the BBMB and when the Tribunal has heard in full and at great length covering the entire gamut of the case, there is no point in cavilling that it lost an opportunity of being heard before the Commission and that the order impugned suffers from punitiveness. It is not necessary that an order directing a party to file tariff application should be passed upon hearing the party. The Electricity Act, 2003 does not mandate the Central Commission to give a hearing to the party before it asks an entity by an order in writing to file tariff application.

- b) The Electricity Act, 2003 is a special Act, a comprehensive code over the subject relating to generation, transmission, distribution, trading and use of electricity and it has an all-pervasive character by virtue of which it overrides the Punjab Reorganisation Act, 1966 to the extent of the provisions of sections 78, 79 and 80 of the said Act and wherever inconsistency would arise between the two Acts, it is the Electricity Act, 2003 that will prevail and the decisions in *KSL and Industries Ltd. Vs. Arihant Threads Limited reported in*

(2008) 9 SCC 763, *Shri Sarwan Singh and another. vs. Shri Kasturi Lal* reported in (1977) 1 SCC 750 and *LIC Vs. D.J. Bahadur and Ors.* reported in (1981) 1 SCC 315 have been referred to in this connection.

- c) It may be that all the usual components of tariff may not be available with the BBMB but as it appears from the submission of the appellant that O&M expenses, one of the components of tariff, only occupies the field of the BBMB, the BBMB may, therefore, be legitimately asked to file a tariff petition keeping in mind the peculiar circumstances applicable to the BBMB and then the Commission will decide how to determine tariff in the case of the BBMB.
- d) The Central Commission has jurisdiction over the BBMB in terms of section 62 (1) (a) read with section 79 (1) (a) of the Electricity Act, 2003. The definition of the word 'supply' as it occurs in section 2 (70) of the Electricity Act, 2003 is not applicable in the context of the use of the word in section 62 (1) (a) because the section 2 begins with the words "*unless the context otherwise requires.*" The definitions in the Act are subject to the contrary context and need not be made applicable to the use of that word in every section of the Act. Reliance has been placed on the decision of the Supreme Court reported in *AIR 1960 SC 971 and G.P. Singh's Principles of Statutory Interpretations (9<sup>th</sup> Edition)*. When the word 'supply' is used in section 62, it may not necessarily mean sale. If it is held that the BBMB is not the owner of the electricity and that the supply is made on behalf of the States which are the owners of the electricity, the result will be that the sale is made on behalf of the State to the distribution licensees. Theoretically this would mean that there is a tariff

fixation for this supply from each of these States to the distribution licensees concerned. The tariff fixation could therefore be done with respect to supply from the State of Punjab to the distribution licensees by the Punjab Electricity Regulatory Commission and supply from State of Himachal Pradesh to the distribution licensees by the Himachal Pradesh Electricity Regulatory Commission and so on by each respective State Electricity Regulatory Commission. This tariff fixation would go into the correctness of the accounts of operation and maintenance of the BBMB, since the States keep no such accounts and incur no such expenses nor are any payments made to the States. Thus, theoretically each State Commission will independently go into the correctness of the very same accounts of the BBMB. Also the BBMB may not be a party to these proceedings at all.

- e) Alternatively, it is submitted that there is in fact sale by the BBMB to the distribution licensees and reference to section 79 (1), 79 (3) (b), 79 (3) (c), 80 (5) and 80 (6) of the Reorganisation Act, 1966 would make it clear that the entire project and all the assets connected therewith stand vested in the BBMB and thus statutorily it is the owner of the assets. Supply by the BBMB to the distribution licensees would, therefore, amount to sale and thus fulfil the requirements of section 2 (70) of Electricity Act, 2003.
- f) The distribution utilities normally pass on costs incurred in procurement of power to the consumers who ultimately have to bear the burden of payment of whatever price is paid to the generating company by the distribution company. Even, if the BBMB only maintains the charges, it is important that the charges that are broadly passed on to the consumers are nothing more than the actual charges incurred. As on the day, the accounts of

the BBMB are not scrutinised by any independent regulator who can certify as to whether the amount of power as being passed on to the consumer are the actual expenses incurred by the BBMB or not. It is, therefore, necessary and desirable that as per the scheme of the Electricity Act, 2003, prudence check of the expenses and tariff fixation is done by an independent regulator so as to ensure that the actual incurred expenses have been passed on to the consumers. The decisions relied on by the appellant are not relevant for the purpose of disposal of appeal.

- g) The BBMB has transmission network of 3705 circuit km of 400 kV, 220 kV, 132 kV and 66 kV transmission lines and 400 kV and 220 kV sub-stations for supply of power from the power house to the States of Punjab, Rajasthan, Haryana, Himachal Pradesh, Delhi and Union Territory of Chandigarh. The transmission lines of the BBMB are carrying the power from the territory of one State to another State and therefore, are covered under section 2(36)(i) of the Act, 2003. Furthermore, the said transmission lines of the BBMB are admittedly being used for conveyance of electricity injected by other generators and licensees. It is in fact the case of the BBMB that the network of the BBMB is being used to transmit more than double the power vis-à-vis its generation. By a letter dated 19.4.2011 addressed by the BBMB to the National Load Despatch Centre, the BBMB has admitted that its network was being used to transmit more than double the power generated by it and the response dated 25.4.2011 from the Power System Operation Corporation Ltd. reveals that it requested the BBMB to approach the Central Commission to have the transmission tariff determined by the Commission. The BBMB also requested that it be paid ISTS charges for the use of the said inter-state

transmission lines by the other users. As such, the transmission lines are being used to transmit electricity from one State to another and as they are admittedly not dedicated transmission lines the jurisdiction of the Central Commission is squarely attracted under the provisions of section 79 (1) (c ) and (d) of the Act,2003. Since the transmission lines of the BBMB are used for conveyance of power from territory of one State to the territory of another State and are admittedly used for conveyance of power by other utilities, these lines are inter-State transmission lines and not dedicated transmission lines as alleged by the BBMB.

- h) The transmission lines are being operated and maintained by the BBMB which is a Statutory Authority having a distinct legal identity of its own separate from the participating States. The BBMB being controlled by the Central Government is in nature of a Government Company and is a deemed licensee under fifth proviso to section 14 of the 2003 Act. It is further submitted that these transmission lines are carrying power from the territory of one State to another State and also the power from the Central Public Sector Utilities. Therefore, these transmission lines are being used for Inter-State transmission of electricity. Accordingly, regulation of inter-State transmission on these lines and determination of tariff of the transmission lines vest in the Central Commission under section 79 (1) (c ) and (d) of the 2003 Act.

14. **The line of approach of the Tribunal :-** As clearly stated in paragraph 11 above, the broad issue that calls for deliberation for the disposal of the appeal is: whether the Central Commission has

jurisdiction to regulate the affairs of the BBMB in terms of the provisions of the Electricity Act, 2003; or to put it differently, whether in view of the BBMB having been the outcome of the Punjab Reorganisation Act, 1966 whereby and whereunder the rights and liabilities of the projects in question came to be succeeded by the succeeding States instead of the erstwhile State of Punjab in so far as the functions relating to generation and transmission lines are concerned, (apart from the other statutory functions of irrigation and flood control) it is beyond the purview of the Central Electricity Regulatory Commission which is the creature of the Electricity Act, 2003, but of which the BBMB is not, to exercise its jurisdiction under the Act, 2003. Mr. Ramachandran, learned advocate appearing for the appellants has submitted that the point for consideration of this Tribunal will be whether the BBMB owns the generating station or the transmission lines or of the power generated from the generating stations or the power transmitted on the transmission line; or whether the generating stations and the transmission lines are owned by the participating States and, therefore, the electricity generated and transmitted belongs to the participating States and the role of the BBMB is only to act as an agent, trustee etc. appointed under a statute to operate and maintain the generating station and transmission lines for and on behalf of and at the cost and expense of the participating States.

Limiting the discussion to this line of approach will be bringing down the deliberation on the appeal in a narrower compass which it does not legally deserve in consideration of plethora of legal provisions associated with the facts. Definitely, the question posed by Mr. Ramachandran shall have to be traversed but the treatment deserves a wider one, namely whether there is availability of the jurisdiction with the Central Commission over the generation and transmission of electricity by the BBMB. We must not forget that the existence of jurisdiction is one thing, while the manner of exercise of jurisdiction or whether in view of circumstance in a given situation exercise of jurisdiction will be warranted or not is quite another. If the former is missing, the latter is misnomer. Therefore, this is how we propose to deal with the appeal.

15. **The law under the Punjab Reorganisation Act, 1966**:- Before going into the discussion on the status of the BBMB, it is necessary to anatomise the essential components of sections 78, 79 and 80 of the Act, 1966. On reorganisation of the erstwhile state of Punjab on 1st November, 1966, Bhakra Management Board (BMB) was constituted under section 79 of the Punjab Reorganisation Act, 1966. The administration, maintenance and operation of Bhakra-Nangal Project were handed over to Bhakra Management Board with effect from 1st October

1967. The Beas Project Works, on completion, were transferred by the Government of India from Beas Construction Board (BCB) to Bhakra Management Board as per the provisions of section 80 of the Punjab Reorganisation Act, 1966. Pursuant to this, Bhakra Management Board was renamed as Bhakra Beas Management Board (BBMB) with effect from 15th May 1976. Since then, the Bhakra Beas Management Board is dedicated to the service of the nation and is engaged in regulation of the supply of water & power from Bhakra Nangal and Beas Projects to the States of Punjab, Haryana, Rajasthan, Himachal Pradesh, and the union territory of Chandigarh. The functions of the BBMB are Administration, Operation & Maintenance of Bhakra-Nangal Project, Beas Project Unit-I (Beas Sutlej Link Project) and Beas Project Unit- II (Pong Dam) in Northern India. The regulation of supply of water is from the Sutlej, the Ravi and the Beas to the States of Punjab, Haryana and Rajasthan and the regulation and supply of power generated are from Bhakra-Nangal and Beas Projects. Apart from generation of power out of Bhakra and Beas Projects, the transmission network for evacuation of power from the BBMB projects admittedly runs into 3705 Circuit Km. length of 400 KV, 220 KV, 132 KV and 66 KV transmission lines and 24 EHV Sub-stations. These are facts. The 'existing state of Punjab' which the Act implies was Punjab as was formed after partition but the said existing State of Punjab came to be

no longer the exclusive owner and the enjoyer of the usufructs of generation of electricity. Under section 78(3) the right to receive and to utilize the power generated out of the projects goes to Punjab after reorganisation, Haryana, Himachal Pradesh, Chandigarh and by operation of law to Rajasthan. At the beginning, the two projects were established as a joint-venture of the erstwhile states of Punjab and Rajasthan. The ownership of the assets was vested in the erstwhile combined State of Punjab and in terms of the above provisions of the Punjab Reorganisation Act the ownership came to be vested in the successor participating States and in some respects in the State of Rajasthan by operation of law. Thus, so far as the ownership of generation of power is concerned, it vests in the successor States of the erstwhile State of Punjab. This is essentially the outcome of the provision of section 3 dealing with reorganisation of the State of Punjab which though has not the inclusion of Rajasthan in that section, the state of Rajasthan unquestionably later became a party to the joint venture. There is, therefore, no denying the fact that the right to receive power belongs to the aforesaid States. When the Act, 1966 was enacted, Bhakra Right Bank Power House with four units had 120 M.W. each capacity and the Beas Projects which were either under construction or were to be constructed as components of the Beas-Sutlej Link Project (Unit I) and Pong Dam Project on the Beas river (Unit II) included Beas-

Sutlej Link Project (Unit I) and Pong Dam Project (Unit II).

16. **Legal status of the BBMB:-** Since it has been the argument that the BBMB has no ownership to the generation of power, it is, therefore, necessary to consider the legal status of this body. Section 79(1) deals with the constitution of a Board named Bhakra Management Board for administration, maintenance and operation of certain works as have been described in Clauses (a) to (f) of the said section 79(1). These clauses relate to administration, maintenance and operation of irrigation and generation of power. Remarkably, constitution of the Board was not by the States as aforesaid but by the Central Government. Again, under section 79 (2), this Board would consist of a whole time Chairman, two whole time Members to be appointed by the Central Government, a representative each of the Governments of the States of Punjab, Haryana, Rajasthan and Union Territory of Himachal Pradesh as it was then so. Therefore, the Board is a legal entity created by a Statute of the Parliament in order to discharge the functions of administration, maintenance and operation of irrigation and generation of power. None of the States as aforementioned created this Board since a single State did not have legal competency to create such a Board. Thus, it is the creation of the Central Government

and the composition of the Board in terms of the Statute shall be made by the Central Government although representatives of the four States have to be there. Under sub-section (3) of section 79, this Board then only called Bhakra Management Board has two functions namely regulation of the supply of water from the Bhakra Nangal Project to the States of Haryana, Punjab and Rajasthan and then regulation of the supply of power generated at the power houses as mentioned in sub-section (1) to any Electricity Board or other authority in charge of the distribution of power with reference to any agreement or arrangement between the Governments of existing State of Punjab and the State of Rajasthan. Under sub-section (6), this Board shall be under the control of Central Government and it will comply with such directions as may from time to time be given to it by the Central Government. Again, under sub-section (8), the Central Government retains to it the power to give directions to the State Governments of Punjab, Haryana, Rajasthan and Union Territory of Himachal Pradesh or any other authority. So far as the Beas Project is concerned, on the date of the enforcement of the Act, 1966, it shall be undertaken by the Central Govt. on behalf of the successor states and the State of Rajasthan. Under sub-section (5) of section 80, any component of the Beas Project in relation to which the construction has been completed may be transferred by the Central

Government to the Board constituted under section 79 whereupon the provisions of section 79 shall apply and then under sub-section (6) of section 80, the Board shall be renamed as Bhakra Beas Management Board (BBMB). Thus, the Bhakra Beas Management Board (BBMB) has been constituted under section 79(1) read with section 80(6) of the Punjab Re-organisation Act, 1966 for the administration, maintenance and operation of works of Bhakra Nangal and Beas Projects. It has been submitted by Mr. Jayant Bhushan, learned senior advocate for the Commission that as on this date power is being distributed from Bhakra Nangal & Beas Projects to the States of Punjab, Haryana, Rajasthan, Himachal Pradesh, Delhi & Chandigarh (UT). Thus, we find that the legal character of the BBMB cannot be identified with that of any of the States. A State within India gets a Constitutional status. The BBMB is a statutory entity and it has to discharge such powers as are assigned to it under the Act and such powers are not the powers to be discharged exactly on behalf of the States and it becomes immaterial whether it has ownership which the States have so as to receive and utilise power. In a sense, it is relatable to a Central Government Company, an organisation, or a Corporation loosely so called created by the Central Government by an Act of Parliament to discharge statutory functions. It is, so to speak, such a statutory body which partakes of the character of an individual. It is a

legal person, an artificial juridical entity. It can sue and be sued, as in this appeal it is the principal suer.

17. The BBMB has been given the power to appoint such staff as may be necessary for the discharge of its functions. As it appears from the submission of Mr. Ramachandran, a number of office bearers are on deputation to the BBMB, while a few others have been appointed by the Board as being permanent employees on the Board. In fact, the second proviso to sub-section (3) of section 80 makes it clear that the Board can discharge its functions with the support of such members of the Staff as may be deputed by the States concerned and again may repatriate those staff to the States but only with the previous approval of the Central Government which is the Controller of this Statutory Body. Now, the purpose of this preface to this paragraph is to understand the financial structure of the Board which is adumbrated in sub-section (5) of section 79 according to which the successor States and the State of Rajasthan shall provide necessary funds to the Board to meet all expenses including the salaries and allowances of the staff required for the discharge of its functions and such amounts shall be apportioned among the successor States, the State of Rajasthan and the Electricity Boards of the said States in such proportion as the Central Government

may having regard to the benefit to each of the said States or the Boards specify. Now that the Beas Project has been transferred to the BBMB and the expenses of construction had been borne by the successor States and the State of Rajasthan the provision of sub-section (5) of section 79 applies *mutatis mutandis* to the Beas Project also. It is not in dispute that the Board has to meet operation and maintenance expenses which again undisputedly are one of the components of tariff contemplated under the Electricity Act, 2003.

18. Thus we find that the Punjab Reorganisation Act, 1966 (Act 31 of 1966) arose out of necessity to reorganise the then existing State of Punjab and for the matters connected therewith. *'The matters connected therewith'* definitely includes the matters as are comprised in Part VIII of the Act. This Part gives the successor States and the State of Rajasthan right to receive and utilize power generated out of the projects mentioned therein in accordance with the agreement if there be amongst the States or by the order of the Central Government. The power of the BBMB is administration, maintenance and operation of the projects for the purpose of regulation or supply of power. Such supply has to be to the Electricity Board or other authority in charge of the distribution of power.

19. **Evolution of Law of Electricity and the Electricity Act, 2003 :-**

Since the principal argument of the appellant has been that the Electricity Act, 2003 has no manner of application to the matters relating to generation, distribution and transmission of power now being regulated by the BBMB and that administration, operation and maintenance functions of the BBMB do not come under the supervisory jurisdiction or regulation of the Central Electricity Regulatory Commission, it is now, therefore, necessary to look at the Electricity Act, 2003 and to ensure how there has been evolution of the law of electricity for over a century and in the context of the object of the said Act whether the Commission can exercise jurisdiction over the BBMB. We have noted that the BBMB is a legal entity partaking of the character of a company of which the States may at best be deemed as share holders. The Indian Electricity Act, 1910 which was an amendment of the Indian Electricity Act, 1903 had the object of supply and use of electrical energy. Under the 1910 Act, as it originally stood after repeal of the Indian Electricity Act 1903, it was the State Government who was competent to regulate supply, and distribution of electrical energy and this 1910 Act provided for issuance of license to any person under Part-II of that Act so as to enable that person to supply energy. Under the

Electricity (Supply) Act, 1948, the Electricity Board was given the duty to arrange for transmission, supply and distribution of electrical energy and it also had power to supply electricity to any licensee. Thus, any State Electricity Board that was formed under section 5 of the 1948 Act had the power and duties to undertake transmission, distribution and supply of electrical energy. Unlike the Act, 1910, the Electricity (Supply) Act, 1948 came to have a somewhat broader objective which is to provide for the rationalisation of the production and supply of electricity, for taking measures conducive to electrical development and for all other matters connected therewith. The two Acts have the commonality in this that in ultimate terms it was the Government that had the integrated functions of generation, transmission and distribution of electrical energy, while in the 1948 Act, the Electricity Boards were constituted to serve the same purpose, but so far as ownership is concerned the State retained to it the exclusive ownership. This is why there is reference to State Electricity Boards in the Punjab Reorganisation Act, 1966 which was meant to cater to the function of distribution of electricity. Thus, under the Punjab Reorganisation Act, 1966, the function of the BBMB was to regulate the supply of power to the Electricity Boards or other authority in charge of the distribution of power. Between 1966 and 2003, there is a long gap of 37 years and the concept of a Central Commission which was introduced by the Electricity Regulatory Commissions Act,

1998 (Act 14 of 1998) could not be conceived of when the Punjab Reorganisation Act, 1966 came into effect from 18<sup>th</sup> September, 1966. For obvious reasons, in this Act, 1966 (Act 31 of 1966), there was need to make reference to the Electricity (Supply) Act, 1948 because the concept of Electricity Board took its birth for the first time in the Electricity (Supply) Act, 1948 and it was virtually the Governments that were the ultimate owner and controller of all the functions attached to electricity. Now, the Act, 1998 (Act 14 of 1998) had the laudable object to provide for establishment of a Central Commission for rationalisation of electricity, tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and for matters connected therewith. A few State Governments like Orissa(then it was so called), Haryana, Andhra Pradesh, Uttar Pradesh, Rajasthan, Delhi, Madhya Pradesh and Karnataka-----some before and some immediate after the enactment of this Central Act, 1998-----had initiated reforms in the electricity sector in between 1995 and 2001 so as to achieve decentralisation of integrated functions. The Act, 1998 as we have noticed along with the Electricity Act, 1910, and the Electricity (Supply) Act, 1948 were put to death with effect from 10<sup>th</sup> June, 2003 when the Electricity Act, 2003 (Act 36 of 2003) came into force with the object of reformation in generation, transmission, distribution, trading and use of electricity and to take all such acts conducive to promotion of

competition along with protection of the interest of the consumers with rationalization of tariff. The preamble of the Act, 2003 exhibits the Parliament's intention to bring about a reform in the electricity sector and to achieve the object it makes the field of the Central Commission or the State Commission, as the case may be, wider particularly to ensure that with promoting private participation and competition a distance is legally created from the Government either at the Centre or in the States in relation to the matters relating to generation, transmission distribution, trading and use of electricity. We quote the preamble of the Act below:-

*“An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto”.*

It will be seen that the Act did not contemplate that in any given situation, the application of the Act will be restricted to only some areas, while matters relating to generation, transmission and distribution dealt with by any other enactment prior to the enactment of the Act, 36 of 2003 will continue to subsist with corresponding relation to the Electricity (Supply) Act, 1948. Whatever limitations do the Act, 2003 suffer from have been so provided explicitly in section 173 which has to

be read harmoniously with sections 174 and 175 of the said Act. As held by the Hon'ble Supreme Court in *PTC India Ltd. Vs. Central Electricity Regulatory Commission* {JT2010 (3) SC1}, the Electricity Act, 2003 is an "exhaustive code" on all matters concerning electricity. It has an all pervading effect where either at the hand of the company formed under Companies Act, 1956 or any independent power producer or a captive generator, there is generation, transmission and distribution of electricity. It is in this perspective that we are to understand and appreciate whether the matters dealt with in sections 78 to 80 of the Act, 1966 could be under the supervisory jurisdiction of the Central Commission. It has been the argument of Mr. Ramachandran, learned advocate for the appellant that notwithstanding sections 173, 174 and 175 of the Act, 2003, these sections cannot be extended to the Punjab Reorganisation Act, 1966 so far as the matters relating to regulation of supply of electricity to the States mentioned in that Act is concerned. It is very difficult to concede with the argument of the learned counsel for the appellant for two reasons. Firstly, under Section 173 and 174, the Acts of the Parliament which have been specifically excluded from the purview of the Electricity Act, 2003 have been mentioned with the provision that in the event of any inconsistency of the provisions of Electricity Act, 2003 with other laws, the Act, 2003 shall have effect. Section 175 makes it very clear that the provisions of Electricity Act,

2003 shall be read as '*addition to and not in derogation of any other law for the time being in force*'. It is, therefore, clear as a corollary to the above that the functions under the Punjab Reorganisation Act, 1966 which are ascribable to the Central Government in relation to supervision of regulation and distribution of supply of electricity to the Electricity Boards or other authority in charge of distribution of electricity can be exercised by the Central Commission under Electricity Act, 2003. If we read section 79 and 80 of the Punjab Reorganisation Act, 1966, we find that it is the Central Government that has the ultimate say over the BBMB and the Act, 1966 did not contemplate that the BBMB will not be under the supervisory jurisdiction of any Authority whatsoever. Under section 79 (5) the beneficiaries States shall be required to meet all expenses including salaries and allowances of the staff and shall be apportioned amongst the States including the State of Rajasthan and also the Electricity Boards of the said States but the proportion in which the apportionment shall be made in respect of the States and the Boards will be determined by the Central Government. Again, sub-section (6) of section 79 makes it explicitly clear that the BBMB has been made subordinate to the Central Government. Further, sub-sections (7), (8) and (9) give supremacy to the Central Govt. in the matter of giving directions not only to the BBMB but also to the State Govts. and any Regulation made by the BBMB concerning effective discharge of its

functions under the Act shall be subject to prior approval of the Central Govt. If the Act, 2003 had been in place at that time, it is difficult to say that the Parliament would still had intention to retain the authority of the Central Govt. in the matters covered under the Electricity Act, 2003 and exercisable by the Central Commission. So far as the Beas project is concerned, the same situation would prevail. Therefore, it was not the intention of the Parliament that the BBMB would not be under the regulatory jurisdiction of any Authority, be it the Central Govt. or the Central Commission constituted under the Act, 2003 and the composition of the Commission under the said Act, 2003 is the sole prerogative of the Central Government . After the Bhakra-Nangal Project and the Beas Project were completed, they were transferred to the BBMB. As of now, it is the BBMB that generates electricity on behalf of the States and deals with inter-state transmission thereof. The Act, 1966 gives explicit power to the BBMB to regulate supply of power to the Electricity Boards or any other authority in charge of distribution of power. Prima facie, one will not be wrong to say at this stage that these are the functions dealt with for supervision by the Appropriate Commission under the Act, 2003.

20. **Jurisdiction of the CERC and the law of Repugnancy:-** Now if upon the reading of the Act, 1966, it appears that the Central Govt. discharges the supervisory and regulatory jurisdiction over the affairs of the BBMB and if these supervisions and regulations cover the field of generation, distribution and transmission, then obviously there will not be any demur to the proposition that after the Act, 2003 came into force, which is a special Act in the field which excludes none save what is provided for in section 173 and includes everybody, the Commission cannot be said to be without its jurisdiction over the BBMB. This analysis is made to establish two propositions namely (a) the Act, 1966 and the Act, 2003 are not inconsistent with one another because the Act, 1966 was consistent with the Electricity (Supply) Act, 1948, and (b) the Central Electricity Regulatory Commission has jurisdiction over the affairs of the BBMB within the periphery of the Act, 2003. The Central Commission can exercise jurisdiction of course, without offending the broad spectrum of the Act, 1966. As held in *Gujarat UrjaVikas Nigam Vs. Essar Power Limited (2008) 4 SCC 755*, section 174 is the principal section, while the principle laid down in section 175 is subordinate to the principal. It is only when there is conflict between the two central Acts, section 174 will prevail over section 175 but no further, and the Hon'ble Supreme Court further said that where there is no conflict, both have to be read together with harmony.

21. Still the question continues for final resolution: whether the functions of generation and transmission discharged by the BBMB requires to be regulated by the Central Commission; or to put it differently, whether the functions exercised or discharged by the BBMB are the same functions over which the Central Commission retain its power to discharge. If the answer to the question is yes then obviously there will be no other conclusion than to say that the BBMB will come under the regulatory jurisdiction of the Central Commission. If on the other hand, the answer is 'no', then the appeal has to succeed. For this purpose, it is now, therefore, proper to reproduce section 79 and also section 62 of the Act, 2003. Section 79 provides as follows:-

*79. (1) The Central Commission shall discharge the following functions, namely:-*

- (a) to regulate the tariff of generating companies owned or controlled by the Central Government;*
- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*
- (c) to regulate the inter-State transmission of electricity ;*
- (d) to determine tariff for inter-State transmission of electricity;*
- (e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.*
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*
- (g) to levy fees for the purposes of this Act;*

- (h) to specify Grid Code having regard to Grid Standards;*
- (i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees.*
- (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;*
- (k) to discharge such other functions as may be assigned under this Act.*

*(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely :-*

- (i) formulation of National electricity Policy and tariff policy;*
- (ii) promotion of competition, efficiency and economy in activities of the electricity industry;*
- (iii) promotion of investment in electricity industry;*
- (iv) any other matter referred to the Central Commission by that Government.*

*(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.*

*(4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.*

Section 62 reads as follows:-

*62. (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for –*

- (a) supply of electricity by a generating company to a distribution licensee:*

*Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;*

- (b) transmission of electricity ;*
- (c) wheeling of electricity;*
- (d) retail sale of electricity.*

*Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for*

*promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.*

*(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.*

*(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.*

*(4) No tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.*

*(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.*

*(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.*

The definition of Appropriate Govt. as is found in section 2 (5) is :

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*(5) "Appropriate Government" means, -*

*(a) the Central Government, -*

*(i) in respect of a generating company wholly or partly owned by it;*

*(ii) in relation to any inter-State generation, transmission, trading or supply of electricity and with respect to any mines, oil-fields, railways, national highways, airports, telegraphs, broadcasting stations and any works of defence, dockyard, nuclear power installations;*

*(iii) in respect of National Load Despatch Centre; and Regional Load Despatch Centre;*

*(iv) in relation to any works or electric installation belonging to it or under its control ;*

*(b) in any other case, the State Government, having jurisdiction under this Act;*

So far as the functions relatable to the BBMB are concerned, a bird's eye-view catches at one glance clauses (a), (c), (d) and (h) of section 79(1) of the Act, 2003. Regulation of inter-state transmission and determination of tariff thereof which we propose to deal with first comes under the purview of the Central Commission. The first attack of the appellant is that before the Central Commission stretches its hand to the BBMB it must ensure that the BBMB is the owner of the generating plants of Bhakra-Nangal and Beas and also the owner of the transmission line. Since the BBMB is not the owner of either of the two and since the ownership vests in the successor States and the State of Rajasthan, the Central Commission cannot determine tariff. For, the very concept of tariff is not applicable to the BBMB, the argument so runs. It is argued with reference to the case laws, which we shall deal with sometime later when we will be traversing the generation aspect, that legally speaking one cannot sell electricity to oneself when that oneself is the owner of the goods. It is a very formidable argument and at the same time charming. No doubt, under the Act, 1966 rights and liabilities in respect of water and power vests in the successor States and the State of Rajasthan and as far as the BBMB is concerned, it operates and maintains generation, inter-state transmissions and distribution of electricity to the successor States and the State of Rajasthan. The tariff for the generation companies under the Central

Govt. and that in respect of inter-state transmission fall within the jurisdiction of the Central Commission. We have found that the status of the BBMB which is the creation of a Statute and which is wholly controlled by the Central Govt. and which is not legally accountable to any of the States is closely akin to a company controlled by the Central Govt. It is not that for determination of tariff in respect of a generating company that company has to be owned by the Central Govt. A generating company controlled by the Central Govt. as happens in the present case under the Act, 1966 falls within the purview of section 79 (1) (a) of the Act. There is no denying the fact that the BBMB has a transmission network of 3705 circuit km of 400 kV, 220 kV, 132 kV and 66 kV transmission lines and 400 kV and 220 kV sub-stations for supply of power from the power houses to the States of Punjab, Rajasthan, Haryana, Himachal Pradesh, Delhi and Union Territory of Chandigarh. Therefore, these lines are in the nature of '*inter-State transmission systems*' which has been defined in section 2(36) of the 2003 Act as under:-

*"inter-State transmission system" includes –*

- (i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;*
- (ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;*
- (iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by Central Transmission Utility".*

Under the Act, 2003 company means a company under the Companies Act, 1956 with inclusiveness of any such either under any Central or State Act. The Damodar Valley Corporation which was established under the Central Act called Damodar Valley Corporation Act, 1948 is under the regulatory jurisdiction of the Central Commission and is a deemed licensee under section 14 of the Act by a judicial pronouncement. A generating company as is defined in section 2(28) to come under the purview of the Central Commission may or may not be required to be incorporated. An association and body of individuals or an artificial juridical person that maintains a generating station becomes a generating company. It is not necessary that to be a generating company ownership is a concomitant phenomenon to that body or person. The BBMB which is a statutory body and a juridical person operates and maintains, if not owns, generating stations of the projects. Artificial juridical person commonly implies an entity created by the law. So far as inter-state transmission is concerned, in like manner, none of the successor States or the State of Rajasthan is legally competent to deal with inter-state transmission or grant license. By virtue of the deeming provisions, the BBMB can be very well conceived of an inter-state transmission licensee if it keeps its transmission lines open and available for transmission of electricity of additional capacity to other

utilities. It is a statutory body entrusted with inter-state transmission of electricity to the successor States or the State of Rajasthan. It is in such circumstances necessary to closely examine whether the BBMB can be considered to be a deemed inter-state transmission licensee by virtue of section 14 of the Act. It is the submission of the appellant that the BBMB transmission lines are dedicated transmission lines and have been laid for evacuation of power from its generating stations to the participating states who are the owners of generating stations and transmission system. The impugned order against which this appeal was preferred is dated 15<sup>th</sup> September, 2011 and the appeal was preferred on 8<sup>th</sup> November, 2011. After the impugned order was passed the Commission started a *suo-motu* proceeding being 15 of 2012 in the matter of determination of tariff of the inter-state transmission lines connecting two states. 35 legal entities were made the respondents in that proceedings and the name of the BBMB comes in Sl.no.10 and that of the DVC under Sl.no.14 in the cause title of that proceeding. The Commission passed an order on 14.3.2012 which we quote below:-

*“5. It has come to the notice of the Central Commission that the some of the owners/developers of the inter-State transmission lines of 132 kV and above in North Eastern Region and 220 kV and above in Northern, Eastern, Western and Southern regions as mentioned in the Annexure to this order have approached the Implementing Agency for including their transmission assets in computation of Point of Connection transmission charges and*

*losses under the Central Electricity Regulatory Commission (sharing of inter-State Transmission Charges and Losses) Regulations, 2010 (hereinafter “Sharing Regulations”)*

6. *As a first step towards inclusion of non-Intra-State Transmission System lines in the PoC transmission charges, the Commission proposes to include the transmission lines connecting two States, for computation of PoC transmission charges and losses. However, for the disbursement of transmission charges, tariff for such assets needs to be approved by the Commission in accordance with the provisions of Sharing Regulations. Accordingly, we direct the owners of these inter-State lines to file appropriate application before the Commission for determination of tariff for facilitating disbursement.*
6. *We direct the respondents to ensure that the tariff petitions for determination of tariff is filed by the developers / owners of the transmission line or by State Transmission Utilities where the transmission lines are owned by them in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009, by 20.4.2012.”*

This order was responded to by the BBMB during the pendency of this appeal wherein challenge has been made before us to the authority of the Central Commission to stretch its hand to the BBMB but in reply to that proceeding the BBMB in brief contended what has been averred in the Memorandum of this Appeal and so far as transmission lines are concerned, it took the stand that primarily they are *“the dedicated transmission lines connected to the generating stations for evacuation of power up to the periphery of the participating States, within the meaning of Section 2 (16) and section 10 of the Electricity Act, 2003 read with the*

*Electricity [Removal of Difficulty] (Fifth) Order, 2005. The BBMB craves leave to refer to the said provisions at the time of the hearing”.*

It may be stated that the Order, 2005 is applicable when a generating company operates and maintains dedicated transmission lines for the purpose of generation of electricity and it applies also to captive generating plant. It is the case of the Central Commission that the BBMB's inter-State transmission lines are not simply for inter-State transmission of electricity to the successor States or the State of Rajasthan, but undeniably the transmission lines are kept open for inter-State transmission of power for utilization of other utilities besides the BBMB. The BBMB submits that to the extent the surplus capacity of the transmission lines are utilised for the transmission of the power of the Central Public Sector Utilities, the lines can be taken as Inter State Transmission System and the States as deemed transmission licensee and the use being of intervening transmission lines as per sections 34 and 35 of the Electricity Act, 2003. Except for the above the transmission system having been established for the power stations of Bhakra and Beas are dedicated transmission lines. In the reply, the BBMB further stated :

*“The BBMB submits that in terms of section 79 of the Electricity Act, 2003 the Hon'ble Commission has notified the Indian*

*Electricity Grid Code ('IEGC'). The objective and purpose of the IEGC is –*

*The Indian Electricity Grid Code (IEGC) is a regulation made by the Central Commission in exercise of powers under clause (h) of subsection (1) of Section 79 read with clause (generation) of subsection (2) of Section 178 of the Act. The IEGC also lays down the rules, guidelines and standards to be followed by various persons and participants in the system to plan, develop, maintain and operate the power system, in the most secure, reliable, economic and efficient manner, while facilitating healthy competition in the generation and supply of electricity. ”*

*The IEGC applies to all entities including users and consumers of electricity, whether or not they are within the regulatory control of the Central Commission under Section 79 (1) (a) to (d) or whether or not subjected to licensing by the Central Commission. The objective of the IEGC is to maintain grid discipline.*

*In order to achieve the above objective, the Hon'ble Commission is entitled to deal with all the entities and systems including Captive Generator, State Generator, State Transmission Utilities, Intra State Dedicated Transmission System, the Generating Stations and the Transmission Systems operated and maintained by the BBMB, though, do not come under regulatory control and supervision of the Central Commission for the purposes of determination of tariff or for licensing as the case may be, in the circumstances mentioned herein above, the provisions of the IEGC has been applied to them treating it to be Intra State Generator and Inter State Transmission System (ISTS).*

*Thus, for the limited purpose of IEGC, the BBMB's Transmission system has been treated as Intra-State Transmission System whereas the generating stations of the BBMB have been treated as intra-state generating stations. Further, considering the nature of the generation project, namely, the project managed by the BBMB being essentially an irrigation project with generation being incidental to irrigation, scheduling and dispatch activities have to be left to be managed by the BBMB giving due weightage to the irrigation requirements.*

*In the circumstances mentioned above, it is not feasible to file the tariff petition as per the formats of the Central Electricity*

*Regulatory Commission (Terms and Condition of Tariff) Regulations 2009 – 14. the BBMB is, however, utilizing the capital assets belonging to the participating states for operating the transmission systems including the re-imbursalment of Operation & Maintenance (O & M) Expenses. the BBMB is in a position to give the details of the O&M expenditure for transmission system as per Central Electricity Regulatory Commission norms as well as Interest in Working capital on the prescribed formats. In addition, the Hon'ble Commission can take the depreciated value of the BBMB's transmission system in the books of the participating States as the capital value. These can be taken for the determination of transmission charges relating to the above transmission lines which may be used as non-Intra-State Transmission System lines in the POC transmission charges scheme notified by the Hon'ble Commission. the BBMB is taking steps to electricity trader such capital value of the above mentioned transmission systems from the participating states and would furnish the same immediately upon being made available to the BBMB.*

*Subject to the above, the BBMB is filing herewith the information as applicable in the prescribed format.*

*It is therefore respectfully prayed that this Hon'ble Commission may be pleased to –*

*Take on record the information as per the formats filed herewith for the purpose of approval for recovery of the applicable transmission charges relating to the above lines of the BBMB.*

*Permit the BBMB to submit additional/submission/documents as may be become necessary.*

*Pass such further Order(s) as may be necessary”.*

This petition before the Commission is preceded by a letter written to the National Load Despatch Centre dated 19.4.2011 by the BBMB requesting the National Load Despatch Centre to inform the quantum of power being wheeled by the BBMB partner states and the adjoining states viz. Punjab, Haryana, Rajasthan & Himachal Pradesh, UT of

Chandigarh, J&K and Delhi through the BBMB network and the quantum of power being wheeled by above states through Power Grid network. It has been stated further in the letter that the above requirement of the BBMB should be made available in the software for determination of POC charges. It appears from this letter that apart from the States mentioned in the Act, 1966, certain other entities were regularly availing themselves of the BBMB's network for wheeling of power. This letter was responded to by the Power System Operation Corporation Ltd. which is a wholly owned subsidiary of Power Grid on 25.4.2011 mentioning that the BBMB network at 400 kV is considered while computing POC as per provision of regulation 7(4) (k) of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 which is as follows:-

*“Consequent to the development of the base load flows on the Basic Network, the networks shall be truncated / reduced suitably by the Implementing Agency to certain level(s) of voltages, as explained in Annexure-I to these Regulations. The Hybrid method shall be applied by the Implementing Agency on the truncated / reduced system to determine the transmission charges based on the Hybrid Method and loss allocation factors attributable to each node in the truncated / reduced power system;*

*In future, if Implementing Agency arrives at a better method of network reduction, then the same may be adopted after approval of Commission”.*

The letter further quotes regulation 2 (1) (y) of the said Regulations, 2010 which is quoted below:-

*“Yearly Transmission Charges (YTC) means the Annual Transmission Charges for existing lines determined by the Commission in accordance with the terms and conditions of Tariff Regulations or adopted in the case of tariff based competitive bidding in accordance with the Transmission License Regulations as specified by the Commission and as in force from time to time and for new lines based on benchmarked capital costs.”*

22. It is thus clear without any shadow of doubt that (a) the surplus capacity of the transmission lines are utilized for the transmission of power of the Central Public Sector Utilities, (b) the BBMB's transmission system is recognised as Inter-State Transmission System by the Indian Electricity Grid Code, (c) the tariff for the BBMB transmission system has to be included and calculated in the YTC recovery under the regulations as mentioned above, (d) IEGC applies to all entities including users and consumers of electricity, and (e) in the circumstance the Central Electricity Regulatory Commission is the only authority and has exclusive jurisdiction with regard to regulation of inter-state transmission of electricity and determination of tariff for inter-state transmission of electricity. The BBMB admits that it is in a position to give the details of O&M expenditure for transmission system as per the Central Electricity Regulatory Commission norms as well as interest on working capital on the prescribed formats and that the Commission can take the depreciated value of the BBMB's transmission system in the books of

the participating States as the capital value and these can be taken for determination of transmission charges relating to the non-ISTS lines. It is, of course, submitted that considering the nature of generation project, the projects managed by the BBMB are essentially irrigation project, generation being incidental thereto. There is no difficulty in saying that the BBMB is a deemed transmission licensee. The argument of learned counsel for the appellant that the BBMB is an agent of the participating Govts. is in the circumstances difficult to accept. The BBMB cannot be regarded to be a substitute for the Central Electricity Regulatory Commission as it is a creature of the Central Govt. by and under a statute to serve certain purposes including generation, distribution and transmission of power. The operation and maintenance expenses at least so far as the transmission chapter is concerned, has to come under the scrutiny of the Central Electricity Regulatory Commission. Being it an inter-state transmission system, none of the State Commissions concerned, nor any of the participating States has any supervisory jurisdiction over the BBMB. In fact, in response to the BBMB's letter dated 09.04.2011, the Power System Operation Corporation Ltd., asked the BBMB to approach the Central Commission to have the transmission tariff determined. With reference to section 2 (16) and section 10 of the Act, 2003 it has been contended by the BBMB that its lines are akin to dedicated transmission line. In the context of what has surfaced above,

it is difficult to say now that the lines of the BBMB are really the dedicated transmission lines. The lines are in fact used for conveyance of power from one State to another for the sake of other utilities. The submission of the appellant is that the BBMB is not the owner of the transmission lines but the participating states are, as such the BBMB is not answerable or accountable to the Central Electricity Regulatory Commission. We have found that as a Statutory Authority, the BBMB possesses a distinct legal identity which is not identical or cannot be equated with the participating states which in fact are the beneficiaries of the power generated out of the projects. It is argued that the Punjab Reorganization Act, 1966 does not provide for the transfer and vesting of power stations and the transmission lines in the BBMB and when this is not so, the BBMB cannot be asked to report to the Central Electricity Regulatory Commission. This is perhaps not the spirit of the Act, 1966 because, at the first instance, Bhakra-Nangal Project meant for the purpose of irrigation and of generation of power was entrusted to the Bhakra Management Board, not to any participating States and the Act was particular in telling that such Board shall be under the control of the Central Government. Again, so far as the Beas Project is concerned, Section 80 (5) provides that after completion of any component of the project it would stand transferred to the Board by the Central Government and then only the Board would be renamed as Bhakra

Beas Management Board. The BBMB is not the creation of the States or of any statute of any of the States. The States are only the beneficiaries of power and water because the rights and liabilities vested in the States. In the circumstance, it can be said that the Central Electricity Regulatory Commission has regulatory jurisdiction over the affairs of the BBMB in so far as they are relatable to the Act, 2003.

23. **Question of Ownership:-** As to the ownership of the generating stations much has been debated by both the sides and they require analysis. It has been the repeated arguments of the appellant that the BBMB is not the owner of the generating stations, the ownership having been vested in the States. The Act 1966 does not speak of 'ownership' either in favour of the BBMB or in favour of the States. The Act speaks of the 'rights' and 'liabilities'. Under the Treaty of 1960, the three eastern rivers fell into the allotment of Punjab as existed prior to the Act, 1966. Obviously, with the bifurcation of Punjab into a number of States and Union Territories, the right to use water and power came to be the rights of all such States/UTs out of the existing State of Punjab as was there before the appointed date. Noticeably, the Bhakra and Beas Projects were transferred to the Board which came under the direct control of the Central Government. Therefore, the jurisprudential concept of ownership is not too much of relevance and the fact as sufficiently we

have stated earlier is that the status of the BBMB is like an artificial juridical person. Furthermore, we have already observed that the definition of generating company does not make the ownership a component thereof. It is not contention of the appellant also that the BBMB cannot be construed as Generating Company within the meaning of section 2 (28) of the Act, 2003. In the circumstances, the question repeatedly posed by the appellant for consideration of the Tribunal as to whether ownership of the generating station lies with the BBMB or whether the generating stations are owned by the participating States does not lead us anywhere. Secondly, the power projects were first controlled by the Central Government and after completion of the projects, they stood transferred to the Board by the Central Government. It is submitted that the term '*regulation of supply of power*' as is found in section 79 (3) (b) of the Act, 1966 cannot be read in isolation of section 79 (1) of the said Act. It is nobody's case that the provisions are to be read independent of each other. If there is no difficulty for the BBMB to be a Generating Company and if the BBMB is under the control of the Central Government then obviously the function of regulation of tariff of a Generating Company under the control of the Central Government lies with the Central Commission as per section 79(1) (a) of the Act,2003. The matters relating to inter-state transmission of electricity in relation to

the BBMB squarely come under clauses (c) and (d) of section 79 (1) which we have seen already.

24. **'Tariff', 'Supply' & 'Sale'**:- The question now, therefore, is whether the word 'tariff' as is repeatedly used in the Act, 2003 can have any manner of application to the BBMB and this is one of the major premises for the appellant to argue against the existence of regulatory jurisdiction of the Central Electricity Regulatory Commission. It is argued that the word 'tariff' is intrinsically related to the word 'supply', and the word 'supply' does not have any connotation from the word 'sale' because 'supply' under section 2(70) means the sale of electricity to a licensee or consumer and when there is neither any licensee nor any consumer, there cannot be any sale and when sale is distinctly absent in the case of the BBMB, the concept of supply as is conveyed in section 2 (70) of the Act, 2003 is a concept totally distinct and different from the word 'supply' as is used at number of places in section 79 of the Act, 1966. The argument, therefore, is that within four corners of sections 78,79 & 80 of the Act, 1966, the functions of determination of generation tariff by the Central Electricity Regulatory Commission under the Act, 2003 do not arise. It is argued that regulation of the supply of power and distribution of the same to the Electricity Boards or other authorities in charge of the distribution of power does not mean that there is sale of

power by the BBMB to the successor States. The States are entitled to nominate or authorize its energy entity which is undertaking the distribution of power to utilize the power generated at the power houses for maintaining the supply to the public at large and it is in that context that there is reference to Electricity Board or other authorities in charge of the distribution of power in section 79(3) (b) of the Act, 1966. It is argued that neither expressly nor impliedly it is in the Act, 1966 that the BBMB will supply electricity to the successor States and the State of Rajasthan in the same sense as is the word meant within the meaning of section 2 (70) of the Act, 2003 and conceptually there cannot be sale by one entity to itself. Reference is made to the decisions in *Gajendra Haldea vs. Central Electricity Regulatory Commission & Ors.* – 2008 ELR (APTEL) 203, *Lanco Amarkantak Power Pvt. Ltd. Vs. MPERC & Ors* decided by this Tribunal on 21.10.2008 in Appeal No.71 of 2008, *Mahendra Kumar Ishwarlal & Company Vs. The State of Madras Sale Tax Cases, 1968, Commissioner of Income Tax Vs. Shri Mirdu Hari Dalmia ITR\_(1982) I Delhi 183, Sri Tirumala Venkateswara Timber and Bamboo Firm Vs. Commercial Tax Officer, Rajahmundry 1968 STC (Vol-XXI) 312 and Commissioner of Income Tax, West Bengal Vs. M/s Hind Construction Ltd. (1972) 4 SCC 460.* On the other hand, the Central Electricity Regulatory Commission maintains that it is a well-settled principle of law that the definitions in the Act are subject to

a contrary context and need not be applicable to the use of that word in every section of the Act and reliance is placed on the Principles of Statutory Interpretation by G.P. Singh, 9<sup>th</sup> Edition pages 173-177 and the decision of the Hon'ble Supreme Court in *AIR 1960 SC 971*. It is submitted that supply cannot mean sale when the word supply is used in section 62 of the Act, 2003. This is so because otherwise to escape the scrutiny of the Appropriate Commission, all that a generation company needs to do is to appoint an agent to effect supply of electricity to a distribution licensee. In such a situation since the agent would not be selling the electricity, as per the submission of the BBMB, there would be no supply and hence no tariff fixation. It is, therefore, submitted that the definition of 'supply' meaning 'sale' is not applicable since the context otherwise dictates. Absurd results will ensue if it were to be held that there could be no tariff fixation for the supply of electricity from the BBMB to the distribution licensees of the participating States. If it is held that the BBMB is not the owner of the electricity before it is supplied to the distribution licensees, the result will be that the sale is made on behalf of the State to the distribution licensees. Theoretically this would then entail a tariff fixation for this supply from the State to the distribution licensees. Since every State would theoretically be part owners of the electricity generated, this would mean that there is a supply from each of these States to the distribution licensees concerned. The tariff fixation

could therefore be done with respect to supply from the State of Punjab to the distribution licensees by the Punjab Electricity Regulatory Commission and supply from the State of Himachal Pradesh to the distribution licensees by the Himachal Pradesh Regulatory Commission and so on by each respective State Electricity Regulatory Commission and so on by each respective State Electricity Regulatory Commission. This tariff fixation would go into the correctness of the accounts of operations and maintenance etc. of the BBMB. Thus theoretically each State Commission will independently go into the correctness of the very same accounts of the BBMB. Secondly, on behalf of the Central Electricity Regulatory Commission, alternative argument is placed to the effect that in view of sections 79(1), 79(3)(b), 79(3)(c), 80(5), 80(6) the position would make it clear that since the projects stood vested in the BBMB, the said entity is statutorily the owner of the assets and supply by the BBMB to the distribution licensees would, therefore, amount to sale. Thirdly, it is argued that even if the BBMB broadly maintains charges, it is important that the charges that are passed on to the consumers ultimately become the actual charges and since as at present the BBMB is not accountable to any regulator and since it is not known how the Central Govt. actually looks after the scrutiny of the accounts of the BBMB, it is necessary that the BBMB's costs, charges, expenses and accounts are scrutinised. The decisions of this Tribunal in

*Gajendra Haldea* and *Lanco Amarkantak* are in different context. These cases deal with the jurisdiction of the State Commission when supply is made by the generation company to electricity traders. In *Mahindra Kumar*, the principle was laid down to the effect that unless there are two distinct and different persons there cannot be sale and one cannot make sale to oneself. The *Commissioner of Income Tax* deals with the proposition that a contract by a minor is void and there can be a lawful agreement between the assessee and minor son. *Sri Tirumala* deals with the distinction between the transfer of title to the goods and contract of agency. The *Commissioner of Income Tax* brings out the proposition that as the machinery falls to the share of the assessee and it is not sold there could not be any question of assessee making profit out of them. Now, it is not that supply by the BBMB to the participating States or the Electricity Boards does prima facie appear to be supply within the meaning of section 2 (70) of the Act, 2003. The word 'supply' as used in section 79 (3)(b) of the Act, 1966 has to be understood in the totality of context in which it is used. Since, right to receive and utilize the power as is conferred under section 78 (3) (b) of the Act, 1966 has not been expressly associated with sale such supply may not come under section 2(70) of the Act, 2003. But there does not end the matter. Mr. Ramachandran, learned advocate appearing for the appellant is correct in saying that section 79 (1) must not be read in isolation of section 62

(1). Supply to the owner of the goods is no doubt a sale, but in case of supply of electricity by a generation company to a distribution licensee question of tariff comes. Now the point is: tariff has nowhere been defined, neither in the Act 2003 nor in the Central Electricity Regulatory Commission Regulations. Therefore, the ordinary meaning of tariff that has to be accepted would be rates, charges, fees etc.. When the Punjab Reorganisation Act, 1966 came into effect, it was the States who would by themselves own and control generation, transmission and distribution. In a word, it was the State Electricity Board formed under section 5 of the Electricity (Supply) Act, 1948 that statutorily was entrusted to control all the functions. The State Electricity Board was exclusively a State-owned Board. The reform that has been brought about through the Electricity Act, 2003 has resulted in unbundling of this integrated entity. As a result of this, in most of the States there has come into being three separate statutory corporate entities and the State may or may not own them. The law also makes it possible that private players come forward to form generation, transmission and distribution companies. All the Corporations / companies either in the public sector or in the private sector dealing with generation, transmission and distribution of electricity have been brought under the purview of the Appropriate Commission. The idea behind all these is that the Govt. keeps itself at a legal distance from these corporate entities although the

Govt. may own any such corporate entity. The present appeal for the very obvious reason has not been chosen to be preferred by any State Govt.. It has been preferred by the Punjab State Power Corporation Ltd., Haryana Vidyut Prasaran Nigam Ltd. and Rajasthan Rajya Vidyut Prasaran Nigam Ltd. which are all Govt. companies and the Himachal Pradesh State Electricity Board. Legally, they are now distinct from the Govt. / States. The BBMB make supply to these business entities and they pass on the costs to the consumers. Legally, therefore, when a generating company supplies electricity to the distribution companies including the deemed distribution licensees tariff requires to be determined by the Appropriate Commission, in this case the authority is the Central Commission. Section 79 (1) (a) of the Act, 2003 empowers the Central Commission to 'regulate' the tariff of generation companies, while in case of inter-state transmission of electricity, the word 'determine' has been used in section 79 (1) (d). In case of inter-state transmission of electricity, the word 'regulate' appears in section 79 (1) (c). There is no difficulty in considering the BBMB to be the generating company under the control of the Central Govt.. It is the cardinal principle of the interpretation of statutes that when a statute is enacted on a subject that covers a number of matters including those over which there is special law thereon the presumption is that the Parliament or the Legislature while enacting the statute keeps in mind that special law.

Viewed in this legal perspective, it can be said that when the Act, 1966 was enacted, the Parliament was conscious of operation of Electricity (Supply) Act, 1948 particularly when there was reference to Electricity Boards in the Act, 1966. As is indicated earlier, section 78 to 80 of the Reorganisation Act, 1966 were made consistent with the Act, 1948. In terms of the Act, 1948, it was the State or the Govt. that was the owner of the power plants, generating stations, transmission lines and the State or the Govt. was also in charge of distribution. All these integrated functions were maintained and controlled by the Electricity Boards which was instrumentality of the State within the meaning of Article 12. The Act, 1966 clearly regarded the BBMB as a generation company and spoke of distribution to the Electricity Boards. The argument of Mr. Ramachandran that the word 'supply' as is meant in section 2(70) of the Act, 2003 cannot be attributed to the word 'supply' as used in the Act, 1966 and, therefore, the BBMB does not come under the jurisdiction of Central Electricity Regulatory Commission is fallacious because unlike the word '*supply*' as has been defined in the Act, 2003, there is no definition of the word supply either in the Act, 1910 or in the Act, 1948. There was no occasion on the part of the author of the Statute to import the idea of '*supply*' of Electricity Act, 2003 in the Act, 1966. Therefore, there could not be conveyance of the idea of sale in the Act, 1966. The idea of sale of the Act, 2003 has been necessitated because of

unbundling of all the functions and making all the functionaries as Corporations with allowance of private players joining in the venture of electricity business. Therefore, the absence of the idea of sale as is used in the Act, 2003 in the 1966 Act does not make the Central Commission not available with the BBMB. In most of the States, the State Electricity Board has been unbundled with the Govt. creating separate corporate entities for generation, transmission and distribution. Now, the functions of the Central Govt. under the 1966 Act are relatable to the Central Commission under the Electricity Act, 2003. As a Govt. company as the BBMB now is, it cannot escape scrutiny and regulatory jurisdiction of the Central Commission. The BBMB cannot be compared to that of a contractor as is contended in the written note of argument. Though there is no actual sale by the BBMB and supply is made in terms of the Act, 1966 such supply does not become absolutely divorced from any consideration. The provision of section 79 (5) of the Act, 1966 will apply also to the Beas Project *mutatis mutandis* in terms of sub-section (5) of section 80. Thus expenses including salaries and allowances of the staff and other amounts to meet expenses shall have to be provided to the BBMB and the amount shall be apportioned having regard to the benefit of the States / Boards as the Central Govt. may specify. Therefore, there are operation and maintenance expenses, renovation and modernisation expenses which are associated with

components of tariff and it is the BBMB that has to meet all these expenses. Regulation of these expenses so far is not the function of any of the State Commission because it is an inter-state Central Govt. owned generation entity. The mere fact that such power of regulation has not been exercised so far is no ground to deny this jurisdiction to the Central Electricity Regulatory Commission when the Act, 2003 is an exhaustive Code. Yes, section 79 (1) has to be read with section 62(1) of the Act, 2003, but if any of the components of section 62(1) is attracted then the jurisdiction of the Central Electricity Regulatory Commission is attracted. With the reorganisation of the then existing State of Punjab, the control of the Bhakra Projects ceased to remain in the hands of that State and it vested in the BBMB. It is the BBMB that has the statutory power to supply electricity to the Boards or authority in charge of distribution. Under section 79 (3) (c) of the Act, 1966, the BBMB has to carry out construction of the remaining works connected with the Right Bank Power House. There is force in the argument of the learned senior counsel appearing for the Central Electricity Regulatory Commission that as the BBMB maintains the charges and costs, it is necessary to scrutinise the same as ultimately charges are passed on to the consumers. The concept of prudence check is a jurisprudential concept under the Electricity laws. Therefore, there is no illegality in bringing the BBMB which is an entity controlled by the Central Govt. and

distinct from the States within the purview of the Central Electricity Regulatory Commission. It may be that the Central Electricity Regulatory Commission finds that there is no necessity of fixing generation tariff in the same lines as are ordinarily done in other Central Govt. owned generating entities. The primordial question is one of jurisdiction of the Commission. The BBMB is paid for by the States as it meets operation and maintenance expenses. It is the central argument of Mr. Ramachandran that whatever be the status of the BBMB, in view of section 78 (1) of the Act, 1966, there is no escape from the conclusion that rights as are given to the States do not merely mean simply the right to receive water and power because the right to the projects themselves has been given to the States. Therefore, the existence of the BBMB has to be conceived of as being a mere trustee or agent or a contractor who is paid or reimbursed the expenses incurred to perform a job. It is difficult to accept this argument because the expression in section 78(1) of the Act, 1966 that *'notwithstanding anything contained in this Act but subject to the provisions of sections 79 and 80'* has controlled the operation of section 78(1) of the Act, 1966. Sections 79 and 80 deal with the constitution of the Board with specification of powers and functions to be discharged by it in relation to generation, and transmission and distribution of electricity to the Electricity Boards through use of inter-state transmission networks which are available to

the other public sector utilities also, and these functions which have not to be looked after by the States or the Governments are the functions ordained in the Act, 2003. Under sections 79 and 80 of the Act, 1966, the projects vested in the BBMB and the BBMB is made under the control of the Central Government. The expression '*subject to*' conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. Reference in this connection can be made to *Chandavarkar Sita Ram Rao Vs. Ashalata S. Guram* (1986) 4 SCC 447. Actually, right in section 78 (1) & (2) has been crystallised in section 79 (3) (b) of the Act, 1966. Therefore, we conclude that the Central Electricity Regulatory Commission has the jurisdiction in respect of the BBMB within the periphery of the Electricity Act, 2003.

25. It has been argued that previously by an order dated 25.9.2007, the Central Electricity Regulatory Commission itself observed that availability based tariff cannot be implemented on BBMB power stations as these stations do not have fixed and variable charges and that the power stations are owned by partner States. When this order was passed by the Central Electricity Regulatory Commission, it has been rightly argued by the learned senior advocate for the Commission, at that time the issue was not thought of from a broad angle and it simply followed its order dated 29.8.2003 that Central Commission does not

extend its jurisdiction to Sardar Sarovar Project where also the powers are allocated to the States of Madhya Pradesh, Maharashtra and Gujarat.

26. **Principle of Natural Justice:-** It is argued that in passing the impugned order the appellants were not heard and the principle of natural justice has been violated. True, the order was passed in a *suo-motu* proceeding and the appellants did not have any opportunity of being heard. We feel that the appellants should have been heard as the question of jurisdiction has been decided. Learned senior advocate for the Commission takes us to the decisions in *Competition Commission of India vs. Steel Authority of India Ltd. and Another (2010) 10 SCC 744* where the application of the principle of natural justice has been categorised under three heads namely a) where application of the principle is excluded by specific legislation; b) where the law contemplates strict compliance with the principle and c) where the law requires compliance but when the Court or the authority thinks that no prejudice has been caused. In our opinion, the instant case comes under the third category because the appellants had scope to say by filing a petition in response to the order impugned, as it did in the case of the order dated 14.3.2012 passed by the Commission, taking the stand that the impugned order was passed without hearing and that on the

grounds mentioned in the Memorandum of Appeal the Central Electricity Regulatory Commission had no jurisdiction, though, of course, the Commission in that event expectantly would have maintained their earlier stand. However, it is not a case where the appellants were to face any civil consequences. Mr. Ramachandran also conceded at the end of the day that when the Tribunal has extensively heard the matter on all points of law and facts the question of violation of natural justice has now become academic. But we would have been happy as a judicial body if the principle of natural justice which could not be fatal to the appellants because of us would have been followed.

27. The result is that the appeal fails and is dismissed. No costs.

(V.J. Talwar)  
Technical Member

(Justice P.S. Datta)  
Judicial Member

Reportable/Not-reportable

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