BEFORE THE APPELLATE TRIBUNAL FOR ELECTRCITY
(APPELLATE JURISDICTION)

Review Petition no.3 of 2011

The 1st March, 2012

Coram; Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial M`ember

In the matter:

Madhya Pradesh PowerGeneration Company Ltd,
Shakti Bhawan, Vidyut Nagar,
Rampur Jabalpur (M.P) 482 008. … Appellant

Versus

1. Madhya Pradesh Electricity Regulatory Commission,
5th floor, Metro Plaza,
Shakti Bhawan, Vidyut Nagar,
Rampur Jabalpur (M.P) 482 008.

2 Madhya Pradesh Power Trading Company Ltd.,
Shakti Bhawan, Rampur,
Jabalpur- 482 008.

3. Madhya Pradesh Poorv Kshetra Vidyut Vitran Co.Ltd.,
Shakti Bhawan, Rampur,
Jabalpur- 482 008.

4. Madhya Pradesh Madhya Kshetra Vidyut Vitran Co.Ltd.,
Nishtha Parisar, Govindpura,
Bhopal- 462 023.

5. Madhya Pradesh Paschim Kshetra Vidyut Vitran Co.Ltd.
GPH Compound, Polo Ground,
Indore – 452 002.

6. Madhya Pradesh Power Transmission Co. Ltd.,
Block No. 3, Shakti Bhawan,
Rampur,
Jabalpur- 482 008.

7. Madhya Pradesh State Electricity Board,
Shakti Bhawan, Vidyut Nagar,
Rampur, jabalpur(M.P) 482 008.

8. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.,
Vidyut Bhawan,
Janpath,
Jaipur- 302 005.

9. Uttar Pradesh Power Corporation Ltd.,
14th floor, Shakti Bhawan Extn.,
14, Ashok Marg, Lucknow 226 001.

10. MSEB (Holding Company) & Maharashtra State Transmission Co.Ltd.,
C-19, E Block, MSETCL, Prakash Ganga,
Bandra Kurla Complex, Bandra (East),
Mumbai 400 051 ….. Respondent(s)

Counsel for the Appellant:

Mr. M.G. Ramachandran
Ms. Sneha Venketaramani
Ms. Swapna Seshadri
Ms. Ranjitha Ramachandran

Counsel for the Respondent:

Mr. Sanjay Sen
No.1 Ms. Shikha Ohri
Ms. Surbhi Sharma
Mr. Ashok Upadhyay

JUDGMENT

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

The appellant in the Appeal no.170 of 2010 ,namely Madhya Pradesh Power Generation Company Limited against whom the said appeal was dismissed by a 115-page judgement by this Tribunal on 6th May,2011 is the Review Petitioner herein on certain grounds which we will notice in the subsequent paragraphs, but before proceeding to consider the grounds of the review petition it is necessary to see the background of the appeal no 170 of 2011, the facts presented therein, the points that arose for consideration, and our reasoning for dismissal of the appeal.

2. The better way is to reproduce certain relevant paragraphs of the said judgement which we do as follows:-

> *The appeal presents a pure question of law: whether the Tribunal can give directions to the Madhya Pradesh Electricity Regulatory Commission to amend, modify or relax any of the provision of the Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of Generating Tariff) Regulations, 2009 on the alleged ground that it has been found impossible for the appellant, a generating company within the meaning of Section 2 (28) of the Electricity Act,2003 to reach the benchmarks or the yardstick fixed by the Commission in its said Regulations, 2009, by virtue of the provisions contained in the said Regulations conferring power to the Commission to amend the Regulations.*
>
> *5. The Commission which is respondent No. 1 herein notified the generation Tariff Regulations, 2009 as aforesaid on 30th April, 2009 setting out norms relating to various components of tariff determination including normative annual plant availability factor, gross station heat*

rate, specific fuel oil consumption, auxiliary energy consumption, operation and maintenance expenses and transit and handling losses for coal in the case of Thermal Power Generation. Prior to the publication of the notification as aforesaid, the appellant submitted its comments on the revised Draft Regulations expressing its difficulties on the norms proposed for the generating stations on the ground that they were old and had outlived normal life expectancy. The appellant was allegedly told by the Commission to file tariff petition as per the norms approved by the State Commission in the tariff Regulations and then incorporate the difficulties faced by the appellant in meeting the norms. Then the appellant filed a tariff petition being No. 54 of 2009 for determination of multi year generation tariff for the control period 2009-2010 to 2011-12. In the said petition the appellant submitted on the following aspects:

a) Tariff based on the bench marks as approved by the Commission as per Regulations 2009.

b) Proposed revision of the appellant concerning benchmarks along with justification

c) Tariff based on the proposed revised benchmarks.

d) Gap analysis of the two sets of tariff elaborated above.

6. In the course of public hearing the appellant reiterated its plea that the norms set out in the Regulations, 2009 were impossible to be met with; as such the Commission should relax the norms by virtue of the power under Regulation 58 of the Tariff Regulations, 2009. The Commission then is said to had observed that as regards the relaxation of the norms sought for by the appellant, it could be considered in a separate petition which is why the appellant filed a petition being No. 8 of 2010 seeking relaxation of the operating norms like the ones as mentioned in the preceding paragraph. In that petition the appellant provided detailed explanation along with supporting data to demonstrate the requirement for relaxation of the operating norms. It was contended that all the units of the appellant except the Sanjay Gandhi Thermal Power Station at Birsingpur had outlived their design life of 25 years and unless major renovation and modernization works were undertaken there could be no improvement in the performance of these units. The station-wise status of the renovation and modernization activities and the constraints faced by the appellant with respect to each of the stations was also explained.

7. The Commission disposed of the petition No. 8 of 2010 which was filed by the appellant proposing for the relaxation of the norms by an order dated 26th May, 2010 which is impugned herein. By the said order which we shall discuss in the sequel, the commission rejected the petition.

8. The aforesaid order of the Commission is assailed on the following grounds:

i) The order is a non-speaking one without dealing with specific aspects.

ii) The order proceeded on the wrong footing that the performance of the thermal power station of the appellant was deteriorating from the previous years and no efforts were made for improvement of the performance by the appellant.

iii) The Commission failed to consider the reasons given by the appellant which included that the generating stations were old and most of them had outlived their lives and there could not be any improvement except through extensive renovation and modernization.

iv) The Commission proceeded on the wrong footing that the appellant was seeking inferior norms during the control period than the ones which were there in the earlier years.

v) The Commission proceeded on the wrong footing that the appellant was not showing any commitment for improvement in the coming years.

vi) The Commission erred in misconstruing the details given and reaching the conclusion that the appellant was seeking relaxation even in regard to Sanjay Gandhi Thermal Power Station which is not quite old. The State Commission has failed to appreciate the peculiar problem faced by the appellant in the above station because of non-completion of some of the facilities of the new plant and the appellant was seeking relaxation only for the financial year 2009-2010. The Sanjay Gandhi Thermal Power Station Unit No. 5 for which relaxation was sought was the first 500 MW plant installed by the appellant and there was a need for the appellant's technical personnel to understand and gain experience for operating such capacity. The appellant had not sought any relaxation in respect of the above unit for the financial year 2010-2011 onwards. The conclusion reached by the State Commission in regard to the said generating unit is, therefore, without consideration of the relevant facts pleaded by the appellant.

vii) The State Commission erred in not considering the Plant Availability/Load Factor achieved by the appellant's generating units in the past few years, the data of which was provided in details by the appellant. The State Commission without considering the actual Plant Availability/Load Factor achieved in the past years has determined the norms to be achieved by the appellant's generating stations which is approximately 20% higher than the Plant Availability/Load Factor presently achieved by these generating units. The State Commission has failed to appreciate that these generating units of the appellant are extremely old and have since long outlived their design life. It was impossible for these units to achieve Plant Availability/Load Factor at

par with the new generating units unless substantial renovation & modernization activities were undertaken

viii) The State Commission has failed to appreciate that the auxiliary energy consumption in a thermal power generating station is more like a fixed consumption. When the machines are running at lower load, the percentage of auxiliary energy consumed becomes higher. Some auxiliaries are required to run even when the machines are shut down. Due to the ongoing renovation & modernization activities, the higher consumption of secondary oil is inevitable and an improvement can be expected only after the renovation & modernization activities are completed.

ix) The State Commission has failed to appreciate that some generating units of the appellant are designed with dry bottom ash disposal system and due to this design constraint, these units have higher specific oil consumption. For example, in the case of the Satpura Thermal Power Station Phase 1 (5 x 62.5 MW), the State Commission has approved the specific oil consumption of the order of 2.5 to 3 ml/kWh whereas, even in the year of best performance the specific oil consumption of the unit was 5.80 ml/kWh. Thus, even with the best possible efforts, it is not possible for the appellant to achieve the target laid down by the State Commission. Thus, the State Commission has failed to appreciate the design peculiarities and the resulting specific oil consumption requirements of these generating units.

x) The State Commission has failed to appreciate that the appellant is already applying a system of coal accounting in line with the system of coal accounting being adopted by other thermal power stations of both private and public sectors. In spite of making all possible efforts to minimize the losses, it is difficult for the appellant to achieve the targets prescribed by the State Commission for reasons beyond its control

xi) The State Commission has failed to appreciate that losses during transit and handling of the coal occur due to factors which are beyond the control of the appellant such as loss of coal quantity due to fine particles getting blown away due to wind or washed away during rainy season, spontaneous combustion causing accumulated heaps of coal to catch fire of their own, surface moisture getting evaporated due to larger travel distance and larger exposed surface area and pilferage. The appellant has adopted the best possible methods to minimize these losses. It is, however, impossible to completely eliminate such losses, thereby reducing these losses to an extent compliant with the prescribed norms. A substantial amount of the handling and transit losses occur when the coal is under the control of the other agencies and the appellant cannot have any role to reduce these losses without interfering with their working, which is just not possible. The State Commission has, therefore, erred in not taking these factors into consideration for relaxing the stringent norms prescribed to reduce the transit and handling losses of coal

xii) The State Commission erred in observing that with regard to hydro generating stations, no exemption can be provided to the appellant from the operating norms prescribed under the Tariff Regulations. The declared capacity of the generating unit may be zero, although the units are ready to run, due to factors beyond the appellant's control. The appellant, therefore, is seeking a relaxation of their applicability to the appellant's generating units. The appellant had also sought clarification from the State Commission regarding the consideration of these constraints while calculating Plant Availability Factor vide letter dated 20.1.2010. The State Commission in its response dated 11.3.2010 has not clarified the above specific issues sought by the appellant, due to which the appellant again wrote a letter dated 03.04.2010 to which no response has been received from the State Commission till date.

xiii) The State Commission wrongly proceeded on the basis that the appellant is proposing revision of norms which are more relaxed than previous submission made on 27.2.2009 and particularly for FY 2009-10, and that more relaxation of norms were sought than the norms specified for FY 2008-09 in the earlier Regulations. The State Commission has further stated that average of operating parameters achieved since 2003-04 were proposed while there are instances when better operating parameters have been achieved, which have been ignored by MPPGCL. The State Commission has failed to appreciate that it has proposed operating norms for the control period on the basis of average of operating parameters achieved during the last 5 years i.e. upto FY 2007-08. However, when the Tariff Regulations for control period FY 2010-12 were notified in April 2009 more recent data was available.

xiv) The State Commission has wrongly concluded that the vision of the petitioner is quite contrary to the spirit laid down under Section 5.3 (f) of Tariff Policy. The State Commission has failed to appreciate that the Central Commission has also considered average performance for fixing the target of Central Generating Stations and norms were fixed below the average to incentivize the generating units to achieve better operating parameters. Regarding relaxed norms for FY 2009-10, the appellant has also considered the force majeure conditions regarding shortage of water in the Tawa lake of STPS, Sarni. Two sets of policies were prescribed under this section of Tariff Policy namely one for plant which is performing at close or above the normative level and for the other stations which are referred to in sections 5 (h) (ii). The section 5 (h) (ii) is regarding the units where operations were much below the norms for many previous years. It was recommended that the initial starting point for determination of revenue requirement should be recognized at relaxed level and not at a desired level and suitable benchmarks study may be conducted to establish desired performance standard and further, separate studies may be required for each utility to assess the capital expenditure necessary to meet necessary service

standards. The appellant had given consent to proposal of the State Commission for carrying out the independent 3rd party study for formulation of O & M norms. The study had not been conducted so far. The appellant has been regularly pursuing the State Commission for conducting such study to assess the capability of all plants operated by the Appellant for providing relaxation.

xv) The State Commission has failed to follow the well settled principles laid down by this Tribunal in the case of BSES Rajdhani Power Limited V. Delhi Electricity Regulatory Commission (2009) ELR APTEL 880; Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited v. Uttar Pradesh Electricity Regulatory Commission and Ors. (Appeal No. 129 of 2006) which deal with the relaxation of norms required to be done in the context of the old generating stations.

xvI) The State Commission has failed to appreciate that section 5.3 (f) of the Tariff Policy provides that norms should be efficient related to past performance capable to achieve and also considering the latest technological advancement, fuel, vintage of equipment, nature of operation, level of service to be provided to the consumers.
xvii) The State Commission has not properly construed Section 6 of the National Tariff Policy. The Policy further clarifies the requirement under Section 6.2 (2) as under;

"Power Purchase Agreement should ensure adequate bankable payment security agreements to Generating Companies. In case of persisting default in spite of the available payment security mechanisms like letter of credit, escrow of cash flows etc. the generating companies may sell to other buyers"
Section 6.2 (3) of the National Tariff Policy further states that-

" 3. In case of coal based generating stations, the cost of project will also include reasonable cost of setting up coal washeries, coal beneficiation system and dry ash handling & disposal system" There is inadequate supply of coal by Coal India Limited to the thermal power stations of the appellant and quality of coal is also deteriorating year after year. The quality of coal supplied is inferior to the design requirements of the boiler equipments resulting in higher Heat Rate and inefficient operation.

xviii)The State Commission has failed to appreciate that even the Central Electricity Regulatory Commission determines the applicable norms and parameters based on actual performance of the generating stations and not arbitrarily and unilaterally without regard to the actual performance in the previous years

9. Accordingly, the prayers are following:

a) *"Allow the appeal and set aside the order dated 26.05.2010 passed by the Madhya Pradesh Electricity Regulatory Commission to the extent challenged in the present appeal.*

12. The contentions of the respondent No.1in response to the memorandum of appeal are as follows:-

a) *Since the Regulations 2009 notified by the State Commission under Section 61 read with Section 181 of the Electricity Act, 2003 has the force of law, the State Commission has to determine the tariff in terms of the said Regulations and not on the basis of statements made by the appellant in a petition proposing for amendment of such regulations.*

b) *The Commission's order dated 26th May, 2010 passed in petition No. 8 of 2010 declining the prayer of the appellant for amendment of the MYT Regulations,2009 cannot at all be the subject matter of challenge under Section 111 of the Act.*

c) *The Tribunal has no authority or jurisdiction to sit on judgment on the on the legality of the MYT Regulations which have acquired the status of the law.*

d) *The appellate power of the Tribunal does not extend to the examination of vires/ and or the impracticability or otherwise of the Regulations notified by the Commission, under Section 111 of the Act. As such, the Tribunal does not require under the law to ask the Commission to amend its regulations in the same manner as was prayed for by the appellant before the Commission.*

e) *The effect of allowing the present appeal would amount to holding that the MYT Regulations, 2009 as framed by the State Commission, which otherwise cannot be set aside by the Tribunal, shall be amended by the Commission meaning thereby what cannot be directly done by the Tribunal is asked to be done indirectly.*

f) *Factually, in spite of repeated reminders to the appellant issued by the Commission to come out with a detailed renovation and modernization plan the appellant failed to do so and it miserably failed in managing its affairs in accordance with the directions issued by the Commission from time to time and in such circumstance, the appellant's asking for amendment of the norms and guidelines by amending the Regulations to suit its convenience does not deserve commendation.*

g) *The respondent No. 1 referred to certain decisions of the Hon'ble Supreme Court in support of its contentions that whatever is asked for by the appellant in this appeal in whatever form it be, is not legally permissible for this Tribunal*

to do so because to do so would be usurping the jurisdiction of the power of judicial review which is available in ultimate analysis with the High Court. It is contended that the appellate jurisdiction of this Tribunal which is vested in Section 111 of the Act does not extend to the jurisdiction of questioning for legality of the Regulations so as to see whether the norms notified in the Regulations are possible to reach by the appellant who has exhibited total failure in coming up to the mark or standard set up by the Commission. The decisions are (a) West Bengal Electricity Regulatory Commission V/s Calcutta Electricity Supply Company Ltd. Reported in (2002) 8 SCC 715, (b) K.S Venkataraman & Co. Pvt.Ltd. V/s State of Madras reported in AIR 1966 SC 1089 ,(c) PTC India Ltd. Vs CERC reported in (2010)4 SCC 603, (d) Narinder Chand Hemraj Vs Lt. Governor of Union Territory of Himachal Pradesh reported in (1971) 2 SCC 747, Supreme Court Employees Welfare Association Vs Union of India & another reported in (1989) 4 SCC 187, (e) .M.U. Sinai Vs Union of India and Ors (1972) 2 SCR 640, (f) Vinod Seth v/s Devinder Bajaj and another reported in (2010) 8 SCC 1 (g) Padam Sen v/s State of UP AIR 1219,and (h) Nain Singh V/s. Koonwarjee reported in (1970) 1 SCC 735.

13. The pleadings of the parties bring us to the following issues:
a) Is the appeal maintainable in its present form and merit?
b) Whether this Tribunal has jurisdiction to afford relief to the appellant as was prayed before the Commission under section 111 of the Electricity Act, 2003?
c) Is the impugned order of the Commission dated 26th May, 2010 passed in petition no. 8of 2010 declining the prayer of the appellant for amendment of MYT Regulations, 2009 can at all be a subject matter of challenge under Section 111 of the Electricity Act, 2003?
d) Whether the appellate power of the Tribunal can be extended to the exercise of setting aside MYT Regulations on the ground of norms set out therein being impossible to be achieved by the appellant for its generating station(s)
e) Whether the appellate power of the Tribunal under Section 111 of the Act enables it to direct the Commission to amend the MYT Regulations?
f) What is the scope and intent of the provisions of the said Regulations, 2009 dealing with the 'power to remove difficulties'(Regulation 57), 'power to amend' (Regulation 58) and inherent power of Commission (Regulation 59) in the context of the exercise of regulatory power to determine the tariff for the electricity utilities namely the generating companies?
g) Whether the exercise or non-exercise of powers by the State Commission under Regulations 57,58 and 59 is justiceable under Section 111 of the Electricity Act, and if so, to what extent and in what manner?

h) Whether the State Commission in exercise or non-exercise of powers under Regulations 57, 58 or 59 is required to give a reasoned order in support of its decision?

i) Whether in the facts and circumstance of the case the appellant has failed on its part to carry out the R&M activities in terms of the directions issued by the Commission so much so that such failure led the appellant to come up before the Commission or before this Tribunal with prayer for amendment of the Regulations at a time when the tariff application for determining the tariff of the appellant is pending for disposal before the Commission.

b) Pass such other Order(s) and this Tribunal may deem just and proper"

3. Upon recording the pleadings of the parties and the points canvassed we made our observations which we quote from certain relevant paragraphs of that judgment

24. If we analyze different provisions of this Act, which are relatable to the appropriate Commission it would appear that the regulatory Commission is a peculiar statutory body having within in itself four functions, (a) Administrative, (b) Legislative and (c) Judicial and (d) Advisory . In its administrative jurisdiction, it controls and specifies the functions of the generating utilities, transmission utilities, distribution utilities and traders of Electricity. Normally, it does not have any concern with any individual consumer. Its legislative function extends to bringing about different types of Regulations pursuant to the provisions of the Act and to carry out the function of the Act and its Regulations include determination of terms and conditions of Tariff Regulations, Conduct of Business Regulation, MYT Frame Work Regulations, to name a few. It is on the basis of these Regulations that an appropriate Commission determines tariff of transmission utilities or of distribution utilities and when it does so it does exercise quasi -legislative power. Under Section 178 of the Electricity Act, 2003, the Central Electricity Regulatory Commission is vested with the power to make regulations and regulations framed by them are required to be laid down before the Parliament under Section 179 which has authority to make any modification. Similarly, the State Commission has been vested with the power to make regulations to carry our the purpose of the Act under Section 181 and all such regulations made by the State Commission are required to be laid before each House of the State Legislature, Unicamral or bicameral as the case may be. The Regulations framed by the State Commission or the Central Commission do partake the character of subordinate or delegate legislation under the law and all such subordinate legislations have the force of the statutory law Therefore, the regulations framed by an appropriate Commission are deemed to be legislative enactments having the approval of Legislature when it is put to use by notification.

25. So far as the authority of this Tribunal is concerned, its power or its limitation has been laid down in the most recent decision of the Supreme Court namely PTC India Ltd. Vs. CERC reported in (2010) 4 SCC603. This is a five judge bench decision of the Supreme Court wherein the question arose as to whether this Tribunal has jurisdiction under Section 111 and 121 to examine the validity of the regulations. The Hon'ble Supreme Court held as follows-

> *''93. for the aforesaid reasons, we answer the question raised in the reference as follows:*
>
> *The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.*
>
> *94. Our summary of findings and answer to the reference are with reference to the provisions of the Electricity Act, 2003. They shall not be construed as a general principle of law to be applied to Appellate Tribunals vis-à-vis Regulatory Commissions under other enactments. In particular, we make it clear that the decision may not be taken as expression of any view in regard to power of the Securities Appellate Tribunal vis-à-vis Securities and Exchange Board of India under the Securities and Exchange Board of India Act, 1992 or with reference to the Telecom Disputes Settlement and Appellate Tribunal vis-à-vis Telecom Regulatory Authority of India under the Telecom Regulatory Authority of India Act, 1997"*

26. This decision has also dealt with certain issues which we are not concerned with. The ratio decidendi of this decision, so far as the power and functions of the Tribunal is concerned, is very clear and have been laid down in para 93 and 94 of the judgment. Therefore, we cannot legitimately do exercise which is not mandated in Section 111 or 121 of the Act. So far as the present appeal is concerned, we are faced with the submissions of the learned Counsel for the appellant that when a Commission declines to exercise its power to remove difficulties, or power to relax or when Commission refuses to exercise its inherent power when exercise of any of such powers was really necessary, then it is within the domain of this Tribunal to exercise its power under 111 to direct the Commission to exercise its any of the powers as enumerated above so much so that the principles laid down in the National Tariff Policy, National Electricity Policy and provisions of the Section 61 of the Act are really honored or they are not honored in breaches.

4. We continued to observe:

37. We have quoted some of the provisions of the Regulations of the State Commission and that of the Act. The Commission is a creature of the statute and apart from the provisions of the Act we have quoted,

some other provisions of the Act are there which are located in Part – IV, Part-V and Part-VI of the Act. Part –IV deals with the licensing, Part –V deals with transmission and Part-VI deals with distribution of electricity. Generation, transmission, distribution and trading are the four components of the electrical system under the Act. If we look at Section 86 which occurs in Part-X of the Act, we can easily find that this Section which governs the other provisions of the Act so far as the State Commission is concerned is a conglomeration of administrative, legislative, judicial and advisory power of the State Commission. These four jurisdictions are vested with the Commission which exercises its powers under any of the jurisdictions in terms of the statute. Following the reforms in the electricity sector, there has been induction of the private sector in the electricity business and in terms of the Act, either the Central Government or the State Government can no longer be identified with any utilities. Section 108 is a provision giving power to the State Government to give any direction only in the matter of policy and that too involving public interest to the Commission, save which the Commission is statutorily an independent body vested with the aforesaid jurisdictions, and so far as the Tribunal is concerned it has jurisdiction to hear appeal against the order of the Commission that is passed primarily under Part VII of the Act. The Tribunal vis-à-vis the Commission has no legislative relation to perform. Basically, it exercises judicial function and that apart there is a provision in Section 121 that gives power to the Tribunal to issue such orders, instructions or directions to any appropriate Commission for the performance of its statutory functions under the Act. Be it noted here that this power is different from appellate power which is vested in Section 111.

38. We could not be in agreement with Mr. Ramachandran that it is not a case of direction to the Commission to bring about an amendment of the notified regulations but it is simply a case asking the Commission by the Tribunal to relax the norms. It has to be made clear that it is not a case where we have been asked to adjudicate upon a tariff determination order in respect of the generating stations of the appellant for any particular financial year. So far no tariff order has yet been passed by the Commission. The tariff application is pending before the Commission for hearing and disposal, it being application no. 54 of 2009. During the pendency of the tariff determination application the appellant filed petition no. 08 of 2010 praying for amendment of the notified Regulations on the ground that the norms set out in the Regulations were on the part of the appellant being impossible to reach and that petition has been disposed of by the Commission through a rejection order on the grounds which we have set out above. Therefore, before us there is no concrete case for adjudication in respect of tariff for the appellant; the Commission has notified its Regulations dealing with how to determine tariff and a set of parameters has been laid down in respect of the generating stations of the appellant and we are asked by the appellant to examine whether the norms fixed by the Commission in the tariff Regulations by virtue of the legislative power of the Commission were pragmatic or otherwise

so that the Commission could be asked to modify the regulations in order that the norms may be relaxed to the advantage of the appellant. We ask ourselves: what is meant when we say that the Commission should be asked only to modify the norms ? The relaxation of norms or modification thereof to the advantage of the appellant irrespective of the question whether such relaxation or modification would or would not be justified is possible only when the notified Regulation is again notified by bringing about an amendment thereof. Unquestionably, the Commission has power to amend, modify, rescind or repeal regulation in the same manner as the Central legislature or State legislature derives its authority from the Constitution to enact a law, to modify or amend, or rescind or repeal; and any of these functions falls within the legislative jurisdiction of the Commission. Therefore, what we are really asked to do is to direct the Commission to bring out the amendment of the regulation. When we ask the Commission to amend its regulations it virtually implies that the regulations framed by it is deficient, short of achieving its purpose and defeats the objectives of the Act, the national tariff policy and the national electricity policy. We do not apprehend that when we say so nobody will say that we are not exercising the power of judicial review the very existence of which with the Tribunal has been negated by the decision of the Hon'ble Suprene Court in the PTC case which we have already noted and which really is not there in the Act or the Constitution. We cannot conceive of the source of the power of judicial review in the statute since the power is a constitutional power that enables a judicial authority to examine the validity of a legislation or a delegated legislation.

39. Be that as it may, let us examine as to which of the sources of power, namely, a) power to remove difficulties, b) power to relax norms, c) exercise of inherent powers and d) power to amend the regulations apart from the power of Judicial Review will be of aid to the appellant and in which particular circumstance. Mr. Ramachandran has taken us to a good number of decisions which we shall now consider. He has referred to Utter Pradesh Power Corporation Limited Vs. National Thermal Power Corporation of India Limited and others reported in (2009) 6 SCC 235. One important observation made at paragraph 56 of the judgment is that:
"It is now a well settled principle of law that a subordinate legislation validly made becomes a part of the Act and should be read as such."
It has been held that power to regulate may include the power to grant or refuse to grant a licence, a power to tax or exempt from taxation, a power to increase tariff or a power to decrease the tariff having relied on the decision in Hotel & Restaurant Association Vs. Star India Pvt. Ltd., (2006) 13 SCC 753, it was held the jurisdiction was not only to fix tariff but also laying down terms and conditions for providing services . In this decision it was held at paragraph 66 that the jurisdiction of the Appellate Tribunal is wide, it being an expert Tribunal, and it can interfere with the finding of the Commission both on fact as also on law. If we have correctly understood the submission of Mr. Ramachandran, it would appear that he seeks to stretch to the point that because of

being it an expert Tribunal having appellate jurisdiction it can direct the Commission to relax the norms, to amend the Regulations or make an order directing the Commission to remove the difficulties; and according to Mr. Ramachandran power to remove difficulties vested with the Government in a statute is not the same thing as power to remove difficulties vested in a Commission. To our reasoning, the appellate jurisdiction of the Tribunal is only exercisable in terms of the statute that created the Tribunal. Certainly as a first appellate forum it can examine facts as also the law. The exercise of the function of the appellate Authority must be within the domain of the law which has been engrafted in Section 111of the Act. It is not deniable that the Commission has manifold powers, namely, administrative, supervisory, legislative and adjudicatory but each power, according to us, must be exercised at appropriate field; simply because a Commission has many powers, it cannot be said that while exercising one power it oversteps its limit in that power and assumes another jurisdiction. This was what has been exactly said in WB Electricity which has also been relied on by Mr. Ramachandran. In this case, the High Court while hearing appeal in its appellate jurisdiction vested in the statute, since repealed, exercised the writ jurisdictional power under Article 226 which was deprecated by the Hon'ble Supreme Court. What we want to emphasise is that this Tribunal would exercise power only to the extent as is conferred on it. There is no difference with Mr. Ramchandran's submission that while determining the tariff, the Commission has to bear in mind the principles laid down in Section 61 and that the tariff has to be determined on cost plus basis so that a reasonable return on investment enures to the investors. In this connection Mr. Ramachandran argued that there cannot be any regulation providing for various terms and conditions in absolute manner without exercising discretion like exemption, relaxation, deviation, removing difficulties etc. Since the power to exercise all these things or any of them is there in the regulations itself, we are nobody to question the legitimacy of such provisions therein. Regulatory Commission Vs. CERC reported in (2002) 8 SCC 715

40. Mr. Ramachandran took us to the recent judgment of the Hon'ble Supreme Court, namely, PTC India Ltd. Vs. CERC reported in (2010) 4 SCC 603 . We have earlier noted that one of the issues which the Hon'ble Supreme Court was invited to address to was whether Section 121 of the Electricity Act gives power to the Tribunal to examine validity of a regulation and the Hon'ble Court had said it can be examined by Judicial Review under Article 226 of the Constitution. Mr. Ramachandran does not dispute this proposition of law and does not ask us to exercise any such power which is really not there. Now, importantly from paragraph 25 onwards of the judgment, the Hon'ble Supreme Court has observed that the Commission has many jurisdictions, legislative, advisory, quasi-judicial as vested in different provisions of the Act. At paragraph 49 of the judgment, their Lordships have said that decision making and regulation making functions are both assigned to CERC and price fixation exercise is really legislative

in character unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 which is appellable under Section 111 although Section 61 is an enabling provision for the framing of regulations by the Commission. At para 52 of the judgment, their Lordships have observed that a distinction must be made between delegation of legislative function and investment of discretion to exercise a particular discretionary power by a statute. The ruling in this PTC case has been so far as the instant appeal is concerned is not purely a matter of academic interest but also decisive.

41. Mr. Ramachandran then took us to the decision in Premium Granites & Anr. V. State of Tamil Nadu & Ors. (1994) 2 SCC 691, it was a case where the main question was whether Rule 39 of the Mineral Concessional Rules is legal and valid. It was struck down by the Madras High Court, while the Hon'ble Supreme Court upheld the vires of the rules saying that it does not offend the Act or the Constitution. This Rule 39 dealt with power of relaxation which has been a matter of concern for the client of Mr. Ramachandran. Their Lordships held at paragraphs 48, 49, 50 and 51 that power of relaxation as was there in Rule 39 has to be exercised for mineral development and in public interest after recording reasons therefor and such exercise of power must exhibit reasonableness of State action. It was further held that it is not the domain of the Court to embark upon uncharted ocean of public policy in an exercise to consider whether the particular public policy is wise or a better policy can be achieved and such exercise must be left to the discretion of the executive and the legislative authorities as the case may be. (Emphasis ours) According to Mr. Ramachandran, we must ask the Commission to exercise such power in its legislative jurisdiction because what was basically prayed before the Commission was to relax the norms by amendment of the regulations. There cannot be any second proposition to the proposition of law as laid down by the Hon'ble Supreme Court. The question whether we would have legitimacy to ask the Commission to amend the regulation is exactly the question before us. To our mind this decision does not help the appellant. If the discretion to relax is not arbitrary, it cannot be read down. If the discretion is based on reason and objectivity while refusing to relax the norm yet keeping in mind the objectives of the Act and the National Tariff Policy then it is not for the Tribunal to interfere with the discretion and ask the Commission in exercise of academic pursuit without before us any order determining tariff application and to substitute the Tribunal's reason to be the reason of the Commission. This to our mind is not the ratio decidendi of the decision, on the contrary the Hon'ble Court held that the Court must not embark upon the public policy.

42. Mr. Ramachandran then took us to the case of Hindustan Paper Corporation Limited Vs. Government of Kerala (19860 3 SCC 398. This was a case where the question was whether the power of exemption under Section 6 of Kerala Forest Produce (Fixation of Selling Price) Act 1976 was ultra vires or not. The Kerala High Court

held it was invalid, but the Hon'ble Supreme Court ruled in favour of validity. Here it has been observed in paragraph 9 of the decision that it is well recognized and constitutionally accepted legislative practice to incorporate provision conferring the powers of exemption on the Government in such statutes and such exemption has to be in public interest. It is not a case before us as to whether the Commission can exercise any power of exemption nor we are called upon to examine whether such exemption was rightly granted or not. Be it noted here that the exemption talked of by the Hon'ble Supreme Court in the instant case or the relaxation talked of in the Premium Granite case is exemption or relaxation vested in the Government but here in the instant appeal before us such relaxation is asked for to be exercised by the Commission in its legislative jurisdiction.

43. Now Mr. Ramachandran says that in the treatise of the learned author Mr. M.P. Jain in Cases and Materials on India Administrative Law – 1994 Edition volume 1, Page 117, there is a deliberation on removal of difficulty clause. This clause is better known as Henry VIII clause the necessity of which arises to remove the difficulties which were not foreseen at the time of passing the Act, and it is left to the executive to remove any such. Mr Ramchandran lays emphasis to the sentence where it has been observed that " At times, 'removal of difficulty' clause may empower the Government to amend the parent Act or any other Act with a view to bring the parent Act into full operation ." It is hardly deniable that a tariff regulations must contain power to remove the difficulties, to relax, to amend the regulations, to obviate from the norms and to exercise inherent power if the facts and circumstances justify exercise any such power.

44 Next we were shown the decision in Hindusthan Steels Ltd. Vs A.K.Roy, (1969)3 SCC 513 which according to us is totally out context because whether an Industrial Tribunal while dealing with a case of termination of an employee from an industrial concern has power to direct reinstatement or order for compensation, and the Hon'ble Supreme Court ruled that such discretion can be exercised by the Tribunal judicially.

45. The principle governing the use of discretion was again considered in de Smith' Judicial Review of Administrative Action,4th . Edition, page285 where it has been observed that the authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner, and in general a discretion must be exercised only by the authority to which it is committed.

46. In support of the argument that the Commission while rejecting the petition for amendment of the Regulations so as to suit the convenience of the appellant has not assigned any reason for such rejection Mr. Ramchandran has relied on the authority in S.N. Mukherjee Vs. Union of India reported in (1990) 4 SCC 594 where it has been held that an administrative authority while exercising quasi-

judicial function must record reason for its decision so that it could be understood that the Authority has given due consideration to the points in controversy and that to show clarity and avoid arbitrariness. We must observe that whether in ultimate terms we accept the appeal or not, we cannot say that the order impugned is without any reason. Reasons have been given which are well understood and it can never be alleged that the order lacks transparency and objectivity, no matter whether one agrees to it or not. It is not the requirement of law, as this decision has held, that as in a Court of law the reason should be elaborate. Therefore, this decision is of no avail to Mr. Ramachandra's client.

47. In State of Karnataka & Anr. Vs. R. Vivekanand Swamy and Another 2008 (5) SCC 328 the question was of relaxation by the Government of the medical reimbursement rules in contravention of which a Government employee got himself treated in a hospital of his own choice which the regulations did not permit but the Government relaxed the rule to mitigate the exigencies of circumstances. This decision is of no avail to any of the parties here. The rider was that such discretion to deviate from the rules must not be arbitrary.

48.. Mr. Ramchandran rightly submits that if an Authority which is vested with a discretion does not exercise the discretion, it would amount to fettering discretion or fettering jurisdiction in support of which he relies on Foulke's – Administrative Law, Eighth Edition, Pg. 217 and Bennion on Statutory Interpretation, Fifth Edition, Indian reprint Pg. 90. The bottom-line is that if power of discretion is there, it may be exercised and such exercise must be judiciously done meaning thereby that power may not be refused when exercise of such power is warranted.

49. While elaborating this above argument, Mr. Ramachandran refers to 115 of the Civil Procedure Code, 1908 dealing with revision. We fail to understand how Section 115 which has drastically been amended does have any level playing field in the circumstances. It is the cardinal principle of law that if the Court refuses to exercise jurisdiction vested in it the Court having power of revision has to revise the order or when the Court exercises jurisdiction not vested in it, then also equally the power of revision lies. We are quite conscious of this position. Now in this connection Mr. Ramachandran takes us to WBERC Vs. CESC Ltd. (2002) 8 SCC 715 where at paragraph 102 of the judgment it was observed that the Hon'ble Supreme Court felt the necessity of having an expert body to act like a Tribunal to examine the orders of the Commission since the matter is technical. This observation of the Hon'ble Supreme Court has inspired Mr. Ramachandran to say that the appellate power under Section 111 is no less wider than the power of judicial review which is exercised under Article 226 of the Constitution. Respectfully to the learned counsel, we are unable to concede to this position because in this case itself the Supreme Court took exception to the manner in which the Calcutta High Court exercised the power of writ jurisdiction while hearing appeal under Section 27 of the Electricity

Regulatory Commission Act, 1998. It was observed that the appellate power and the power of judicial review are distinct. It is important to remember here that in this decision we have been reminded by the Supreme Court that there is weighty authority for the proposition that a Tribunal which is a creature of a statute cannot question the vires of the provisions under which it functions and quoting the decision of Dhulabhai Vs. State of M.P. AIR 1969 SC 78 it was held that challenge to the provisions of a particular act as ultra vires cannot be brought before the Tribunal constituted under that Act and even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

50. Mr. Ramachandran himself has cited Hilaire Barnett – Constitutional and Administrative Law, first Indian reprint, 1996, Pg. 716 wherein it was observed that judicial review is distinguishable from an appeal against a decision. An appeal is made both on the law and the facts, while judicial review by contrast is concerned with the manner in which the decision maker has applied the relevant rules. It has been observed in this book that judicial review derives from the courts inherent powers to keep decision making bodies within the bounds of their powers, and to provide remedies for abuse of power, and its purpose is not to substitute a decision of the Court for the decision of the administrative body.

51. Again, the learned author Bennion in his treatise on Statutory Interpretation, 5th Edition, Indian Reprint, Pg. 142 writes that the distinction between original and appellate jurisdiction is an important one, while in the former the enforcement agency gives a decision upon hearing the counsel, while in the latter the body has to carefully consider the reasons and if it involves an improper exercise of discretion the appellate body may substitute its own view. In a word, appellate jurisdiction is a statutory jurisdiction which is competent to examine both fact and the law but which will not normally interfere with the exercise of the judges discretion except, however, on the grounds of law.

52. In Cellular Operators Association of India and Others Vs. Union of India and Others reported in (2003) 3 Supreme Court Cases 186 the scope and power of the Telecom Regulatory Authority of India was considered. Mr. Ramachandran interprets this judgment to say that the Appellate Tribunal for Electricity which is as expert body as the Appellate Tribunal under Telecom Regulatory Authority of India Act, 1997 can exercise so much of power to make any order while examining legality, propriety or correctness of a decision or order or direction of a Commission and in that way it surpasses the power of judicial review. This Tribunal is a creature of statute as other Tribunals are. Each functions in its own orbit as defined in the Act creating it. In the Telecom Regulatory Appellate Tribunal, there is Section 15 according to which power of that appellate Tribunal has been found by the Hon'ble Supreme Court to be quite wide as has been indicated in

the statute itself and the decisions of the Supreme Court dealing with the power of Court exercising appellate power or original power will have no application for limiting the jurisdiction of the appellate Tribunal under that Act. But one Hon'ble Judge writing separate opinion while concurring observed that when jurisdiction upon a Court or Tribunal is conferred by statute the same has to be construed in terms thereof and not otherwise, while the power of Judicial Review of the Supreme Court as also the High Court stand on a different footing.

53. Now, Mr. Ramachandran refers to five decisions of this Tribunal, namely, Maharashtra State Power Generation Co. Ltd. Vs. Maharashtra Electricity Regulator Commission & Ors. (2010 ELR (APTEL) 0189, NTPC Ltd. S. Madhya Pradesh State Electricity Board 2007 ELR APTEL 7, BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission (2009) ELR APTEL 880, Uttar Pradesh Rajya Vidut Utpadan Nigam Ltd. Vs. Uttar Pradesh Electricity Regulatory Commission and Ors. (Appeal No. 96 of 2008) and Gujarat State Electricity Corporation Ltd. Vs. Gujarat Electricity Regulatory Commission and Ors. (Appeal No. 129 of 2006). In the Maharashtra case, the appellant submitted its application for approval of ARR and tariff petition for FY 2005-06 and 2006-07. The Commission passed an order determining the tariff under the tariff regulation and an appeal was preferred against that order. In course of hearing and disposal, this Tribunal felt the necessity of an independent study to consider the operating parameters observing that the Commission has power to revise the parameters by amending the tariff regulations. Nothing more was done in that case. The Tribunal did not make any order directing the Commission to amend the regulations. It simply directed an exercise of study to examine the feasibility of coming down from the norms. To our understanding, this decision does not lay down any proposition of law and the questions we are confronted with were not posed thereat, and here it is a case where we are not hearing any appeal against any order determining tariff; we are called upon to hear an appeal against alleged insufficiency, incorrectness of the regulations themselves on the ground that the norms set down there should be amended. In the NTPC case it was observed at page 293 which is the ratio decidendi of the case that regulation 13 of the CERC Terms and Conditions of Tariff Regulations, 2004 empowers the Commission to vary the provisions of the regulations on its own motion or on an application made before it as power to relax is there with the Commission. Notably, in the two cases observations were made in course of hearing and disposal of the appeals that arose out of orders determining tariff which is not the case with us. In BSES Rajdhani case, the Tribunal held that the Commission has right to reconsider the target that has been set and if necessary they may amend regulation. In Uttar Pradesh Rajya Vidyut Utpadan Ltd case upon factual analysis direction was made to the Commission by this Tribunal to re-determine the parameters for the year 2006-07 and 2007-08 and to undertake study for renovation and modernisation of older plants. In Gujrat State Electricity Regulation case, the Tribunal made certain directions to

modify the generation tariff on certain points set out in the body of the judgment. None of the decisions of this Tribunal which have been relied upon by the appellant does render any real assistance to us because in each of the cases the Tribunal felt while hearing appeal on determination of tariff, which we are not doing, that the Commission may in consideration of facts and circumstances of each particular case may go on re-determine tariff after varying different parameters by undertaking study. In none of the cases this Tribunal directed any of the Commissions to amend the regulations so as to suit the parameters of the Generating Companies.

54. Having studied the decisions relied on by Mr. Ramachandran, we are to consider whether we should ask the Commission to exercise the power of removal of difficulties, or to relax or to amend the regulation or to exercise inherent powers of the Commission. At the cost of repetition it has to be observed that in the peculiar situation in which we are beset with if we ask the Commission to exercise the power of removal of difficulty, or to relax, or to exercise inherent power, we would be directing the Commission indirectly which we cannot do directly that it should amend its regulation. What we cannot ask the Commission to do directly, we cannot ask to do indirectly and it is the place now to see that as to under what circumstances and in which jurisdictions the power to remove difficulties or to power to relax or to exercise inherent jurisdiction can be exercised. The question is whether the power to remove difficulties can be exercisable in legislative jurisdiction or the power to relax or the power to exercise the inherent power to do justice can be exercised in the legislative jurisdiction. Importantly, what the appellant desires is an order of the Tribunal so that the Commission in its legislative jurisdiction exercises legislative power to amend its regulations which power definitely is there with the Commission, of course.

55. We fail to be in agreement with Mr. Ramachandran when he says that power to remove difficulties as is ordinarily available in statute enacted by Parliament is not the same power as the power to remove difficulties as is there in a regulation available to the Commission. But Mr. Ramachandran is right when he says that such power is vested in the Commission to remove anomalies and difficulties. To our understanding, the exercise to remove difficulties cannot have different connotation in different statutes or distinguishable between statute and regulation. If we closely read Regulation 57 of the MYT Regulations, 2009 we find that power to remove difficulties which is given to the Commission is basically an administrative power not a legislative power which the Commission may by general or special order do or undertake or direct a generating Company to do or undertake things which the Commission find necessary for the purpose of removing the difficulty. This power is exercisable only to ensure that the Act is implemented and it is in furtherance of the Act that the power to remove difficulties is conferred. It is only to give effect to the provisions of the regulations that this power is exercised. It has been rightly

argued by Mr. Sanjay Sen, learned Advocate for the Commission that the power to remove difficulty does not contemplate removal of hardship that may arise as a result of giving effect to the regulation. The decision in M.U.Sinai Vs Union of India (1975) 2 SCR 640 is pertinent. In this decision it has been held that in order to obviate the necessity of approaching the legislature for removal of every difficulty encountered in the enforcement of statute, the legislature some times thinks it expedient to invest the executive with a very limited power to make minor adaptations and peripheral adjustments in the statute for making its implementation effective without touching its substance. It has been observed that :
"The existence or arising of a difficulty is the sine qua non for the exercise of power. If this condition precedent is not satisfied as an objective fact, the power under this clause cannot be invoked at all. Again, the "difficulty" contemplated by the clause must be a difficulty arising in giving effect to the provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty. Further, the Central Government can exercise the power under the clause only to the extent it is necessary for applying or giving effect to the Act etc., and no further. It may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty change the scheme and essential provisions of the Act ".

56. If it is a legislative function to remove difficulty like amending regulation, no direction can be passed by the Tribunal to the delegated Authority to exercise legislative power. Mr Sanjay Sen, learned counsel for the Commission takes us to the words of regulation 57.1 to submit that the power to remove difficulties which lies with the Commission is exercisable only to give effect to the provision of the Regulations . Now to direct the generating company to do or undertake things or itself to do or undertake by general or special order implies that this power to remove difficulties is intended to be exercised from the administrative domain of the Commission instead of exercising the legislative jurisdiction. Mr. Sen relies on M.U. Sinai V/s Union of India, (1975) 2 SCR 640 which we have already discussed. It is submitted by Mr. Sen that before the Commission the appellant did not rely on this power to remove difficulty clause, what was prayed for before the Commission was amendment of the Regulations. It is submitted that no direction can be passed by a Tribunal to the delegated authority to exercise legislative power.

57. Mr. Sen relied on the West Bengal Regulatory Commission Vs CESC (ibid) to argue that the question of vires cannot be argued before the Tribunal. He refers to the decision of the Honb'le Supreme Court in Raleigh Investment Co. Ltd. Vs Governor General in Council reported in ILR(1944)1 Cal 34 , United Motors (India) Ltd. Vs State of Bombay reported in (1953) 55 ,Bomb. LR 246, M.S.M.M. V/s. Meyyappa

Chettiar V. ITO reported in II (1964)54 ITR I51(Mad) & K.S. Venkatraman & Co. (P) Ltd. Vs State of Madras(ibid) where it has been held that there is weighty authority for the proposition that a Tribunal which is creature of a Statute cannot question the vires of the provisions under which it functions. Mr. Sen refers to one of our decisions in Navyeli Lignite Corporation Ltd. Vs Tamil Nadu Electricity Board and Ors. Where we have observed as follows :

"9. In view of the aforesaid decision of the Supreme Court, which is directly on the point, we have no hesitation in holding that the Regulations framed under Sections 61 & 178 of the Electricity Act 2003, are in the nature of subordinate legislation and we have no jurisdiction to examine the validity of the Regulations in exercise of our appellate jurisdiction under Section 111 of the Act of 2003. Even, under section 121, which confers on the Tribunal supervisory jurisdiction over the Commission, we cannot examine the validity of the Regulations framed by the Commission, as we can only issue orders, instructions or directions to the Commission for the performance of its statutory functions under the Act. It is not a case, where the Commission has failed to perform its statutory functions. At this stage we may also refer to the submission of Mr. Reddy that Regulation 16(i) (c) of the Regulations applies to the appellant alone and therefore the same cannot be in the nature of subordinate legislation. It needs to be noted that Sub Clauses (a), (b) and (c) of Sub Regulation (i) of Regulation 16 apply to various entities. Regulation 16(i) (c) undoubtedly applies to the appellant alone but this is in view of the special nature of the generating unit established by the appellant. It is well settled that a legislation can be framed for a single unit, entity or a person. The same principle would apply to the framing of subordinate legislation in respect of a single unit or entity or body, provided it can be distinguished from others on the basis of its peculiar or distinctive features. In any event we are bound by the decision of the Supreme Court rendered in the West Bengal Electricity Board case (Supra) as it directly deals with the nature of the Regulations notified by the Regulatory Commission in exercise of its power conferred by Section 58 of the Electricity Regulatory Commissions Act, 1998, a provision similar to sections 68 and 178 of The Electricity Act, 2003. None of the other decisions cited at the bar deal with the Regulations framed under the provisions of the Act of 1998 or the Act of 2003. .Accordingly, on the first point we hold that the Regulations framed under Electricity Act 2003, are in the nature of subordinate legislation and on second point we hold that the challenge to their validity falls outside the purview of the Tribunal."

58. Thus, Mr. Sen submits that since the regulations have the force of a statute the appellate Court cannot go into the validity of the regulations. In this connection, Mr. Sen also relied on the decision in PTC India Ltd. Vs CERC (ibid) which we have discussed earlier.

59. As regards the regulation 56 dealing with deviation from norms it is submitted by Mr. Sen that regulation 56 and 56.1 of the MYT Regulations, 2009 permit deviation from norms only under certain specific circumstances which have been elaborated in the said provisions. We are in agreement with Mr. Sen that the deviation from the norms contemplated under the MYT Regulations, 2009 is only in relation to approval of Tariff under Section 63 of the Act and the MYT Regulations, 2009 does not conceive of deviation on any other ground apart from what have been expressly provided for in the said regulations. We are simply to observe that if in course of determination of tariff pursuant to the application filed by the appellant the Commission would think that the deviation from the norms was necessary within the parameters as laid down in the regulations it can very well do so, but for us in course of the present appeal in its present form and prayer it is quite impossible that this regulation 56 can at all be invoked.

60. As regards power to amend which is given in regulation 58 it is not deniable that the Commission undoubtedly has that power. Section 21 of the General Clauses Act clearly provides that power to issue notification, orders, rules, bye-laws includes a power exercisable in the same manner to add or amend or vary or rescind. The question is whether we should direct the Commission to exercise that power. It is not that we are hearing and disposing of an application for determination of tariff because such application is yet to be disposed of according to the Tariff Regulations. What we are asked to do is to direct the Commission to relax the norms in the MYT Regulations, 2009. It is not that we are asked to direct the Commission to relax a particular norms in exigencies of circumstances of a particular case because in that case the Commission has the power to deviate from the norms subject to the conditions stipulated in the Regulations. To direct the Commission to deviate the norms for particular generating station or stations of the appellant we mean that such direction is possible so far as the Commission is concerned to implement only by amendment of the MYT Regulations. To repeat, it is not a case of prayer for deviation from norms in a particular situation while keeping the legislation in tact. Before we are prepared to direct the Commission to deviate from the norms and that too by amendment of the Regulations we would be required to observe that the norms or parameters set out in the Regulations are unjust or improper or illegal so much so that amendment is necessary, which means that we are travelling beyond our jurisdiction in asking the legislature to bring about a regulation with amendment so as to suit the need of the appellant. We are constrained to hold that by going that path is none else the path of the judicial review because we are to hold first that the law is deficient, unjust or unlawful. In this connection, we may refer to the decision in Narinder Chand Hemraj Vs Lt. Governor- Administrator of the Union Territory of Himachal Pradesh reported in (1972) 1 SCR 940 wherein it was observed as follows:

"What the appellant really wants is a mandate e from the Court to the Competent Authority to delete the concerned entry from the schedule A and include the same in Schedule B. We shall not go into the question whether the Government of Himachal Pradesh on its own authority was competent to make the alteration in question or not. We shall assume for our present purpose that it had such a power. The power to impose a tax is undoubtedly is a legislative power. That power can be exercised by the legislature directly or subject to certain conditions, the legislator may delegate that power to some other authority. But the exercise of that power whether by the legislature or by its delegate is an exercise of legislative power. The fact that the power was delegated to the executive does not convert that power into an executive or administrative power. No Court can issue a mandate to a legislature to enact a particular law. Similarly, no Court can direct a sub-ordinate legislative body to enact or not to enact a law which it may be competent to enact. No Court can give a direction to Government to refrain from enforcing a provision of law.

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61. Similarly in Supreme Court Employees Welfare Association & Ors. v/s Union of India reported in (1989) 4 SCC 187 the same principle was reiterated in these words "There can be no doubt that no Court can direct a legislature to enact a particular law." Similarly, when a executive Authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority. On the same principle it is impossible for the Tribunal to direct the sub ordinate legislative body to amend a subordinate legislation under Section 111 of the Electricity Act. As we said earlier, what we could not do directly we could not do indirectly.

62. With regard to exercise of inherent power which we have noticed in regulation 59.2 it can fairly be stated that this inherent power which is akin to Section 151 of the Civil Procedure Code is exercisable only in adjudicatory jurisdiction, not in legislative jurisdiction. The law is very clear on the subject. In Vinod Seth v/s Devinder Bajaj & Anr. (2010) 8 SCC 1 the Hon'ble Supreme Court refers to the decision in Padam Sen Vs. State of U.P. reported in AIR 1961 SC 218, Manohar Lal Chopra vs Seth Hira Lal reported in AIR 1962 SC 527, Nain Singh Vs Koonwarjee reported in (1970) 1 SC 732 and held that Section 151 is intended to apply where the Code does not cover any particular procedural aspect, and interest of justice requires the exercise of power to cover a particular situation. Section 151 is not a provision of law conferring power to grant any substantive relief. This power is exercisable not with reference to any matter duly covered by a statute, nor any such order under inherent jurisdiction can be passed contrary to the provision of the law. When the law is silent and adjudicatory process demands that a particular order is necessary to prevent the abuse of the Court then and then only Court's inherent jurisdiction expressed in Section 151 can be invoked. This is the essence of the decisions quoted above and

we find that regulation 59.2 has been drafted exactly in line with Section 151 of the CPC.

63. It is very well settled that a delegated legislation is open to the scrutiny of a Court on two grounds, namely a) it violates the provisions of the Constitution and b) it violates the provisions of the enabling Act. In the case of alleged violation of the enabling Act the ground may include not only the cases of violation of the substantive provision of the Act but also the cases of violation of the mandatory procedure prescribed. It is Mr. Ramachandran's argument that the power of judicial review is not at all required in as much as what is prayed for is simply deviation from norms as contained in chapter III , Regulation 33, 34 , 35 and 36 of Madhya Pradesh Electricity Regulatory Commission(Terms and Conditions of generation Tariff)(Revision-I) Regulations, 2009 (RG-26 I) of 2009), and if the Tribunal find that having regard to the age of the generating units deviation from norm is required then it may direct the Commission to do so by amendment. Mr. Sen for the Respondent No.1 seriously disputes the submission contending that it has far reaching consequences. Now, howsoever simplistic the argument of Mr. Ramachandran appears to be, it has cascading effect in this that in that case the Tribunal which is mandated to hear appeal only under Section 111 of the Act and in relation to a particular regulation either of the Central Commission or State Commission has to direct that since the regulation fails to achieve the objective of the Act amendment of the regulation is called and direction has to be given. In fact, Mr. Ramachandran commenced his argument with the submission that the aforesaid Regulation, 2009 has not been framed and enacted in compliance with the provisions of the Act, particularly Section 61 thereof and accordingly it offends the Act. The learned Counsel for the appellant brought to our notice a decision of this Tribunal in appeal No. 36 of 2008 wherein this Tribunal held as follows: "There is however, no bar on the Commission reconsidering the target and amend the regulation, if necessary. The target for MYT period needs to be set on the basis of losses at the beginning of the MYT period and not on the basis of the loss level on the date of privatization when the policy target period began. The consequences of failure or success in reaching the loss reduction target have already been borne by the licensee. Hence, reference to the initial level of loss at the time of privatization is not necessary. The Commission may itself consider the plea of any amendment in the target set in this regard in case the appellant makes out a case. There fore we direct that the appellant may make an appropriate representation to the Commission in this regard within one month hereof and that if a representation is so made the Commission shall dispose it in two months"

64. This decision was not passed on an appeal wherein challenge was made to a regulation concerned. The Tribunal was appropriately hearing an appeal under Section 111 of the Act. The Tribunal did not give any direction to the Commission to consider an amendment in positive term. Liberty was given to the appellant to make a

representation and in that case the Commission was directed to dispose it in two months. Here an appeal has purportedly been filed before us under Section 111 but the substance is a challenge to the regulation on the ground that the norms set out in that regulation was such as would defeat the object of the Act and hence the Tribunal should direct the Commission to bring about an amendment.

65. Thus, to summarize our reasoning, power to remove difficulties is a power given to the executive in order that the provisions of the Act may be given effect to. The Executive may exercise such power by executive order or in some cases they exercise legislative function to bring about minor adjustments so that implementation of the Act may be smoothened. Here in regulation 57 it is an express language that the Commission may by general or special order itself do or undertake or direct a generating company to do or undertake things for the purpose of removing the difficulties. This provision in the context of an express provision in regulate in 58 giving the Commission power to amend is not attracted here.

66. In view of the decisions cited in the preceding paragraphs, we find that this appeal fails to be an appeal under Section 111 of the Act. The prayer in substance in this appeal has been one to give a command to the Commission to effect amendment of the regulation on the ground of alleged defects therein impairing the fulfilment of the object of the Act which we are unable to subscribe to in as much as to do so would entail in travelling beyond our jurisdiction. While saying so, we do not say that the Commission at no point of time can exercise the powers conferred on it under regulation 56, 57, 58 and 59 in appropriate cases.

67. So far as regulation 56 is concerned, it appears that this regulation is not so wide and generic that the Commission can deviate from the norms as it would like to in any manner in appropriate case. Moreover this regulation can be exercised in course of determination of tariff of a generating company without bringing about an amendment.

68. Inherent jurisdiction as found in regulation 59.2 and 59.3 cannot be exercised in legislative domain. We repeat to say that in course of determination of tariff the Commission may exercise its inherent power in order to prevent the abuse of the process of the Commission and to give complete justice in any given matter.

71. One may in his wisdom agree or disagree with the findings of the Commission, but it cannot be said that the Commission's detailed order is without any reason. The Commission has assigned cogent reasons for not agreeing to the appellant's prayer for amendment of the regulations. We in this Appellate Forum are mandated to hear appeals under Section 111 of the Act and must not substitute our Jurisdiction to say that the Commission's order for refusal to effect amendment was justified. The norms set out in chapter III of the Regulations are not so impractical, imprudent, absurd, manifestly wrong and shockingly high

and speculative that warrants interference even if it is considered that this appeal under Section 111 against an order of the Commission refusing to bring about an amendment is absolutely justified. Again, to ask the Commission to make amendment of the regulation would imply: (a) such direction is possible in law in this appeal presented in the present form (b) the regulations are not in keeping with the provisions of the Act and (c) it is quite permissible for this Tribunal to make such order, which to our understanding is impermissible for the reasons we have set out hereinabove. While observing so, we do not observe at the moment that the Commission is powerless to do so. The Commission has power to relax or deviate from the norms, but for the purpose of deviating from the norms, they by virtue of regulation 58 can amend the norms set out in Regulation 56 so that the norms are brought down at a level comfortable to the appellant's power plants. Mr. Ramachandran has submitted that the norms of operation as laid down in Regulation 33 are quite unusual inasmuch as they are specific power plants oriented and that is why the appellant made an application for amendment of Regulation 33. Mr. Sen for the Commission has submitted that as the appellant company is the Government Company vested with the function of generation of electricity and this company has number of power plants, the norms had to be made different according to the age of the power plant. The norms for the old generating stations have not been the same for the new ones and this is for the convenience of the appellant and no exception or challenge can be made to Regulation 33 of the Regulations, 2009 only because of certain norms having been made specific station-oriented. It has been submitted by Mr. Sen that the Central Electricity Regulatory Commission does not make uniform norms in the Regulations and they mention specifically the stations which are not as young as the other ones established in recent times. Having heard learned counsels for the parties, we do not think that the Commission's Regulation 33 can be taken exception to because of specification of norms station-wise. In this connection, our attention has again been invited by the learned counsel for the Commission to the decision of this Tribunal in Neyveli Lignite Corporation Ltd. Vs. Tamil Nadu Electricity Board and others (Appeal Nos. 114 and 115 of 2005). This Tribunal has held as follows:

"At this stage we may also refer to the submission of Mr. Reddy that Regulation 16(i) (c) of the Regulations applies to the appellant alone and therefore the same cannot be in the nature of subordinate legislation. It needs to be noted that Sub Clauses (a), (b) and (c) of Sub Regulation (i) of Regulation 16 apply to various entities. Regulation 16(i) (c) undoubtedly applies to the appellant alone but this is in view of the special nature of the generating unit established by the appellant. It is well settled that a legislation can be framed for a single unit, entity or a person. The same principle would apply to the framing of subordinate legislation in respect of a single unit or entity or body, provided it can be distinguished from others on the basis of its peculiar or distinctive features. In any event we are bound by the decision of the Supreme Court rendered in the West Bengal Electricity Board case (Supra) as it

directly deals with the nature of the Regulations notified by the Regulatory Commission in exercise of its power conferred by Section 58 of the Electricity Regulatory Commissions Act, 1998, a provision similar to sections 68 and 178 of The Electricity Act, 2003. None of the other decisions cited at the bar deal with the Regulations framed under the provisions of the Act of 1998 or the Act of 2003. Accordingly, on the first point we hold that the Regulations framed under Electricity Act 2003, are in the nature of subordinate legislation and on second point we hold that the challenge to their validity falls outside the purview of the Tribunal. Accordingly, the point raised by Mr. Ramachandran has been set at rest so far as this Tribunal is concerned."

72. It has been submitted by Mr. Sen that it is incorrect to say that the Commission advised the appellant to file tariff petition incorporating the difficulties in meeting the norms set out by the Commission, on the contrary, the appellant on its own filed the MYT petition. Our attention has been drawn to the letter dated 08.09.2009 wherein the Commission communicated to the appellant as follows:
"MPPGCL submitted that the company is facing difficulties in complying with the operational norms notified in the MYT Regulation, 2009. MPPCL requested for a review of benchmark set by the Commission in MYT Regulation, looking to the conditions of machines. The Commission expressed its displeasure and observed that this reason for delay in filing MYPT petition was not convincing. Since the norms under Regulations are notified tariff petition is to be filed accordingly. <u>However, the norms fixed by the Commission are almost similar to the norms fixed by the CERC for the same vintage of power station</u>."(Emphasis ours)

73.The Commission in its MYT order for FY 2009-10 to FY 2011-12 dated 03.03.2010 has observed that the appellant in its petition sought for revision in the bench marks/norms specified in the Regulations, 2009 notified on 8th Mary, 2009 and also filed a tariff proposal based on the norms proposed by the appellant. The Commission conveyed to the appellant that since it was only in the recent past that after a prolonged public hearing norms were set out it was not possible to revise the norms. Then, the appellant filed a petition being no. 8 of 2010 specifically praying for relaxation of norms and in the preceding paragraphs we have found the reasons of the Commission in rejecting the petition. It is commented by Mr. Sen that appellant sought revision in norms which were more relaxed than its previous submission made on 27.02.2009 as comments to the draft regulation and further the appellant was seeking more relaxed norms for FY 2009-10, than the norms specified for FY 2008-09 in the Regulation for the earlier control period based on which the MYT order for the control period 2006-07 to2008-09 as also the true up orders for FY 2006-07 were issued. These submissions are borne by the record and could not be disputed. The commission's impugned order testifies to this position. It has been submitted by Mr. Sen that the appellant considered the average of the operating parameters actually achieved since FY 2003-04 when there

are instances of the appellant achieving better operating parameters in between the years and the approach of the appellant was not in conformity with what the tariff policy provides for in Section 5.3 which we quote below:
"Suitable performance norms of operations together with incentives and disincentives would need be evolved along with appropriate arrangement for sharing the gains of efficient operations with the consumers. Except for the cases referred to in para 5.3 (h) (2), the operating parameters in tariff should be at "Normative levels" only and not at "Lower of normative and actual".
The policy further runs thus:
"This is essential to encourage better operating performance. The norms should be efficient, relatable to past performance, capable of achievement and progressively reflecting increased efficiencies and may also take into consideration the latest technological advancements, fuel, vintage of equipments, nature of operations, level of service to the provided to consumers etc.".

5. Our penultimate paragraph being no. 77 was as follows:

77. We have so far covered all the issues in a comprehensive manner and summarize our reasons as below:

(a) The appeal is not maintainable in its present form.
(b) To direct the Commission to effect an amendment of the regulation would entail encroaching upon the power of Judicial Review which we do not have.
(c) The impugned order of the Commission dated 26th May, 2010 cannot be the subject-matter of challenge in an appeal under Section 111 of the Electricity Act.
(d) Regulation 57 dealing with power to remove difficulties is inappropriate and cannot be taken as resort to for downgrading the benchmarks.
(e) Regulation 56 as it is there in the regulation does not entitle the Commission to come down from the norms and it is only when regulation 58 is exercised to amend regulation 56 that the Commission may in its wisdom lower down the norms and benchmarks.
(f) Regulations 59.2 and 59.3 of Regulation 59 are exercisable in adjudicatory process, not in legislative jurisdiction.
(g) The Commission's impugned order does not suffer from lack of reason and objectivity of facts.
(h) While holding the above, we also hold that it is always open to the Commission, if they would like, to undertake any study of norms even after the rejection of the prayer for amendment so as to consider the feasibility or otherwise of bringing out an amendment of the Regulations in course of the determination of the tariff application. We also hold that within the present

parameters of Regulation 56 the Commission can deviate from the norms if it so wishes and deems fit. We also hold that the Commission is at liberty if it would deem proper to amend Regulation 56 on the strength of Regulation 58 so as to widen its power to deviate. We further hold that the Commission in course of determination of tariff may exercise any of the powers as is available to it in a suitable situation in their respective jurisdiction. Since the prayer for amendment has been refused by a reasoned order, we are not in a position to say that we must intervene so as to compel the Commission to pass an amended notified Regulations.

6. In the review petition it has been contended as follows:

a) "The appellant had clearly set out in its appeal itself that the State Commission has already determined the tariff in petition no. 54 of 2009 vide order dated 03.03.2010, before passing the order impugned in the present appeal itself. The said tariff order has been issued without considering the submissions made by the appellant regarding the relaxation of norms. The tariff order dated 03.03.2010 has also been challenged before this Hon'ble Tribunal by appeal no. 105 of 2010.

b) The Tribunal did not consider that the Commission has not considered at all any of the detailed reasons provided by the appellant in the petition before the Commission. The Tribunal also did not consider the specific justification provided by the appellant regarding the age and conditions of each of its generating station including the difficulties faced by each of the stations .

c) The Tribunal failed to consider the submission made by the appellant that the renovation and modernisation plan has already been drawn up .

d) Tribunal failed to deal with the contention raised by the appellant that the Commission misconstrued the appellant's prayer for relaxation in the formula for calculation of the availability of hydro power plant.

7. We have heard Mr. M.G. Ramachandran learned advocate appearing for appellant and Ms. Surbhi Sharma learned advocate appearing for the Commission .

8. In terms of Order 47 Rule 1 of the CPC only the following points will arise for consideration :-

a) Only new and important matter or evidence which was not within the knowledge of the review petitioner and which could be discovered later.

b) Mistake or error apparent on the face of the record.

c) Any other sufficient reason.

9. The grounds b), c), and d) as enumerated in paragraph 7 cannot be the subject matter of review. These grounds can be the subject matter of appeal.

10. As regards ground a) we are to observe that the appeal no. 105 of 2010 was not the subject matter of the appeal before us in

appeal no. 170 of 2010. Since, we should not justify our finding made in appeal no. 170 of 2010 in such term as would amount to explanation or elaboration of what we have stated therein we have reproduced only certain paragraphs from our 116 - page judgment covered in 78 paragraphs which speak for themselves. Our reasoning, particularly, given from paragraph 54 to 68, 71 to 73 and 77 we only emphasize upon. Exercise of power under section 56 and 57 cannot be considered in abstract terms. What was prayed before us was amendment of the regulation. We were not adjudicating upon any tariff determination proceeding where the Commission can go to the extent of case specific. Whatever concession was possible in the manner the appeal was presented before us we have indicated in paragraph 77 (h). Even after determination of tariff the Commission can exercise its powers in its respective jurisdiction.

11. Subject to the above we dismiss the review application.

(P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

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REPORTABLE /NON- REPORTABLE