

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI (APPELLATE
JURISDICTION)

APPEAL NO. 122 OF 2025 & IA NO. 635 OF 2025
APPEAL NO. 129 OF 2025 & IA NO. 703 OF 2025
&
APPEAL NO. 169 OF 2025 & IA NO. 723 OF 2025

Dated: 31st October, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Ms. Seema Gupta, Technical Member (Electricity)

APPEAL NO. 122 OF 2025 & IA NO. 635 OF 2025

In the matter of:

GUJARAT URJA VIKAS NIGAM LIMITED

Through its Managing Director

Sardar Patel Vidyut Bhawan, Race Course Circle,
Vadodara – 390007, Gujarat.

... Appellant

VERSUS

**1. CENTRAL ELECTRICITY REGULATORY
COMMISSION**

Through its Secretary

6th, 7th & 8th Floors, Tower B,
World Trade Centre, Nauroji Nagar,
New Delhi – 110029.

... Respondent No.1

**2. TATA POWER COMPANY LIMITED,
“CORPORATE CENTRE”,**

Through its Managing Director

34, Sant Tukaram Road, Carnac Bunder,
Mumbai, Maharashtra – 400009.

... Respondent No.2

**3. PUNJAB STATE POWER CORPORATION
LIMITED,**

Through its Chief Engineer (PP&R),

PP&R, Shed T-1, Thermal Design,
Patiala – 147001, Punjab.

... Respondent No.3

- 4. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED,**
Through its Managing Director,
4th Floor, Prakashgad, Plot No. G-9,
Bandra (East), Mumbai – 400051.

... Respondent No.4
- 5. AJMER VIDYUT VITARAN NIGAM LIMITED,**
Through its Managing Director,
Hathi Bhata, Old Power House,
Ajmer, Rajasthan – 305001.

... Respondent No.5
- 6. JAIPUR VIDYUT VITARAN NIGAM LIMITED**
Through its Managing Director,
Vidyut Bhawan, Janpath,
Jaipur, Rajasthan – 302005.

... Respondent No.6
- 7. JODHPUR VIDYUT VITARAN NIGAM LIMITED**
Through its Managing Director
New Power House, industrial Area,
Jodhpur, Rajasthan – 342003.

... Respondent No.7
- 8. UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED**
Through its Chief Engineer,
Vidyut Sadan, Plot No. C-16, Sector-6,
Panchkula, Haryana – 134112.

... Respondent No.8
- 9. DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,**
Through its Chief Engineer
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana – 125005.

... Respondent No.9
- 10. UNION OF INDIA, MINISTRY OF POWER**
Through its Secretary,
Shram Shakti Bhawan,
Rafi Marg, New Delhi – 110001.

... Respondent No.10

Counsel for the Appellant(s): Ranjitha Ramachandran
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Divyansh Kasana
Hemant Sahai
Kanika Chugh
Shryeshth Ramesh Sharma
Siddharth Nigotia
Mohit Gupta
Kartikay Trivedi
Indu Uttara
Shri Venkatesh
Akash Lamba
Abhishek Nangia
Kunal Veer Chopra
Harsh Vardhan
Vedant Choudhary
Nihal Bhardwaj
Mohit Mansharamani
Manu Tiwari
Shivam Kumar
Aashwyn Singh
Aniket Kanhausa
Adarsh Singh
Ananya Dutta
Ashutosh Kumar Srivastava
Suhael Buttan
Priya Dhankar
Vineet Kumar
Surbhi Kapoor
Tanishka Khatana
Nikunj Bhatnagar
Tarang Saraogi Manav
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Drishti Rathi **for Res. 2**

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Anand K. Ganesan
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Shivani Verma **for Res. 5**

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Shivani Verma **for Res. 6**

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Swapna Seshadri
Shivani Verma **for Res. 7**

APPEAL NO. 129 OF 2025 & IA NO. 703 OF 2025

In the matter of:

**PUNJAB STATE POWER CORPORATION
LIMITED,**

*Through its Dy. Chief Engineer/ ISB-1,
Shed T-1, Thermal Design,
Patiala – 147001, Punjab.*

... Appellant

VERSUS

- 1. CENTRAL ELECTRICITY REGULATORY COMMISSION**
Through its Secretary
6th, 7th & 8th Floors, Tower B,
World Trade Centre, Nauroji Nagar,
New Delhi – 110029. ... Respondent No.1
- 2. TATA POWER COMPANY LIMITED, “CORPORATE CENTRE”,**
Through its Managing Director
34, Sant Tukaram Road, Carnac Bunder,
Mumbai, Maharashtra – 400009. ... Respondent No.2
- 3. GUJARAT URJA VIKAS NIGAM LIMITED**
Through its Managing Director
Sardar Patel Vidyut Bhawan,
Race Course Circle,
Vadodara – 390007, Gujarat. ... Respondent No.3
- 4. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED,**
Through its Managing Director,
4th Floor, Prakashgad, Plot No. G-9,
Bandra (East), Mumbai – 400051. ... Respondent No.4
- 5. AJMER VIDYUT VITARAN NIGAM LIMITED,**
Through its Managing Director,
Hathi Bhata, Old Power House,
Ajmer, Rajasthan – 305001. ... Respondent No.5
- 6. JAIPUR VIDYUT VITARAN NIGAM LIMITED**
Through its Managing Director,
Vidyut Bhawan, Janpath,
Jaipur, Rajasthan – 302005. ... Respondent No.6
- 7. JODHPUR VIDYUT VITARAN NIGAM LIMITED**
Through its Managing Director
New Power House, industrial Area,
Jodhpur, Rajasthan – 342003. ... Respondent No.7

8. UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED

Through its Chief Engineer,
Vidyut Sadan, Plot No. C-16, Sector-6,
Panchkula, Haryana – 134112.

... Respondent No.8

9. DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,

Through its Chief Engineer
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana – 125005.

... Respondent No.9

10. UNION OF INDIA, MINISTRY OF POWER

Through its Secretary,
Shram Shakti Bhawan,
Rafi Marg, New Delhi – 110001.

... Respondent No.10

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Shaيدا Das
Punyam Bhutani
Paritosh Bisen
Deepak Thakur
Varnika Tyagi
Kamya Sharma
Aparna Tiwari
Amaan Ahmed Khan

Samprati Singh
Divyansh Kasana
Nihal Bhardwaj
Surbhi Kapoor
Adarsh Singh
Siddharth Nigotia
Manu Tiwari
Abhishek Nangia
Mohit Mansharamani
Akash lamba
Shivam Kumar
Kartikay Trivedi
Aashwyn Singh
Mohit Gupta
Harsh Vardhan
Aniket Kanhaual
Ananya Dutta
Indu Uttara
Priya Dhankar
Vineet Kumar
Nikunj Bhatnagar
Kunal Veer Chopra
Vedant Choudhary
Tarang Saraogi
Manav Bhatia
Drishti Rathi
Tanishka Khatana **for Res.2**

Ranjitha Ramachandran
Srishti Khindaria
Aneesh Bajan **for Res.3**

APPEAL NO. 169 OF 2025 & IA NO. 723 OF 2025

In the matter of:

1. JAIPUR VIDYUT VITARAN NIGAM LIMITED

Through its Managing Director,
Vidyut Bhawan, Janpath,
Jaipur, Rajasthan – 302005.

... Appellant No. 1

2. AJMER VIDYUT VITARAN NIGAM LIMITED,

Through its Managing Director,
Hathi Bhata, Old Power House,
Ajmer, Rajasthan – 305001.

... Appellant No. 2

3. JODHPUR VIDYUT VITARAN NIGAM LIMITED

Through its Managing Director
New Power House, industrial Area,
Jodhpur, Rajasthan – 342003.

... Appellant No. 3

VERSUS

1. CENTRAL ELECTRICITY REGULATORY COMMISSION

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2. TATA POWER COMPANY LIMITED

Through its Managing Director
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Mumbai, Maharashtra – 400009.

... Respondent No.2

3. GUJARAT URJA VIKAS NIGAM LIMITED

Through its Chairman
Sardar Patel Vidyut Bhawan,
Race Course Circle,
Vadodara – 390007, Gujarat.

... Respondent No.3

4. PUNJAB STATE POWER CORPORATION LIMITED,

Through its Dy. Chief Engineer (PP&R),
PP&R, Shed T-1, Thermal Design,
Patiala – 147001, Punjab.

... Respondent No. 4

5. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED,

Through its Managing Director,
4th Floor, Prakashgad, Plot No. G-9,
Bandra (East), Mumbai – 400051.

... Respondent No.5

6. UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED

Through its Chief Engineer,
Vidyut Sadan, Plot No. C-16, Sector-6,
Panchkula, Haryana – 134112.

... Respondent No.6

7. DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,

Through its Chief Engineer
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... Respondent No. 7

8. UNION OF INDIA, MINISTRY OF POWER

Through its Secretary,
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... Respondent No.8

Counsel for the Appellant(s):

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Tushar Srivastava
Nimesh jha
Ashutosh Kumar Srivastava
Abhishek Nangia
Priya Dhankar
Vineet Kumar
Shaيدا Das
Shivam Kumar
Siddharth nigotia
Surbhi Kapoor
Manu Tiwari
Mohit Gupta
Aparna Tiwari
Kartikay Trivedi
Paritosh Bisen
Tanishka Khatana
Punyam Bhutani
Kumal Veer Chopra
Indu Uttara

Nikunj Bhatnagar
Deepak Thakur
Harsh Vardhan
Aashwyn Singh
Manav Bhatia
Divyansh Kasana
Vedant Choudhary
Aniket Kanhaua
Tarang Saraogi
Samjprati Singh
Varnika Tyagi
Kamya Sharma
Ananya Dutta
Amaan Ahmed Khan
Drishti Rathi
Adarsh Singh
Shryeshth Ramesh Sharma **for Res.2**

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

These three Appeals have been filed by the Appellants Gujarat Urja Vikas Nigam Limited (hereinafter referred to as '**GUVNL**'), Punjab State Power Corporation Ltd (hereinafter referred to as '**PSPCL**'), and Jaipur Vidyut Vitran Nigam Limited & Ors. (Respondents 1, 2 and 4 to 6 in Petition No. 179/MP/2023) against the interim Order dated 10.03.2025 passed by the Central Electricity Regulatory Commission (hereinafter referred to as the '**CERC**') in Petition No. 179/MP/2023 filed by Tata Power Company Limited (hereinafter referred to as '**TPCL**') under Section 11(2) of the Electricity Act, 2003. In Petition No. 179/MP/2023 filed by it, TPCL had sought, by way of interim relief, additional amounts over and above the provisional tariff notified by the Independent Committee appointed by the Central Government to be paid to them for the entire period covered by the Notification dated 20.02.2023 issued by the Central Government under Section 11(1) of the Electricity Act, 2003, and as extended from time to time till 30.04.2025, pending determination of the adverse financial

impact claimed by TPCL in Petition No. 179/MP/2023. By the common interim order, impugned in these three Appeals, interim relief was granted to TPCL for the period from 18.04.2023 till the date of passing of the impugned order, and to be continued further thereafter.

During the hearing of the IAs filed in these appeals, Learned Senior Counsel and Learned Counsel, appearing on behalf of parties on either side, fairly stated that, since the Appeals were filed against the interim order passed by the CERC, this Tribunal may, if it so considers it appropriate, decide the main Appeals itself, and pass final orders therein.

II. ORDER OF CERC IN PETITION NO. 179/MP/2023 DATED 10.03.2025

Petition No. 179/MP/2023 was filed by Tata Power Company Limited (“TPCL”) under Section 11(2) read with Section 79 of the Electricity Act, 2003, *inter alia*, seeking determination of suitable principles/methodology for the computation of the rate/compensation payable to them towards supply of power to Respondent Nos.1 to 8 (including the Appellants in this batch of Appeals) in terms of the directions issued by Ministry of Power (“MoP”), under Section 11(1) of the Electricity Act on 20.2.2023, for the period between 1.3.2023 to 15.6.2023 and for such further period as may be applicable during the currency of the said directions. Pending final adjudication of the dispute raised in the said petition, the Petitioner had also sought the following interim reliefs: (a) pending final adjudication of the present Petition, to direct Respondent Nos. 1 to 8 to make timely and complete payment at the Interim/ Provisional Tariff @ INR 6.25 per unit being the rate calculated as per the methodology adopted by the Commission through its Final Order in Petition No. 128/MP/2022 dated 03.01.2023; (b) pending final adjudication of the present Petition, direct Respondent Nos. 7 and 8 to furnish an unconditional, irrevocable and revolving Letter of Credit (as per PPA) amounting to INR 5 Cr and further make payment towards the fixed charges for the availability declared by the Petitioner during the currency of the Directions dated 20.02.2023 issued by Respondent No. 9

required to be furnished under the Directions dated 20.02.2023 read with Interim Order dated 13.09.2023 and Final Order dated 03.01.2023 issued by Commission in Petition No. 128/MP/2022; and (c) pass any such further other order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case.

In its order, in Petition No. 179/MP/2023 dated 10.03.2025, the CERC noted that the 9th Respondent -Ministry of Power had issued directions under Section 11(1) of the Electricity Act vide its letter dated 5.5.2022 (the "2022 Directions" for short) requiring imported coal-based power plants to operate and generate power to their full capacity and supply to the procurers under power purchase agreements ('PPA holders') in the first instance in view of the energy crisis being faced in the country; subsequent to the 2022 Directions, the Ministry of Power issued further clarifications to address the implementation issues which remained in force from 6.5.2022 till 31.12.2022; the Petitioner, after supplying power to the PPA holders in terms of the 2022 Directions, had filed Petition No. 128/MP/2022 before the CERC under Section 11(2) of the Electricity Act seeking relief to mitigate the adverse financial impact of the 2022 Directions; the CERC, vide its order in Petition No.128/MP/2022 dated 3.1.2023, determined the methodology to off-set the adverse financial impact on the Petitioner on account of supply of power in compliance with the 2022 Directions, and issued a slew of other directions dealing with various aspects raised by the Petitioner and the Respondents in the said petition; the Petitioner filed an Appeal before APTEL challenging the order dated 3.1.2023 in Petition No.128/MP/2022 on those issues where reliefs were disallowed by the Commission; the Respondent Procurers had also challenged the order dated 3.1.2023 before APTEL, seeking stay on the implementation of the said order; and APTEL has granted interim stay of the order dated 3.1.2023 subject to payment of 50% of the dues to the Petitioner in terms of the said order.

The CERC further noted that, in view of the forecasted peak demand for electricity and in the likely scenario of a gap in the demand and supply of

domestic and essential requirements to maintain coal stock at the generating station, the Ministry of Power issued another direction under Section 11(1) of the Electricity Act, vide its letter dated 20.2.2023, requiring imported coal-based power plants to operate and generate power to their full capacity, and supply to the PPA holders at the first instance; the directions dated 20.2.2023 under Section 11(1) of the Electricity Act were subsequently amended vide letter dated 31.3.2023 (collectively referred to as the “2023 Directions”); the 2023 Directions recognized that the existing Power Purchase Agreements did not have adequate provisions for pass through of the entire increase in international coal price, and accordingly provided that supply of power to the PPA holders shall be made at rates to be mutually agreed or at the rates to be worked out by a Committee constituted by the MoP to meet all prudent costs of using imported coal; and operation of the 2023 Directions was initially for a period of three months from 16.3.2023 to 15.6.2023, which was extended from time to time, the latest being till 30.4.2025 vide letter dated 28th February 2025.

After extracting the 2023 directions containing the terms and conditions of supply of power, the CERC noted, in the impugned order, that subsequently the Ministry of Power, vide its letter dated 31.3.2023, had amended the terms of the directions in Clauses 5(q), (r), and (s) of the earlier directions; the Petitioner commenced supplying power and declaring availability in terms of the 2023 Directions with effect from 16.4.2023; the Ministry of Power, vide its letter dated 31.3.2023, notified the energy charge rate of Rs.4.52/kWh on a fortnightly basis starting from 16.3.2023 in respect of the generating station of the Petitioner; the 2023 Directions were extended by the Ministry of Power from time to time; the Petitioner continued to comply with the 2023 Directions during the extended period and supplied power accordingly; and the latest extension of the 2023 Directions was up to 30.4.2025.

After taking note of the contentions raised in the Petition filed by Tata Power, the CERC took note of the submission of GUVNL that the Interim Prayer

sought by TPCL, by way of an increase in the provisional tariff amount fixed by the Committee appointed by the Central Government, was misconceived and was liable to be rejected as the relief sought was contrary to the scheme provided in Section 11 of the Electricity Act according to which there can only be a final determination of the adverse financial impact under Section 11(2) of the Electricity Act; further, the benchmark rates fixed by the MoP, which was interim in nature, could not be revised or varied in the absence of any extra-ordinary or exceptionally proven circumstances; there was no cause of action in law to consider the interim prayer as sought by TPCL when it had not placed the relevant actual coal cost, freight, insurance, handling charges, taxes, duties, etc., which were material facts to claim any order in tariff; and GUVNL had relied on the following judgements relating to the grant of interim relief (a) **Makers Development Services (P) Ltd. -v- M. Visvesvaraya Industrial Research & Development Centre: (2012) 1 SCC 735**; (b) **T. Arivandan -v- T.V. Satyapal: (1997) 4 SCC 467**; (c) **Agriculture Produce Market Committee -v- Girdharbhai Ramjibhai Chhaniyara: (1997) 5 SCC 468**; (d) **Arshad Zaheer -v- Municipal Corpn. of Greater Mumbai: (2006) 5 SCC 282**; (e) **Abdul Karim and Ors. -v- State and Ors: AIR 2006 J&K 97**; (f) **Vellakutry -v- Karthyayani: AIR 1968 Ker 179**; and (g) **Gujarat Bottling Co. Ltd. -v- Coca Cola Co: (1995) 5 SCC 545**.

The CERC thereafter took note of the contention of GUVNL that TPCL had solely based its prayer for interim relief on the order dated 03.01.2023 passed by the CERC in Petition No 128/MP/2022, which was erroneous since the methodology adopted in the said order proceeded on the basis that, as per Indonesian Regulations, export of coal below the HBA derived prices, i.e., from 6322 kcal/kg was prohibited whereas the benchmark prices under the Indonesian Regulations were only for computation of royalties and taxes, and the export price of coal was otherwise not subject to benchmark prices under Indonesian Regulations; TPCL had admittedly procured coal from Indonesia below HBA Price. (Para 6(a) of the additional affidavit of the Petitioner dated

25.8.2023); while determining the adverse financial impact of the Section 11 Directions, CERC was required to factor in the following: (a) the parameters on SHR, Auxiliary Consumption, Specific Oil consumption, etc., on an actual basis as per Tata Power disclosure itself was favourable as compared to normative, and had resulted in substantial savings; (b) the mining profits was needed to be adjusted to the full effect; (c) the components of freight, insurance, and handling charges had not been affected by the Indonesian Regulations, nor had anything been otherwise placed by TPCL to show that they had increased significantly to what was factored in by Tata Power itself while submitting the bid, and the same had been set out in Schedule VII to the PPA; (d) there had been a material breach on the part of TPCL in following the direction issue under Section 11 in the public interest to maximise generation and compensation, and therefore was payable by TPTCL; and (e) there were other counter-claims of GUVNL of a monetary nature, which were required to be set off against the amount determined as Adverse Financial Impact.

The CERC then noted that, in their additional submissions made vide affidavit dated 5.10.2024 pursuant to the hearing dated 27.09.2024, GUVNL had further submitted that the claims made by Tata Power, under the interim orders sought, were far in excess of the admissible computation under the applicable parameters under the Section 11 directions notified by the Central Government on 20.02.2023; the FOB price of coal needed to be computed with reference to indices of Argus, which reflected the market price of coal in Indonesia; Tata Power could not also claim any such thing as Argus plus premium, and thereby arbitrarily inflate its claim substantially as to the FOB price of coal admissible; there was no basis for claiming any premium; the provisional tariff allowed by the Committee was on Argus and the same had been considered by GUVNL; Tata Power could not claim any amount towards Ocean freight, insurance, or other charges, Station Heat Rate arbitrarily, and the same needed to be based on accepted parameters; any savings on an actual basis qua the applicable parameters were to be considered in favour of the Procurers; and from April

2023 to March 2024 they had paid an additional sum of Rs. 215 crores to Tata Power by way of provisional tariff under the Committee determination, and were entitled for adjustment in addition to the claims related to non-supply of power by Tata Power.

The CERC thereafter noted the submissions of GUVNL that the interim relief sought by TPCL was liable to be rejected with exemplary costs as (a) Section 11 of the Electricity Act, 2003 contemplated only final determination by the Commission and not grant of any interim orders over and above the methodology specified by the Central Government for devising the provisional tariff; (b) there was a flaw in the basis of the claim made by the petitioner as it was evident from the annual report that the Petitioner was in a position to import coal at \$83.7/tonne from its own mine; however, coal was procured from other expensive sources, and a much higher price of coal was being claimed from the Procurers in the present proceedings; it was clear, and accepted by the Central Government and the CERC, that the bench-marked prices, for export of coal from Indonesia, as governed by Indonesian Regulations was only for computation of royalties and taxes; the export price of coal was otherwise not subjected to benchmark prices under the Indonesian Regulations, and was to be considered as per the indices such as Argus, etc; (c) the clarification dated 31.03.2023 issued by the Ministry of Power mentioned that *the cost of coal was based on the index linked with the lower cost of imported coal*; such basis could not be modified/altered or changed by the Commission while deciding the adverse financial impact under Section 11(2) as a part of the final order; this basis could not be modified/altered or changed by the CERC while deciding the adverse financial impact under Section 11(2) as a part of the final order, and had no power to vary the same, even for the purposes of the interim order; the admissible adverse financial impact could, in no event, be more than the relevant market indices, such as Argus; in fact, Tata Power was required to give, in a transparent manner, the FOB price of coal at which PT Kaltim Prima Coal was required to export coal to Tata Power subject to the maximum of the market

indices published by Argus etc; Tata Power was, therefore, not entitled to proceed on the basis of HBA derived prices as per the order dated 03.01.2023, and then compare the spot market purchases to claim the price of coal; similarly, the Insurance and Shipping charges, as well as the unloading charges, could not be more than the normative indexation prices; the claim made by Tata Power based on the order dated 03.01.2023, and the claim as per the Argus and/or PPA, was submitted up to August 2024 by GUVNL in the statement of comparison claim by TPCL vis-à-vis admissible as per ARGUS and/or PPA; there was no cause of action in law to consider the interim prayer as sought by Tata Power when Tata Power had not placed the relevant actual coal cost, freight, insurance, handling charges, taxes duties, etc., which were material facts which needed to be placed to claim any order in tariff; Tata Power had not placed the cause of action for making any interim relief and they had not submitted documents such as invoices raised by the coal mining company, the authentication by the port authorities in the country of export, bill of lading at load port, Bill of Entry certified by the Indian Custom Authority (entire document), name of the supplier of coal, certificates in regard to quality, quantity, nature, specification of the coal covered under the bill of lading (by certifier registered with Indonesian Government), Invoices raised on Tata Power for freight and insurance, as well as handling charges, coal running account providing the opening stock and closing stock at every 15 days interval, along with independent Auditors certificate, availability of coal from PT Kaltim Prima Coal and price of such coal, Auditors' Certificate for actual applicable tax & Royalty to PT Kaltim Prima Coal (KPC) Mine for determination of effective tax rate for computation of Mining Profit; GUVNL had placed sufficient material to show that (a) the determination by the Committee itself was more than what Tata Power was entitled to and (b) the claim of Tata Power was far in excess of the determination by the Committee and was unsubstantiated; Tata Power ought to have procured coal from PT Kaltim Prima Coal, etc., and in the event of procurement from other sources/countries, the amount payable should be

restricted to the actual FOB price of PT Kaltim Prima Coal, subject to the maximum of Argus Indices price; the Audited Accounts of Tata Power itself indicated no irreparable loss/equity for grant of any interim order; and GUVNL had raised objections on their conduct contending that Tata Power did not wish to give details of the actual cost with supporting documents, and wanted an increase in the provisional tariff based on unsubstantiated data without actual facts and documents placed on record in a transparent manner.

The CERC then noted that Rajasthan Discoms had adopted the submissions of GUVNL on factual aspects of the claim and had submitted that the prayer of the Petitioner for interim reliefs was not tenable in law or on facts. They had submitted that the well-settled principles for consideration for the grant of any interim relief, i.e. (a) Prima-facie case of the Petitioner to succeed on merits; (b) Balance of convenience in favour of the Petitioner and against the Respondents; and (c) Irreparable loss or injury to be caused to the Petitioner if the interim relief is not granted, were not satisfied in this case; in the present case, the relief being sought was in the form of a mandatory injunction, which required a much stricter test as held by the Supreme Court, in **Dorab Cawasji Warden v. Coomi Sorab Warden and Ors: (1990) 2 SCC 117**; apart from the fact that there was no prima facie case made out (which is, in fact, required of a much higher standard), there was no question of any serious injury being caused which could not be compensated in monetary terms and that the balance of convenience was not in favour of the Petitioner; the prayer of the Petitioner for interim relief had no basis and was, therefore, not maintainable.

Regarding the relief sought by TPCL, the CERC noted that the Petitioner-TPCL had submitted that since the Commission, by way of the order in Petition No.128/MP/2022 dated 03.01.2023, had already established the principles under which claims under Section 11(2) of the Electricity Act would be admitted, the Petitioner had made claims in accordance with the said settled principles in the captioned petition; it had been consistently seeking redressal of its

grievances relating to the under-recovery of ECR before the Commission as well as before the Committee appointed by the MoP; as per the Committee, the benchmark tariff was being computed for facilitating the smooth running of the ICB plants in the absence of mutual agreement between the ICB plants and the beneficiaries; however, the Committee noted that there was a provision under Section 11(2) of the Electricity Act whereby the ICB plants could approach the appropriate Commission to set off any adverse financial impact; its claim was not unreasonable or unjustified as the Respondent Procurers were procuring more expensive power on a short-term bilateral basis and through power exchanges; GUVNL had attempted to wrongfully and selectively pick data to demonstrate that the Petitioner was recovering more than its actual ECR; the value of the Argus index taken by GUVNL was incorrect since the applicable index would depend on the specific GCV of the shipments while the coal consumption (around 5220-5350 GCV for plant sustainability), which was arrived at through blending.

While considering the prayer of the Petitioner for grant of interim relief, the CERC observed that, from the pleadings of the parties, the following issues arose for consideration: (a) Whether the Petitioner's case fulfilled the conditions for the grant of interim relief?; (b) If the answer to (a) above was in the affirmative, what should be the quantum of interim relief to be granted to the Petitioner?; (c) Whether any direction was required to be issued to Haryana Utilities with regard to the opening of LC for fixed charges?

On Issue No.1, ie Whether the Petitioner's case fulfilled the conditions for the grant of interim relief?, the CERC examined the scope of its power to grant an interim order and observed that, in terms of Section 94(2) of the Act, the Commission has been vested with the power to grant appropriate interim order in any proceedings; the power of the Commission to pass an interim order in any proceeding, hearing or matter under the Act is unfettered; an interim order will come into existence only when the Commission passes an Order in any

proceeding to that effect; the Petitioner had asked for interim relief as part of its petition; since the Commission had not passed any order, adopting the provisional tariff fixed by the Committee and notified by the Government as an interim tariff, the provisional tariff fixed by the Government on the recommendations of the Committee could not be considered as an interim relief granted by the Commission; and, therefore, the Petitioner's prayer for interim relief made in the petition could not be considered as a prayer for "further interim relief," as contended by the Respondents; in its Record of Proceedings dated 18.8.2023, the Commission had observed that, in so far as the interim directions/reliefs as prayed for by the Petitioner were concerned, the Commission did not find it proper to issue any such direction at this stage; the said Record of Proceedings clearly revealed that the Commission neither granted nor denied any interim relief to the Petitioner; the Commission had only observed that it did not "find it proper to issue any directions at this stage"; in other words, the Commission did not grant interim relief pending completion of pleadings without providing opportunity to the Respondents; therefore, the Commission's refusal to grant interim relief, pending completion of pleadings, cannot be construed as rejection of the prayer of the Petitioner for interim relief; and, since neither the interim relief was granted nor was denied vide RoP dated 18.8.2023, the Proviso to Order 39 Rule 4 of the Code of Civil Procedure Code, 1908, relating to modification of interim relief, was inapplicable in the facts of the case.

On the objection of the Respondents (Appellants herein) that the Petitioner's case did not satisfy the established principles for the grant of interim relief; the CERC noted that the Supreme Court, in **Makers Development Services (P) Ltd. v. M. Visvesvaraya Industrial Research & Development Centre: (2012) 1 SCC 735**, had laid down the tests for grant of interim relief holding that, while passing an interim order of injunction under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908, the court is required to consider three basic principles, namely, (a) prima facie case, (b) balance of convenience and inconvenience, and (c) irreparable loss and injury. In addition to the above-mentioned three basic

principles, a court, while granting injunction, must also take into consideration the conduct of the parties.

The CERC observed that the grant of interim relief was governed by three well-established principles viz. (1) whether the Petitioner had made out a prima facie case; (2) whether the balance of convenience was in favour of the Petitioner, i.e., whether it would cause greater inconvenience to the Petitioner if interim relief was not granted than the inconvenience which the Respondents would be put to if it is granted; and (3) whether the Petitioner would suffer irreparable injury; and, with the first condition as a *sine quo non*, at least two conditions should be satisfied conjunctively, and a mere proof of fulfilment of one of the three conditions did not entitle a party to the grant of interim relief in its favour.

On the question whether a prima-facie case for grant of an interim order had been made out, the CERC observed that the first element of the test to be satisfied, for the grant of interim relief, was whether a prima facie case was made out by the Petitioner; a finding on “prima facie case” was a finding of fact; while arriving at such a finding of fact, the court must arrive at the conclusion that a case for further examination has been made out [**M.Gurudas v. Rasaranjan, (2006) 8 SCC 367**]; in the present case, the Petitioner had been directed by the MoP, under Section 11 of the Act (2023 Directions), to operate and generate electricity to its full capacity and supply to the PPA holders, i.e., Respondents, in the first instance; further, the 2023 Directions recognized that the cost of imported coal was not a pass through as per the provisions of the PPA, and further provided that the rate at which power was to be supplied shall be worked out by a committee that shall ensure that the benchmark rates of power so worked out meet all the prudent costs of using imported coal for generating power, including the present coal price, shipping costs, O&M costs, etc., and a fair margin; the Committee had been notifying the benchmark ECR for various generating stations, including that of the Petitioner, on a fortnightly basis; it was

the case of the Petitioner that the benchmark ECR determined by the Committee did not fully cover the actual cost for procurement of imported coal; the Commission advised the Petitioner to take up the matter with the Committee, which the Petitioner did; according to the Petitioner, the Committee did not fully redress their grievance, and advised the generators, including the Petitioner, to approach the Appropriate Commission under Section 11(2) of the Act; the Committee, through Respondent No. 9, did not make submission with regard to their stand; the Petitioner had approached the Commission under Section 11(2) of the Act which provided that the Commission may off-set the adverse financial impact of the directions under Section 11(1) in such manner as it considers appropriate; and thus, the moment directions are issued under Section 11(1) of the Act, a legal right accrues in favour of the Petitioner to off-set the adverse financial impact by the Commission.

The CERC further observed that the Petitioner had placed on record a statement supported by an Auditor's Certificate that the rates fixed by the Committee fell short of the actual cost of generation by Rs. 1,229 Crore till 31.1.2024 and Rs. 1,663 crores till 31.8.2024; the Commission had considered the actual calculation placed on record by the Petitioner and had also sought the component-wise break-up along with the reasons for under-recovery; the Petitioner, in response to the RoP dated 27.09.2024, had submitted the amount of under- recovery as Rs. 1,662 Crore for the period from 16.04.2023 to 30.08.2024 as per the energy charge rate worked out in line with the methodology allowed by the Commission in the Order dated 3.1.2023 in Petition No. 128/MP/2022, and the actual energy charge rate; the Respondents, particularly GUVNL, had placed their own calculation on record and had argued that the benchmark price determined by the Committee catered to the expenditure actually incurred by the Petitioner; while submitting that the claim of the Petitioner was excessive, the Respondents had contended that the consideration of the premium amount on the FOB price claimed by the petitioner, and the relief cannot be granted on this count without examination; and,

therefore, it was not appropriate to grant the interim relief based on the differential amount with respect to the actual cost as submitted by the Petitioner.

The CERC then observed that it had issued the order dated 3.1.2023 in respect of the 2022 Directions which was *pari materia* to the 2023 Directions; they had considered the comparison of the energy charge rate with reference to the relief granted by the Commission in the Order dated 3.1.2023; there was a significant difference between the energy charge rate as paid by the PPA holders based on the rate notified by the Committee and the energy charge rate worked out as per the methodology decided by the Commission in the order dated 3.1.2023; after considering the documents and calculation on record, the Commission was of the view that there was, *prima facie*, a significant difference between the benchmark rates determined by the Committee and the actual cost claimed to have been incurred by the Petitioner to source imported coal from different countries to meet its obligations under the 2023 Directions; since the Petitioners had incurred the expenditure consistently each month in the procurement of coal to supply power to the Procurers, such a major shortfall would affect the financial viability of the Petitioners to generate and supply electricity pursuant to the directions issued under Section 11(1) of the Act; and, in its view, the Petitioner had a strong prima-facie case for interim relief to compensate the expenditure actually incurred for the procurement of coal.

Regarding Balance of convenience, the CERC observed that, after a prima facie case is made out, the second component of the test is the “balance of convenience”, which must also be in favour of granting the interim relief; the Court/Tribunal, while granting or refusing to grant interim relief, is expected to exercise sound judicial discretion to ascertain the amount of substantial mischief or injury that is likely to be caused to the parties if interim relief is refused and compare it with that which is likely to be caused to the other side if the interim relief is granted; the Court/Tribunal must satisfy itself that the comparative hardship, mischief, or inconvenience that is likely to occur from withholding the

grant of interim relief will be greater than that which would be likely to arise from granting it (**Dalpat Kumar v. Prahlad Singh**): (1992) 1 SCC 719: AIR 1993 SC 276); the basic principle for the grant of an interlocutory order was to assess the right and need of the Petitioner, as against that of the Respondents; and the determination as to where the balance of convenience lies is a duty incumbent on the courts/tribunals (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd**: (1999) 7 SCC 1).

The CERC then observed that, in the present case, the Petitioner was required to incur considerable expenditure to generate and supply power as per the 2023 Directions; unless the financial distress caused to the Petitioner due to under-recovery of the generation cost is mitigated through suitable interim relief, the Petitioner would not be financially viable to arrange imported coal and supply power to the Respondents; in other words, denial of interim relief would erode the financial viability and, consequently, the ability of the Petitioner to procure coal to supply power for the entire duration of the 2023 Directions; on the other hand, failure of the Petitioner to generate and supply power to the Respondents would force the Respondents to purchase costly power to meet the needs of their consumers as the shortage had been recognized by the MoP while issuing directions to the Petitioner under Section 11; and, therefore, the balance of convenience lay in favour of the Petitioner as the consequence of the denial of interim relief would cause injury to the Petitioner and the Respondents.

Regarding the test of Irreparable injury, the CERC observed that, as the grant of interim relief was discretionary, the exercise of such discretion was subject to the court/tribunal satisfying itself that its interference was necessary to protect the party from injury that could not be adequately compensated by way of damages; in other words, irreparable injury would ensue before the legal right would be conclusively established (**Dalpat Kumar v. Prahlad Singh**, (1992) 1 SCC 719); the third component of the test for the grant of interim relief was that the Court/Tribunal should satisfy itself that non-interference would result in

“irreparable injury” to the party seeking relief and that such party needs protection from the consequences of such injury; and irreparable injury did not mean that there must be no physical possibility of repairing the injury but meant only that the injury must be a material one, namely one that could not be adequately compensated by way of damages.

The CERC then observed that Section 61(d) of the Act provided that tariff determination should ensure “safeguarding consumer’s interest and, at the same time, recovery of the cost of electricity in a reasonable manner; the purpose of this guiding principle was that the generating company should make a recovery of the cost of electricity in a reasonable manner so that it was not out of pocket to meet the expenditures to arrange materials and services to generate and supply electricity; if the Petitioner was not paid the reasonable cost of generation of electricity, it would not be able to discharge its obligations to meet the 2023 Directions; the Petitioner had been discharging its obligations by supplying power at a benchmark price even though it was not able to recover its cost of production; it may be argued that the Petitioner would be able to recover the shortfall after the adverse financial impact was conclusively determined; however, denial of interim relief would adversely affect the Petitioner’s ability to generate and supply electricity which could not be compensated by payment of shortfall tariff with interest subsequently.

The CERC concluded Issue No.(a) holding that, since all the tests for grant of interim relief were satisfied in this case, the Commission was of the view that the Petitioner was entitled to protection by way of interim relief.

On Issue No.(b), ie as to what should be the quantum of interim relief to be granted to the Petitioner?, the CERC observed that the benchmark energy charge rate was being determined by the Committee as per the 2023 Directions on a fortnightly basis for weekly payment by the Procurers, including the Petitioner; the Committee had mainly considered the Gross Calorific Value, FOB Price, Ocean Freight Charges, Port Handling Charges, Operational Parameters,

and Mining Profit to work out the benchmark ECR rate; the Committee had fixed the benchmark rates on a fortnightly basis with effect from the fortnight starting 16.3.2023; the Petitioner had computed the energy charge rate in terms of the principles decided in the Commission's order dated 3.1.2023 in Petition No.128/MP/2022 which pertained to the determination of the adverse financial impact of the 2022 Directions applicable for the period from 6.5.2022 till 31.12.2022; the Petitioner had submitted, vide its affidavit dated 4.3.2024, a comparative chart containing the energy charge rate calculation as per the Committee, as per the order of the Commission dated 3.1.2023 in Petition No.128/MP/2022, and the actual cost incurred by the Petitioner; the Petitioner had sought the energy charge rate under different heads by way of interim relief ie (a) cost of coal as per the order dated 3.1.2023 in Petition No.128/MP/2022, which provided that, for coal imported from Indonesia, the FoB price of coal would be computed on the basis of HPB based on HBA index or the actual, whichever was lower whereas for the coal received from countries other than Indonesia, CIF price would be considered; (b) Transportation and Fuel Handling Charges in terms of the principle decided in the order dated 3.1.2023 in Petition No.128/MP/2022, i.e., as per the rates quoted in the PPA; (c) Other Charges on an actual basis; other charges were not allowed in the order dated 3.1.2023 in Petition No.128/MP/2022 on the ground that PPA did not have any provision for other charges; and (d) Operational Parameters: in accordance with the principle decided in the order dated 3.1.2023 in Petition No.128/MP/2022, which provided that the heat rate and APC would be as per the Tariff Regulations 2009 which was prevalent on the date of commercial operation or the actuals, whichever is lower.

The CERC observed that the Petitioner had claimed the energy charge rate as per the Commission's order dated 3.1.2023 in Petition No.128/MP/2022; they had submitted that, for the fortnight from 16.4.2023 till 30.4.2023, the Committee recommended energy charge rate was Rs.4.65/kWh, whereas the actual ECR was Rs.6.83/kWh and the ECR as per the order dated 3.1.2023 in Petition

No.128/MP/2022 worked out to Rs.6.25/kWh; the Respondents had raised the dispute on individual parameters, whereas there was an agreement on some of the parameters, such as the price of GCV of blended coal, loss of GCV during transit and handling, ocean freight, and handling charges as per the PPA; in view of the complexity involved in computation, the Commission felt that it may not be advisable to go into detailed computation for the purpose of interim relief; an attempt had been made to analyse and compare elements of the energy charge rate as submitted by the Petitioner and the Respondent GUVNL *vis-à-vis* the rate notified by the Committee; the Petitioner, on the directions of the Commission, vide Record of Proceedings dated 15.12.2023, had approached the Committee with regard to its claim of under- recovery of the cost of actual generation *vis-à-vis* the benchmark rates fixed by the Committee; the Committee, after consideration of the concerns of the Petitioner and other ICB plants, had conveyed its decision through the minutes of the meeting dated 26.12.2023, which were as under: (a) the Committee decided to take the lower of Platts and Argus Indices for computation of coal price without considering the premium or discount on coal price; (b) the Committee decided to use imported coal prices of 5000 kCal/kg for computation of benchmark energy charge rate, and for any variation in coal grade, ICBs were required to approach the Appropriate Commission; (c) the Committee decided to consider the transit time of six weeks for the import of coal and, accordingly, coal prices as per the index prevailing in the previous 7th and 8th week prior to the start date of the control period (on a fortnightly basis); and (d) Ocean freight: the Committee decided to continue with the practice of considering the weekly Clarkson index.

The Commission's observations were dealt with under different heads. On (I) Price of imported Coal, including Gross Calorific Value, the CERC compared the factors considered by the Committee, the Petitioner, and the Respondent No.1 GUVNL in respect of coal price, and had summarized it in the form of a table. On FoB Price of blended coal, the CERC observed that the Committee had considered the GCV of 5000 kCal/Kg (ICI 3) while working out the

benchmark energy charge rate; the Committee had left it to the Appropriate Commission to decide any variation in coal grade from the GCV of 5000 kCal/kg (ICI 3); the Petitioner has computed on the basis of higher GCV of coal (5291 kCal/kg) based on the design parameters of its plant (i.e. 5350 kCal/kg) and actual consumption of coal during the month of November 2023; the Respondent GUVNL had considered the same blended GCV of 5291 kCal/kg and had computed the FoB price of coal on the basis of Agrus ICI 3 index price (5000 GCV) by extrapolating the same to the blended GCV of 5291 kCal/kg; the petitioner, vide affidavit dated 18.4.2024, had submitted that the Committee had considered the FOB price of coal for the month of November 2023 as 78 USD/Ton for GCV of 5000 kCal/kg) whereas the actual price of coal consumed by TPCL was 91.80 \$/ton (based on blended GCV of 5291/kCal/kg); on the other hand, GUVNL had considered the FOB price of coal ex-Indonesia as 84.35 USD/ton for GCV of 5291/kCal/kg by applying pro-rata ARGUS Index of 5000 GCV; the reasons for the difference in the FoB price of coal between the Committee, the Petitioner, and GUVNL were as under: (a) the Petitioner had submitted that the Committee had considered the FoB price of coal on ICI 3 for GCV of 5000 kCal/kg as USD 78/MT; the design parameter of the Petitioner's plant is 5350 kCal/kg; as per the Petitioner, the GCV of blended coal used in November 2023 was 5291 kCal/kg; (b) the Respondent GUVNL had considered USD 79.91/MT with GCV of 5000 kCal/kg (ICI 3) to arrive at the FoB price of blended coal, ignoring the transit and storage time; by extrapolating the said rate with the actual GCV of coal consumed during November 2023, the FoB price of coal for GCV of coal with GCV of 5291 kCal/kg worked out to USD 84.35/MT $[(5291/5000) \times 79.71 = 84.35 \text{ \$/ton}]$; (c) the Petitioner had calculated the FoB price of coal based on the actual cost of coal as USD 91.80 kCal/kg by taking the weighted average GCV and price of coal for each shipment; and the methodology adopted by the Petitioner for computation of the FoB price of blended coal during the month of November 2023 was extracted as under:

As submitted by the Petitioner for November, 23				
Shipment No.	Vessel name	Consumption Qty [MT]	Consumption GCV (Kcal/Kg)	FOB Value [USD/MT] (CFR changed to FOB level)
643	XXX	22,207	5,585	78.39
647	XXX	33,233	4,793	74.38
649	XXX	80,848	4,125	54.37
650-B	XXX	25,906	4,474	66.48
651	XXX	37,747	5,721	107.12
655	XXX	63,320	6,303	118.07
648	XXX	79,945	4,010	54.64
654	XXX	64,672	6,040	123.72
656	XXX	94,760	4,873	82.03
653	XXX	79,057	6,433	123.23
662	XXX	10,475	5,720	111.35
663	XXX	88,841	4,610	91.92
657	XXX	44,028	6,473	124.78
Total		7,25,039	5,219	91.80 *

(XXX – Vessel Name omitted * weighted average price)

The CERC noted the explanation given by the Petitioner on the methodology to apply the index value as under:

“....However, consumption of coal during any month would be varied as the quantum of coal consumed varies month on month. For e.g. One shipment arrives from Country A and another from Country B having 5500 GCV and 4800 GCV, respectively. The applicable Index would depend on the specific GCV of the shipments while the coal consumed required to have a particular GCV depending on the coal consumption (around 5200-5350 GCV (for plant sustainability), which is arrived through blending. Hence, the value of Argus Index taken by GUVNL is incorrect.”

The CERC then observed that, while the Petitioner had considered the weighted average GCV and the actual price of each shipment of coal to arrive at the FoB price of blended coal, GUVNL had considered the coal price of the blended coal with reference to only Argus ICI 3 index (5000 GCV) without working out the weighted average price of each shipment during the month. As a result, the FoB price worked out by GUVNL cannot be said to be the representative FoB price of blended coal being consumed by the Petitioner; for the purpose of comparison only, the Commission had worked out the FoB price of coal based on the actual GCV of coal (blended coal) consumed quantity and quality submitted by the Petitioner and based on reference indices as under:

Shipment No.	Vessel name	Consumption Qty [MT]	Consumption GCV (Kcal/Kg)	FOB Price (Pro-rata with reference to ICI 3) (5000 GCV)	FOB Price (Pro-rata with reference to nearest ICI Index)			FOB Value [USD/MT] (CFR change to FOB level)
					GCV	Index Price	Revised Index Price at actual GCV	
1	2	3	4	5	6	7	8	9
643	XXX	22,207	5,585	78.28	5800	86.25	83.05	78.39
647	XXX	33,233	4,793	69.49	5000	72.49	69.49	74.38
649	XXX	80,848	4,125	62.21	4200	54.06	53.09	54.37
650-B	XXX	25,906	4,474	64.86	4200	52.23	55.64	66.48
651	XXX	37,747	5,721	88.13	5800	91.61	90.36	107.12
655	XXX	63,320	6,303	91.38	6500	115.79	112.28	118.07
648	XXX	79,945	4,010	64.47	4200	60.25	57.52	54.64
654	XXX	64,672	6,040	99.83	5800	96.96	100.97	123.72
656	XXX	94,760	4,873	79.57	5000	81.64	79.57	82.03
653	XXX	79,057	6,433	99.09	6500	120.52	119.28	123.23
662	XXX	10,475	5,720	93.40	5800	96.5	95.17	111.35
663	XXX	88,841	4,610	72.79	4200	57.64	63.27	91.92

657	XXX	44,028	6,473	106.99	6500	122.02	121.51	124.78
Total		7,25,039	5,219	81.39*			83.41*	91.80*

(*Total GCV and FOB price for the month is on weighted average based on shipment-wise quantity. XXX – Vessel Name omitted.)

The CERC observed that (a) it could be seen from column (5) of the table above that, while the price of coal increased with an increase in quality, the actual consumption of coal, i.e., the quantity of coal required to produce one unit of electricity, gets reduced; hence, the energy charge rate would remain unchanged up to the pro-rata increase of coal price on account of blending if the Argus ICI 3 index was taken as a reference, which was similar to the approach taken by the Respondent GUVNL for computation of FoB price of coal; it was noticed from column (6) of the table above that by considering the nearest Index price of coal, the weighted average price of coal based on individual shipments works out to 83.41 \$/MT, which can further increase if the shipment of higher GCV coal is consumed; (b) the weighted average FOB price of blended coal of GCV 5291 kCal/kg had been worked out as 81.39 \$/MT with reference to the ICI 3 index (applicable to GCV of 5000 kCal/kg); this method did not capture the variation in index price between high and low-quality coal; if the nearest Argus Index of 5800 GCV and 6400 GCV was considered for higher quality coal, the weighted average FOB price of blended coal of GCV 5291 kCal/kg had been worked out as 83.41 \$/Ton; (c) the Commission, in para 6.3 of its order in 12/SM/2023, had already recognized the decoupling of high CV and mid-CV Coal in the International Coal index, i.e., Argus, Platts, etc; it implied that the rate of increase of International Index price with an increase of quality was non-linear, and hence the blending of coal based on a weighted average of quantity and shipment-wise price of higher quality coal led to a higher weighted average coal price; the petitioner had used the higher GCV blended coal of more than 5000 GCV due to technical requirements; thus, prima facie, there was a case for allowing ECR based on the higher FOB price of the blended coal compared to the pro-rata FOB price of coal worked out by the Committee with reference to

the Argus ICI3, which is for 5000 GCV; the Petitioner, the Respondent, and the Committee have applied a different methodology for arriving at the FoB price of blended coal as discussed above; Respondent No.1 GUVNL had submitted the calculation vide affidavit dated 13.3.2024; the Petitioner submitted the calculation as per the CERC order, actual cost, and as per the Committee vide affidavit dated 18.4.2024; the impact of FOB price on per unit energy charge as per the calculation submitted by the Petitioner and the Respondent No.1 worked out for the month of November, 2023 as under:-

	As per the Committee	As per the Respondent No.1 GUVNL	As per the Petitioner	As per CERC Order dated 3.1.2023	As per actual cost
SHR (kCal/kWh)	2121	2050	2148	2121	2148
GCV (kCal/kg)	5000	5219	5219	5219	5219
GCV diff (in handling)	-	72	-	-	-
Total GCV	5000	5291	5219	5219	5219
Aux (%)	8.50%	4.75%	7.88%*	7.88%	7.88%
Specific Coal Consumption (kg/kWh)	0.46	0.41	0.45	0.44	0.45
FoB price (\$/MT)	78.00	79.71	91.80	91.80	91.80
Ex Rate	83.00	82.80	83.23	82.80	83.23
FoB Price (Rs/MT)^	6474	6600	7641	7601	7641
ECR (Rs/unit)^	2.98	2.71	3.44	3.34	3.44

(* As per actual, which is less than normative. **FoB price worked out as per nearest index price in Para 64(e) of this order. ^FoB Price (Rs/MT) and ECR (Rs/Unit) have been calculated)

On Transit time, the CERC noted that the petitioner, in its affidavit dated 18.4.2024, had considered timing for Coal Sourcing and Consumption at the Mundra plant in 45-60 days in advance and the same being consumed over two-three months as per the coal blending plan; the Committee, in its minutes of the meeting dated 26.12.2023, had allowed the transit time of the 7th/8th week; the Respondent GUVNL had opposed the claim of the Petitioner along with the time-wise flow of coal, which required further examination.; since the Committee had considered the 7th/8th week after November 2023, this effect was not factored in for the energy charge rate determined from April 2023 to November 2023; it appeared that had the Committee considered the 7th/8th week from the beginning of the 2023 Directions, the energy charge rate notified by the Committee and paid by the Respondents would have been different; they had observed the downward and upward trend of the Index price; on 14th April 2023, the Index price was 94.48 \$/Ton, which was reduced to 42 \$/Ton on 30th June 2023 but subsequently increased to 79.35 \$/ton as on 29th December 2023 for 5000 kCal/Kg in 26 weeks; since overall there was a downward trend, it could be concluded that the energy charge rate would be marginally higher if the transit time were considered; and for the purpose of computation of energy charge rate, the Commission, accordingly, allowed a time gap of eight weeks between the loading port and discharge port or the actual freight time, whichever was less as considered by the Committee.

With regards Premium on Argus Index Price, the CERC observed that, during the hearing on 15.3.2024, the Respondents GUVNL, PSPCL & HPPC had submitted that TPCL was claiming higher costs by charging a higher premium; there was disagreement between the Petitioner and the Respondents with regard to the basis of arriving at the FoB price, particularly on the index to be used and whether a premium quality was applicable if the Argus Index price was used; the Petitioner, in para 18 of its Written Submission dated 16.5.2024, had submitted that the Respondents had alleged that the Petitioner had not

computed the ECR on current HBA index, and instead had gone to the previous index which was no longer applicable; it was submitted that majority of the coal was now being procured based on the Argus index plus premium, at the relevant grade; further, even for procurement from Indonesia under the spot market, the Petitioner's data was benchmarked based on the Argus index plus premium, at the relevant grade; the Commission, in the order dated 3.1.2023 in Petition No.128/MP/2022, had adopted the HBA price or the actual price of coal, whichever was lower, while deciding the FoB price of coal in connection with the determination of the adverse financial impact of the 2022 Directions; the Petitioner had calculated the adverse financial impact in terms of the principles decided in the said order, and had sought reimbursement of ECR accordingly by way of interim relief; however, in its submission as quoted above, the Petitioner had admitted that it was procuring coal on Argus index plus premium at the relevant grade, and not on the basis of the HBA index as submitted by the Petitioner in connection with 2022 Directions. Therefore, the determination of adverse financial impact in connection with the 2023 Directions will no longer be with reference to HPB price based on the HBA index since the Petitioner was admittedly procuring coal at Argus index plus premium; and, moreover, the HBA index had been supplemented by the HBA1 and HBA2 index since March 2023 and the HBA3 index since August 2023, linking the indices to the different grades of coal being exported from Indonesia.

The CERC thereafter observed that the existing HBA index used 4 indices, namely the Global coal Newcastle Index (GCNC), Newcastle Export Index (NEX), Platts Index, and Indonesia Coal Index (ICI), with each having a weighted average of 25%; since the existing HBA formula was more inclined to follow the price of high-calorie coal produced abroad and did not reflect the ground conditions in the Indonesian coal market, which produced low- calorie coal, the Government of the Republic of Indonesia had modified the HBA index and added HBA1, HBA2, and HBA3 indices; according to the attachment to Minister of Energy and Mineral Resources No. 41 of 2023 (of the Government of the

Republic of Indonesia), there were three HBA formulas that referred to the average selling price of coal with certain calories in the previous month (Pm) and the average selling price of coal with certain calories in the previous two months (Pm-1); and the formulas were as under: (a) $HBA = (0.7 \times P_m) + (0.3 \times P_{m-1})$ [US\$/tonne], where, Pm was the average selling price of coal with calories of 6,200-6,400 kcal/kg GAR the previous month; Pm-1 was the average selling price of coal with 6,200-6,400 calories from the previous two months; (b) $HBA1 = (0.7 \times P_m) + (0.3 \times P_{m-1})$ [US\$/tonne], where, PM was the average selling price of coal with calories of 5,100-5,300 kcal/kg GAR the previous month, and Pm-1 was the average selling price of coal with 5,100-5,300 calories from the previous two months; (c) $HBA2 = (0.7 \times P_m) + (0.3 \times P_{m-1})$ [US\$/tonne], where, PM was the average selling price of coal with calories of 4,100-4,300 kcal/kg GAR the previous month, and Pm-1 is the average selling price of coal with 4,100-4,300 calories from the previous two months.

The CERC held that, as per the design parameters of the Petitioner's plant, coal with a GCV of 5291 kCal/kg was suitable for the generation of electricity; coal with a GCV of 5291 kCal/kg fell within the specifications provided for the HBA1 index; and, accordingly, they had made a comparison of HBA1 with Platts and ICI 3 as under:

5000 kCal/Kg GAR)	Jan-24	Feb-24	March-24
Platts	78.24	78.26	78.40
HBA 1 *	84.00	84.28	85.36
Argus ICI-3	79.40	78.95	78.92
Diff (HBA1 & Platts)	6.86%	7.14%	8.15%
Diff (HBA1 & Argus ICI-3)	5.48%	6.32%	7.54%

(*Derived based on 5200 kCal/Kg GAR Index)

The CERC further observed that HBA 1, which was one of the official indices notified by the Government of the Republic of Indonesia and which approximates the design parameters of the Petitioner's plant, was higher than

Platts and Argus by USD 4 to 5/MT in these months; the Petitioner had submitted that it had procured coal on the Argus index with a premium; however, the Petitioner had not furnished any data with regard to the premium actually paid; the MoP appointed Committee, vide para 5(1) of the minutes of the meeting held on 26.12.2023, recognized the premium on Argus index but did not crystallise the rate of premium by observing as under:-

“...On the issue of premium being paid by ICB Plants, the Committee noted that sometimes imported coal is available on discount and sometimes on premium. Accordingly, the Committee decided only to consider the index value.”; and. in the absence of relevant data with regard to the premium actually paid over and above the FoB price of coal, the Commission was not in a position to take any view on the issue of premium at the stage of grant of interim relief.

The CERC observed that, as discussed above, prima facie there was a case for allowing energy charge rate on account of (i) a higher FOB price of the blended coal compared to the pro-rata FOB price of coal worked out by the Committee with reference to the ICI 3, (ii) marginally higher energy charge rate if the transit time considered was more; they were not inclined to consider the claim on account of the premium at this stage; based on the data submitted by the petitioner for November 2023, they had made a sample check on the impact on FOB price after excluding the premium; the actual FOB price of coal for November 2023, submitted by the Petitioner, was USD 91.80 per ton, whereas the pro-rata FOB price of blended coal for GCV of 5291 kCal/kg was USD 83.41 per ton worked out based on the ARGUS index with GCV of 5000 kCal/Kg as given in Para 64(e) of this order; the difference between the actual FOB price and the FOB price worked out based on the Index works out to USD 8.39 per ton; if a premium of USD 4 per ton was assumed, there would be a difference of about USD 4.39 per ton after adjustment of premium in the difference between the actual FOB price and pro-rata FOB price worked out above, which was approximately 52% of the differential amount; this may undergo change on a

month-to-month basis due to variations in the price and quantity; and it implied that there was merit in providing interim relief on account of the FOB price of coal even after capping at the ARGUS index price.

On Loss of GCV during Transit, the CERC noted that the Petitioner had claimed GCV 72 kCal/Kg as transit loss; GUVNL, in its calculation, had also considered the transit loss of GCV 72 kCal/Kg; however, the Committee had not considered the impact of transit loss on the energy charge rate; there was a prima facie case to consider the transit loss of GCV as part of ECR while granting interim relief; and there would be an impact of transit loss in the differential amount of the energy charge rate on account of the FOB price of coal, which may vary on a month-to-month basis due to variations in the FOB price of coal.

With regards Operational parameters, the CERC noted that the Petitioner had submitted in the main petition that the operational parameters (Heat Rate and Auxiliary Consumption), as allowed in the order dated 3.1.2023 in Petition No.128/MP/2022, may be considered for the purpose of interim relief; in the order dated 3.1.2023, the Commission had allowed the operational parameters as per the Tariff Regulations, 2009; GUVNL had submitted that relief should be granted as per bid parameters, i.e., SHR of 2050 kCal/kWh and Auxiliary Power Consumption of 4.5%; GUVNL had relied upon the order dated 6.12.2016 in Petition No. 159/MP/2012 in which the Commission had considered SHR of 2050 kCal/kWh and Auxiliary Power Consumption of 4.5% while granting the compensatory tariff; however, GUVNL's similar contention in Petition No.128/MP/2022 was not accepted by the Commission in its order dated 3.1.2023 with the following observations: *"109. We have considered the submissions of TPCL and GUVNL. The operational/technical parameters in terms of the order dated 6.12.2016 in Petition No.159/MP/2012 was in the context of the compensatory tariff which was being granted as a package to TPCL. However, while deciding the adverse financial impact of Section 11*

Directions which has to cover the variable cost of generation and a reasonable margin as per the Appellate Tribunal's judgement in GMR case, we are not inclined to adopt the operational parameters in the present case which was approved in order dated 6.12.2016 in Petition No.159/MP/2012. In our view, the operational parameters such as heat rate and APC should be lower of the actual or as worked out in accordance with Tariff Regulations, 2009 which was in force at the time of commercial operation of the generating station of the Petitioner. Heat Rate and APC worked out on the basis of Tariff Regulations, 2009 are 2121 kCal/kg and 8.50% respectively"; the Commission had differentiated the operational parameters considered in the order dated 6.12.2016 in Petition No.159/MP/2012; accordingly, they did not accept the submission of GUVNL with regard to Heat Rate and Auxiliary Consumption; the Commission, while framing Terms and Conditions of Tariff Regulations every five-year period, arrives at the operational parameters based on the past performance of the various generating stations and in consultation with various stakeholders; thus, the operational norms determined under the Terms and Conditions of Tariff Regulations reflect achievable norms; the decision taken by the Commission, in its order dated 3.1.2023 in Petition No. 128/MP/2022, balanced the interest of all the stakeholders and addresses the concerns of Respondent No.1; therefore, the station heat rate and auxiliary power consumption for the purpose of arriving at the energy charge rate should be lower than the actual or as worked out in accordance with CERC (Terms and Conditions of Tariff) Regulations, 2009, which was in force at the time of commercial operation of the generating station of the Petitioner; in the light of the above data, they were inclined to adopt their decision in the order dated 3.1.2023 in Petition No.128/MP/2022 with regard to the SHR and Auxiliary Power Consumption while computing the ECR, i.e., the actual or as worked out in accordance with Tariff Regulations, 2009, whichever is lower.

The CERC observed that Respondent No.1 GUVNL, vide affidavit dated 13.3.2024, considered the transportation charges based on PPA as 14.67 \$/ton

on the ground that transportation charges were not affected by an increase in coal prices on account of Indonesian Regulations; the Petitioner, vide affidavit dated 18.4.2024, submitted the computation of the energy charge rate by the Committee constituted by the MOP wherein the ocean freight and insurance value was considered as 11 \$/ton for November 2023; if they considered the transportation charges as per PPA worked out by Respondent No.1, it appeared that the transportation charges as 14.67 \$/ton and considered by the Committee as 11 \$/ton for November 2023 as submitted by the Petitioner based on simulation, there was a difference of about 2.67 \$/ton in the PPA rate and the rates considered by the Committee; the Petitioner had further submitted a brief on price consideration in the long term transportation contract vide affidavit dated 16.5.2024, which stated that the long term transportation contract took into consideration the base freight rate from Tanzum Bara Coal Terminal (TBCT) Indonesia, which was the load port to Mundra West Port, India which was the discharge port, CERC LSFO Bunker rate, estimated vessel disbursement charges as applicable at load port as well as discharge port, charter liability insurance and cost of armed guards; they were not inclined to go into the details of the long term transportation contract at this stage; since the Petitioner in the main petition had claimed the transportation charges as per the PPA by way of interim relief, which was also the view of the Respondent No.1 GUVNL as well as consistent with the principle laid down under order dated 3.1.2025 in Petition No. 128/MP/2022, they had considered the transportation charges at the PPA rate for the purpose of interim relief.

With respect to Port handling charges, the CERC held that, as per the submission of the petitioner, the Committee had considered Rs 473 per ton towards port handling charges; the petitioner had submitted that the actual port handling charges vary from Rs 500 to Rs. 800 per ton due to fixed cost components in their contract; however, the Petitioner in the main petition had requested that, for the purpose of interim relief, ocean freight charges and port handling charges be considered as per the order dated 3.1.2023 in Petition

No.128/MP/2022 wherein these charges were allowed as per PPA for Indonesian coal and on CIF basis for coal sourced from countries other than Indonesia; Respondent No.1 GUVNL had also considered port handling charges as Rs 463 per ton as per PPA; accordingly, they held that for the purpose of interim relief, the Petitioner shall be entitled to claim the transportation and port handling charges as per the PPA.

On Mining Profit, the CERC held that the petitioner had submitted that, in the CERC Final Order, KPC consumption was to be considered, and the Petitioner had not consumed any KPC shipment; the issue whether or not the mining profit was applicable for the coal consumed from other sources would be examined at the time of the final order; and, prima facie, based on the records placed by the petitioner, the mining profit was not considered for the purpose of interim relief.

The CERC concluded that, in light of the above discussion, the Petitioner's claim for interim relief had merit on certain counts only, as discussed below: (a) the Petitioner and the Respondents had a dispute mainly on consideration of the premium on the ARGUS index price since there was a difference between the actual price and the ARGUS index price of similar quality coal even after excluding the premium amount; it was mainly on account of the fact that the ARGUS index price was non-linear with the increase of quality as discussed in Para 64 of this order, i.e., the actual index price of high-quality coal (say 5500 kCal) was higher than the FOB price worked out based on 5000 kCal quality of coal on pro-rata basis; hence, the petitioner was entitled to relief on account of the FOB price of coal; the issue of admissibility of the premium on the ARGUS Index price and the mining profit would be dealt with in the final order; (b) apart from the above, the Committee, while considering the FOB price of coal, had changed the transit time to the 7/8th week from November 2023 onwards, replacing the 4th week; they had discussed the impact of the transit time on the FOB price of coal and allowed a time gap of eight weeks between the loading

port and discharge port or the actual freight time, whichever was less, as considered by the Committee; and since the trend of the Index price was downward, the transit time had an impact on the FOB price of coal; (c) as regards the loss of GCV during transit, it was observed that the Petitioner and the Respondents both had agreed on the consideration of loss of GCV during transit whereas the MOP Committee had excluded the same; the impact on the specific coal consumption and energy charge rate due to the loss of 72 kCal/Kg was considered for interim relief; (d) as regards the transportation charges and Port Handling Charges, there was broad agreement between the Petitioner and the Respondents on consideration of the transportation charges and port handling charges as per the PPA, which was higher than as considered by the MOP Committee; and, accordingly, the impact on this count was considered for interim relief. (e) the Commission had allowed the interim relief in line with the order dated 3.1.2023 in Petition No. 128/MP/2022 and some of the aspects accepted by the Committee and Respondents; some of the issues, such as premium and mining profit, wherein Respondents had strong contention, the effect of these factors could not be included in interim relief without detailed examination on merit; accordingly, following a cautious approach, the Commission had allowed the interim relief of – (i) fifty percent of the difference in the energy charge rate on account of the FOB price of coal between the energy charge rate as the methodology decided in the CERC order dated 3.1.2023 as claimed by the petitioner (duly certified by the Auditor) and as worked out by the Committee on account of the Coal price along with corresponding taxes & duties on a monthly basis during the operation of the 2023 Directions; (ii) the transportation charges and Coal Handling Charges as per the PPA after adjustment of the amount recovered as per the MOP Committee rate on this count.

The CERC allowed the Petitioner to recover the arrears on account of the interim relief as decided in para 81 above in three equal monthly instalments, and observed that the interim tariff granted through this order was subject to

adjustment on the basis of the final determination of the adverse financial impact of the 2023 Directions by the Commission.

The interim prayer in Petition No. 179/MP/2023 was disposed of in terms of the above, and the Petition was directed to be listed for final hearing in due course.

III. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were put forth by Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellants-GUVNL and PSPCL, Sri Anand. K. Ganeshan, Learned Counsel appearing on behalf of the Appellant-Rajasthan Discoms, and Sri P. Chidambaram, Learned Senior Counsel appearing on behalf of the Respondent-TPCL. It is convenient to examine the rival contentions, urged by Learned Senior Counsel and Learned Counsel on either side, under different heads.

IV. DOES THE POWER CONFERRED BY SECTION 94(2) OF THE ELECTRICITY ACT, TO GRANT INTERIM RELIEF, EXTEND TO PROCEEDINGS UNDER SECTION 11(2) THEREOF?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS-PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that there cannot be any interim order passed by the CERC, in the exercise of its powers under Section 94(2) of the Electricity Act, in Section 11 proceedings, when there is a provisional tariff determined by Expert Committee constituted for the purpose, and such provisional tariff is already higher than the PPA tariff which has been held to be binding; the scheme under Section 11 of the Electricity Act, 2003, being a special provision to deal with extra-ordinary situations to protect the interest of the consumers at large, with the Central Government issuing the directive and appointing a Committee to determine the provisional tariff, cannot be interfered with or over-ridden by

any interim order of the Central Commission under Section 94(2) of the Electricity Act, 2003; and the authority of the Central Commission is only to determine finally the adverse financial impact.

B. SUBMISSIONS URGED ON BEHALF OF TPCL:

Chidambaram, Learned Senior Counsel appearing on behalf of TPCL, would submit that CERC has ample powers to grant interim relief under Section 94(2) of the Electricity Act read with Regulation 47 of the CERC (Conduct of Business) Regulations.

C. ANALYSIS:

Section 94 of the Electricity Act relates to the powers of the Appropriate Commission. Section 94(1) stipulates that the Appropriate Commission shall, for the purposes of any inquiry or proceedings under the Electricity Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of matters enumerated in clauses (a) to (g) thereunder. Section 94(2) stipulates that the Appropriate Commission shall have the power to pass such interim order in any proceedings, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate.

The power conferred on the Appropriate Commission, to pass interim orders under Section 94(2), is extremely wide. The Appropriate Commission has been conferred the power to pass interim orders in “*any*” proceedings, hearing or matter before it. By use of the word “*any*”, Parliament has made it clear that the power to pass an interim order can be exercised in any proceedings, hearing or matter pending before the Appropriate Commission.

That the Appropriate Commission has the power to pass an interim order, even in a proceeding under Section 11(2) of the Electricity Act, can be better explained by way of an illustration. Since the power conferred on the Appropriate Government, under Section 11(1) of the Electricity Act, is a coercive

power to be exercised in extra-ordinary circumstances, the Central Government may, in situations where say there is a grave threat to national security, issue directions to generating companies to operate and maintain its generating stations, and supply electricity free of cost, for the entire duration of such threat. That the generating company would have suffered an adverse financial impact as a result of such directions is obvious and self-evident. Requiring the generating company to await a final adjudication, of the proceeding under Section 11(2) of the Electricity Act, before it is granted some form of relief, to even partially off-set the adverse financial impact it has suffered as a result of such directions, would not only be unduly harsh, but is also not warranted from a plain and literal reading of Section 94(2) of the Electricity Act. Such an interpretation, more so in the light of the word “*any*” used in Section 94(2), is wholly unjustified.

A petition filed by a generating company, under Section 11(2) of the Electricity Act, is undoubtedly a proceeding before the Appropriate Commission. Since the power to pass an interim order extends to any proceeding under the Electricity Act, there is no reason why such a power to pass an interim order should be circumscribed, and be held inapplicable to proceedings under Section 11(2) of the Electricity Act. Consequently, the power to pass an interim order under Section 94(2) can also be exercised by the Appropriate Commission in a proceeding instituted before it by a generating company under Section 11(2) of the Electricity Act.

It must, however, be borne in mind that existence of power is distinct from its exercise. While the Appropriate Commission has the power to pass an interim order even in a Section 11(2) proceedings, exercise of the power to pass an interim order must, among others, satisfy the triple tests stipulated for grant of interim relief. The Commission must record reasons, on the basis of the material on record, for its conclusion that these tests are satisfied. A finding, that these tests are satisfied, without any factual foundation in this regard will not suffice.

Further, the jurisdiction conferred on the Appropriate Commission, under Section 11(2) of the Electricity Act, is to off-set the adverse financial impact, caused to a generating company, as a result of the directions issued by the Appropriate Commission under Section 11(1) thereof. It goes without saying that, since the power to pass a final order under Section 11(2) is only to off-set the adverse financial impact caused by the directions issued under Section 11(1), the power to pass an interim order can be exercised by the Appropriate Commission only after it holds that the generating company has, prima-facie, suffered an adverse financial impact as a result of the directions issued by the Appropriate Government under Section 11(1) of the Electricity Act.

V. APPELLATE POWER OF THIS TRIBUNAL TO INTERFERE WITH AN INTERIM ORDER PASSED BY THE COMMISSION: ITS SCOPE:

A. SUBMISSIONS URGED ON BEHALF OF TATA POWER?

Sri P. Chidambaram, Learned Senior Counsel appearing on behalf of TPCL, would submit that the Supreme Court, in **Wander Ltd. v. Antox India P. Ltd.** (1990 Supp SCC 727) has held that the appellate court's power of interference with interim orders is limited; this ratio has been followed in **Ramakant Ambalal Choksi v Harish Ambalal Choksi and Ors.**, 2024 SCC OnLine SC 3538 and **Neon Laboratories Limited v Medical Technologies Limited**, (2016) 2 SCC 672; intervention is justified only if the lower court's exercise of discretion is shown to be arbitrary, capricious, perverse or contrary to settled legal principles; GUVNL has failed to demonstrate how the interim Order is perverse or contrary to settled legal principles; instead, its submissions are confined to claims of prejudice and commercial hardship; further the CERC, in granting interim relief, has correctly applied the well-established triple test for grant of interim relief, viz., (a) existence of a prima facie case; (b) balance of convenience; and (c) irreparable injury.

Sri P. Chidambaram, Learned Senior Counsel appearing on behalf of TPCL, would further submit that the impugned interim Order is certainly not perverse; it is based on the CERC's *prima facie* consideration of the facts and the documents on record; assuming that the Interim Order overstates (according to GUVNL) or understates (according to TPCL) the interim price that should be paid, only 50% of the overstated / understated price has been given to TPCL at this stage; the interim Order of the CERC is subject to adjustments on the basis of the final determination of the "adverse financial impact" of the 2023 Directions by the CERC; and, moreover, GUVNL is fully protected because TPCL has offered to give a Bank Guarantee for the amounts to be paid by GUVNL to TPCL, pursuant to the Interim Order.

B. JUDGEMENTS RELIED UPON UNDER THIS HEAD:

a. JUDGEMENTS RELIED ON BEHALF OF TPCL:

1. In **Wander Ltd. v. Antox India (P) Ltd., 1990 Supp SCC 727**, the Supreme Court held that the appellate bench fell in error on two important propositions; the first was a misdirection in regard to the very scope and nature of the appeals before it, and the limitation on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order; the appeals before the Division Bench were against the exercise of discretion by the Single Judge; in such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance, and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court has ignored settled principles of law regulating grant or refusal of interlocutory injunctions; an appeal against exercise of discretion is said to be an appeal on principle; the appellate court will not re-assess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material; the appellate court would normally not be justified in interfering with the exercise of discretion under

appeal solely on the ground that, if it had considered the matter at the trial stage, it would have come to a contrary conclusion; and, if the discretion had been exercised by the trial court reasonably and in a judicial manner, the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

After referring to its earlier judgement in **Printers (Mysore) Private Ltd. v. Pothan Joseph: (1960) 3 SCR 713: AIR 1960 SC 1156**, the Supreme Court, in **Wander Ltd**, held that the appellate judgment did not seem to defer to this principle.

2. In **Ramakant Ambalal Choksi v. Harish Ambalal Choksi, (2024) 11 SCC 351**, the Supreme Court, after referring to **Printers (Mysore) (P) Ltd. v. Pothan Joseph, 1960 SCC OnLine SC 62**, and **Charles Osenton & Co. v. Johnston, 1942 AC 130 (HL)**, extracted certain observations from **Evans v. Bartlam, 1937 AC 473 (HL)**, and then observed that, in **Evans v. Bartlam, 1937 AC 473 (HL)**, it was made clear that, while adjudicating upon the discretion exercised by the trial court, the appellate court is obliged to consider the case put forward by the appellant in favour of its argument that the trial court had exercised its discretion arbitrarily or incorrectly in the circumstances; what flowed from a plain reading of the decisions, in **Evans v. Bartlam, 1937 AC 473 (HL)** and **Charles Osenton & Co. v. Johnston, 1942 AC 130 (HL)**, was that an appellate court, even while deciding an appeal against a discretionary order granting an interim injunction, had to: (a) examine whether the discretion had been properly exercised i.e. examine whether the discretion exercised was not arbitrary, capricious or contrary to principles of law; and (b) in addition to the above, an appellate court may, in a given case, have to adjudicate on facts even in such discretionary orders; the principles of law explained in **Wander Ltd. v. Antox India (P) Ltd., 1990 Supp SCC 727** had been reiterated in a number of subsequent decisions of the Supreme Court; however, over a period of time, the test laid down by the Supreme Court as regards the scope of

interference had been made more stringent; the emphasis was now more on perversity rather than a mere error of fact or law in the order granting injunction pending the final adjudication of the suit; in **Neon Laboratories Ltd. v. Medical Technologies Ltd.**, (2016) 2 SCC 672, the Supreme Court had held that the appellate court should not flimsily, whimsically or lightly interfere in the exercise of discretion by a subordinate court unless such exercise is palpably perverse; perversity can pertain to the understanding of law or the appreciation of pleadings or evidence; in other words, the Court took the view that, to interfere against an order granting or declining to grant a temporary injunction, perversity had to be demonstrated in the finding of the trial court; in **Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan**, (2013) 9 SCC 221, the Supreme Court had emphasised on the principles laid down in **Wander Ltd. v. Antox India (P) Ltd.**, 1990 Supp SCC 727, and had observed that, while the view taken by the appellate court may be an equally possible view, the mere possibility of taking such a view must not form the basis for setting aside the decision arrived at by the trial court in the exercise of its discretion under Order 39 CPC; the basis for substituting the view of the trial court should be mala fides, capriciousness, arbitrariness or perversity in the order of the trial court; and, in **Monsanto Technology LLC v. Nuziveedu Seeds Ltd.**, (2019) 3 SCC 381, the Supreme Court had observed that the appellate court should not usurp the jurisdiction of the Single Judge to decide as to whether the tests of prima facie case, balance of convenience and irreparable injury are made out in the case or not.

The Supreme Court, in **Ramakant Ambalal Choksi**, further observed that the appellate court, in an appeal from an interlocutory order granting or declining to grant interim injunction, is only required to adjudicate the validity of such order applying the well-settled principles governing the scope of jurisdiction of the appellate court under Order 43 CPC; the appellate court should not assume unlimited jurisdiction and should guide its powers within the contours laid down in **Wander Ltd. v. Antox India (P) Ltd.**, 1990 Supp SCC 727.

On the meaning of the expression “perverse”, the Supreme Court, in **Ramakant Ambalal Choksi**, observed that any order made in conscious violation of the pleadings and the law was a perverse order; in **Moffett v. Gough, (1878) 1 LR Ir 331**, the Court had observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence; in **Godfrey v. Godfrey, 106 NW 814 : 127 Wis 47 (1906)**, the Court defined “perverse” as “turned the wrong way”; not right; distorted from the right; turned away or deviating from what is right, proper, correct, etc; the wrong finding should stem out on a complete misreading of the evidence or it should be based only on conjectures and surmises; the safest approach on perversity was the classic approach on the reasonable man's inference on the facts; to him, if the conclusion on the facts in evidence made by the court below was possible, there was no perversity; if not, the finding was perverse; and inadequacy of evidence or a different reading of evidence was not perversity (**Damodar Lal v. Sohan Devi, (2016) 3 SCC 78**).

3. In **Neon Laboratories Ltd. v. Medical Technologies Ltd., (2016) 2 SCC 672**, the Supreme Court observed that it did not normally entertain appeals against interlocutory orders; the appellate court should not flimsily, whimsically or lightly interfere with the exercise of discretion by a subordinate court unless such exercise is palpably perverse; perversity can pertain to the understanding of law or the appreciation of pleadings or evidence; they would restrict themselves by referring to **Wander Ltd. v. Antox India (P) Ltd., 1990 Supp SCC 727**; and they would be careful not to transgress these frontiers.

b. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANTS:

1. In **Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel, (2006) 8 SCC 726**, the Supreme Court observed that they were not oblivious that normally the appellate court would be slow to interfere with the discretionary jurisdiction of the trial court; the grant of interlocutory injunction is in exercise of discretionary power and, hence, the appellate courts will usually not interfere

with it; however, the appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored settled principles of law regulating the grant or refusal of interlocutory injunction; this principle has been stated by the Supreme Court time and time again (**Wander Ltd. v. Antox India (P) Ltd: 1990 Supp SCC 727; Laxmikant V. Patel v. Chetanbhai Shah: (2002) 3 SCC 65; and Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai: (2006) 5 SCC 282 (2006) 5 Scale 263**); the appellate court may not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material; the appellate court would, normally, not be justified in interfering with the exercise of discretion under appeal solely on the ground that, if it had considered the matter at the trial stage, it would have come to a contrary conclusion; however, in this case, the courts below had proceeded on a prima facie misconstruction of the documents; they had adopted and applied wrong standards; and, therefore, a case for interference had been made out.

2. In Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282, the Supreme Court held that, where the lower court acts arbitrarily, capriciously or perversely in the exercise of its discretion, the appellate court will interfere; exercise of discretion by granting a temporary injunction when there is “no material”, or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse; when we refer to acting on “no material” (similar to “no evidence”), we refer not only to cases where there is total dearth of material, but also to cases where there is no relevant material or where the material, taken as a whole, is not reasonably capable of supporting the exercise of discretion; in this case, there was “no material” to make out a prima facie case and therefore the High Court, in its appellate jurisdiction, was justified in interfering in the matter and vacating the temporary injunction granted by the trial court.

c. ANALYSIS:

An appeal lies to this Tribunal, under Section 111(1) of the Electricity Act, against an order passed by the Appropriate Commission under the said Act. The word ‘order’, referred to in Section 111(1), would include an interim order passed by the Commission also. The power conferred on this Tribunal under Section 111(3), to interfere with an order passed by the Commission, is no doubt wide, and is akin to the power conferred under Section 96 of the Civil Procedure Code with respect to a first appeal. In an appeal, preferred against the final order passed by the Commission, this Tribunal can interfere both on facts and law and re-appreciate the evidence on record to arrive at a conclusion different from that of the Commission.

Unlike exercise of the appellate jurisdiction to interfere with the final order passed by the Commission, the scope of interference in an appeal preferred to this Tribunal, against an interlocutory order passed by the Commission, is limited. The jurisdiction of the Appellate Court, to interfere being equitable, is also governed by equitable principles. Before the appellate court, the appellant must satisfy that the discretion has been improperly exercised by the court below. **(Punit Beriwal v. Suva Sanyal, 1997 SCC OnLine Cal 240 : AIR 1998 Cal 44)**. The appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court below had ignored settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not re-assess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would, normally, not be justified in interfering with the exercise of discretion in the order under appeal solely on the ground that, if it had considered the matter at the trial stage, it would have come

to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner, the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. **(Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282; Wander Ltd. v. Antox India (P) Ltd. [1990 Supp SCC 727; Punit Beriwalla v. Suva Sanyal, 1997 SCC OnLine Cal 240 : AIR 1998 Cal 44)**. The appellate court may not re-assess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. **(Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel, (2006) 8 SCC 726)**.

The appellate Court is called upon to see whether the trial Judge has properly exercised the discretion which he undoubtedly possesses. The appellate Court is not to approach the case as if it were the trial Judge. The question which the appellate Court has to consider is whether or not the trial Judge has properly exercised his judicial discretion. **(Lakshmi Narasimhiah v. Yalakki Gowda, (1965) 1 Mys LJ 370: AIR 1965 Mys 310; Sakharam Nana Saheb Patil v. Vithal Siddappa Chalawadi : (1969) 17 Law Rep. 512 (Mys); Venkat Reddy v. Budenna, 1971 SCC OnLine Kar 18 : AIR 1971 Mys 308)**. Except where the discretion has been shown to have been exercised arbitrarily, capriciously or perversely or where the order of the Court under scrutiny ignores settled principles of law, the appellate Court would not ordinarily interfere with the exercise of discretion in the matter of grant of temporary injunction by the lower Court and substitute its own discretion therefor. **(Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282; Laxmikant V. Patel v. Chetanbhai Shah: (2002) 3 SCC 65)**.

The appellate court should not usurp the jurisdiction of the court below to decide as to whether the tests of prima facie case, balance of convenience and irreparable injury are made out in the case or not. **(Monsanto Technology LLC v. Nuziveedu Seeds Ltd., (2019) 3 SCC 381; Ramakant Ambalal Choksi**

v. Harish Ambalal Choksi, (2024) 11 SCC 351). While the view taken by the appellate court may be an equally possible view, the mere possibility of taking such a view must not form the basis for setting aside the decision arrived at by the trial court in the exercise of its discretion under Order 39 CPC. The basis for substituting the view of the trial court should be mala fides, capriciousness, arbitrariness or perversity in the order of the trial court. (**Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan, (2013) 9 SCC 221; Ramakant Ambalal Choksi v. Harish Ambalal Choksi, (2024) 11 SCC 351).**

The appellate court, in an appeal from an interlocutory order granting or declining to grant interim injunction, is only required to adjudicate the validity of such order applying the well-settled principles governing the scope of jurisdiction of the appellate court under Order 43 CPC. The appellate court should not assume unlimited jurisdiction. (**Ramakant Ambalal Choksi v. Harish Ambalal Choksi, (2024) 11 SCC 351).**

While adjudicating upon the discretion exercised by the trial court, the appellate court is obliged to consider the case put forward by the appellant in favour of its argument that the trial court has exercised its discretion arbitrarily or incorrectly in the circumstances. (**Ramakant Ambalal Choksi v. Harish Ambalal Choksi, (2024) 11 SCC 351; Evans v. Bartlam, 1937 AC 473 (HL).**) An appellate court, while deciding an appeal against a discretionary order granting an interim injunction, should: (a) examine whether the discretion had been properly exercised i.e. examine whether the discretion exercised was not arbitrary, capricious or contrary to the principles of law; and (b) in addition to the above, an appellate court may in a given case be required to adjudicate on facts even in such discretionary orders. (**Ramakant Ambalal Choksi v. Harish Ambalal Choksi, (2024) 11 SCC 351; Evans v. Bartlam, 1937 AC 473 (HL); and Charles Osenton & Co. v. Johnston, 1942 AC 130 (HL).**)

The discretion to grant injunction cannot be arbitrary but must be sound and reasonable guided by judicial principles and is capable of correction by a

court of appeal. (**Punit Beriwal v. Suva Sanyal, 1997 SCC OnLine Cal 240 : AIR 1998 Cal 44**). Where the discretion exercised by the trial court, either for or against the plaintiff, is neither reasonable nor judicious, interference by the Appellate Court may be justified. (**Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282; Laxmikant V.Patel v. Chetanbhai Shah: (2002) 3 SCC 65**). Where the lower court acts arbitrarily, capriciously or perversely in the exercise of its discretion, the appellate court will interfere. Exercise of discretion by granting a temporary injunction when there is “no material”, or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse. (**Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282**).

If it appears to the appellate Court that, in exercising its discretion, the trial Court has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach, it would then be certainly open to the appellate Court, and in many cases it may be its duty, to interfere with the trial Court's exercise of discretion. In cases falling under this class are exercise of discretion by the trial Court which in law is wrong and improper and that would certainly justify and call for interference from the appellate Court. (**Printers (Mysore) Private Ltd. v. Potham Joseph: AIR 1960 SC 1156; Uttar Pradesh Co-operative Federation Ltd. v. Sunder Bros. Delhi: AIR 1967 SC 249; Venkat Reddy v. Budenna, 1971 SCC OnLine Kar 18 : AIR 1971 Mys 308**). The appellate Court can upset the decision of the trial Court provided it finds that the lower Court has ignored well settled principles of law regulating grant or refusal of interlocutory injunction. (**Lark Laboratories (India) Ltd. New Delhi v. Medico Interpharma Ltd., Baroda, 2002 SCC OnLine Guj 68 : AIR 2002 Guj 368**).

The appellate court should not interfere in the exercise of discretion by a subordinate court unless such exercise is palpably perverse. Perversity can

pertain to the understanding of law or the appreciation of pleadings or evidence. **(Neon Laboratories Ltd. v. Medical Technologies Ltd., (2016) 2 SCC 672; Ramakant Ambalal Choksi v. Harish Ambalal Choksi, (2024) 11 SCC 351; Ramakant Ambalal Choksi v. Harish Ambalal Choksi, (2024) 11 SCC 351).** Any order made in conscious violation of the pleadings and the law is a perverse order. A perverse verdict is one that is not only against the weight of evidence but is altogether against the evidence. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. If the conclusion, on the facts in evidence made by the court below, is found by a reasonable man to be a possible view, there is no perversity. If not, the finding is perverse. **(Ramakant Ambalal Choksi v. Harish Ambalal Choksi, (2024) 11 SCC 351).** Inadequacy of evidence or a different reading of evidence is not perversity. **(Ramakant Ambalal Choksi v. Harish Ambalal Choksi, (2024) 11 SCC 351; Damodar Lal v. Sohan Devi, (2016) 3 SCC 78).**

Exercise of discretion by granting a temporary injunction when there is “no material”, or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse. Acting on “no material” (similar to “no evidence”) would include not only cases where there is total dearth of material, but also cases where there is no relevant material or where the material, taken as a whole, is not reasonably capable of supporting the exercise of discretion. **(Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282).** If the court below has proceeded on a prima facie misconstruction of documents, and they have adopted and applied wrong standards, a case for interference at the appellate stage is made out. **(Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel, (2006) 8 SCC 726).**

In **Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1**, the Supreme Court held that three specific features available in the complaint had not been disturbed by reason of lack of evidence but an incidental issue

wholly dependent upon those three specific features had been taken up for consideration and an order of injunction granted; this is where the Commission was in error; a prima facie case or at least an arguable case did not and could not possibly suggest an order of injunction without any factual support; and there ought to be some such support on facts without which there would not be any justification for grant of an interim order.

As the Appropriate Commission (in the present case the “CERC”) exercises its discretionary jurisdiction in granting or refusing to grant interim relief/injunction, interference by this Tribunal, in an appeal preferred against such an order, would be justified only where (i) the said order is found to be arbitrary, capricious, perverse or contrary to settled legal principles; (ii) where the Commission has exercised its discretion, to grant or refuse to grant temporary injunction, in the absence of any material on record. Acting on no material would include not only cases where there is total dearth of material but also cases where there is no relevant material or where the material taken as a whole is not reasonably capable of supporting the exercise of discretion by the Commission; (iii) where the Commission has ignored relevant facts or the relevant documents on record or where the Commission has misconstrued the documents and has adopted and applied wrong standards; (iv) where the Commission has acted contrary to law or the law has been wrongly and improperly applied; (v) where an order is passed by the Commission in conscious violation of the pleadings and the law; (vi) an erroneous finding arising out of a complete misreading of the evidence, or where the conclusion on facts is based wholly on conjectures and surmises as this would amount to a perverse finding; (vii) where the conclusion arrived at by the Commission, on the basis of the evidence on record, is one which no reasonable man could possibly have arrived at.

In the light of the principles afore-mentioned, let us now examine whether or not the impugned order passed by the Commission necessitates interference in the present appellate proceedings.

VI. IS THE IMPUGNED ORDER IN THE NATURE OF AN INTERIM MANDATORY INJUNCTION?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS-PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that there cannot be any mandatory interim directions to pay money; CERC has not dealt with this aspect, despite the decision of the Supreme Court in **Dorab Cawasji Warden (1990) 2 SCC 117** being cited and noted in the impugned order; (Ref also **Abdul Rehman Siddique v Ahmed Mia Gulam Mohuddin Ahmedji: 1996 2 MhLJ 1042; Kishore Kumar Khaitan v Praveen Kumar Singh (2006) 3 SCC 312**); when the final relief itself is for money, there cannot be any claim that Tata Power cannot be compensated by money (Refer: **Colgate Palmolive (India) Ltd v Hindustan Lever Ltd, (1999) 7 SCC 1; Kashi Math Samsthan v Shrimad Sudhindra Thirtha Swamy, (2010) 1SCC 689; Dalpat Kumar v Prahlad Singh, (1992) 1 SCC 719**); and Tata Power has not dealt with the above decisions, particularly on mandatory directions and has only referred to **Wander Limited v Antox India (P) Ltd, 1990 (Supp) SCC 727** which was on completely different facts. (Reliance is placed on **Ramdev Food v Arvindbhai Rambhai Patel (2006) 8 SCC 726**; and **Seema Arshad Zaheer v MCGM 2006 5 SCC 282**).

B. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANTS UNDER THIS HEAD:

1. In **Dorab Cawasji Warden v. Coomi Sorab Warden, (1990) 2 SCC 117**, the Supreme Court held that the relief of interlocutory mandatory injunction is

granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining; but since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are: (1) the plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction; (2) it is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money; and (3) the balance of convenience is in favour of the one seeking such relief; being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case; though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunction would be a sound exercise of judicial discretion.

2. In **Abdul Rehman Siddique v. Ahmed Mia Gulam Mohuddin Ahmedji, 1996 SCC OnLine Bom 248**, the Bombay High Court held that mandatory injunction or the order or direction in the mandatory form at the interim relief stage is an exceptional order and such temporary injunction in a mandatory form is not expected to be granted in a routine manner; it is only in rare cases that the Court sparingly exercises its jurisdiction in passing the injunction in the mandatory form; and unless there are compelling circumstances, the courts do not ordinarily pass the order of mandatory injunction at an interlocutory stage.

3. In *Kishore Kumar Khaitan v. Praveen Kumar Singh*, (2006) 3 SCC 312, the Supreme Court held that, before ordering an interim mandatory injunction or refusing it, the court has first to consider whether the plaintiff has proved that he was in possession on the date of suit and on the date of the order and he had been dispossessed the next day; unless a clear prima facie finding that the plaintiff was in possession on those dates is entered, an order for interim mandatory injunction could not have been passed and any such order passed would be one without jurisdiction; an interim mandatory injunction is not a remedy that is easily granted; and it is an order that is passed only in circumstances which are clear, and the prima facie material clearly justify a finding that the status quo has been altered by one of the parties to the litigation, and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction.

C. ANALYSIS:

As noted hereinabove, the interim reliefs sought for by the Respondent-TPCL before the CERC, pending final adjudication of the main petition, was to direct Respondent Nos. 1 to 8 (among whom were all the Appellants herein) to make timely and complete payment at the interim provisional tariff at INR 6.25 per unit being the rate calculated as per the methodology adopted by the CERC in its final order in Petition No. 128/MP/2022 dated 03.01.2023. The case of TPCL was that, in terms of the Section 11(1) directions, the Appellant was receiving an energy charge rate of Rs.4.52 per kWh. What they sought by way of interim relief was for a direction to pay them an enhanced provisional tariff of Rs.6.25 per unit. By way of the impugned order, the CERC permitted the Respondent-TPCL to recover the differential amount [i.e. the amount determined by the Commission minus the amount received by TPCL under Section 11(1)] from the Appellants herein in three equal monthly instalments. In effect, the Appellants herein were directed to pay the differential provisional tariff, determined by the interim order passed by the CERC, to TPCL.

Before considering the submission, urged on behalf of the Appellants, that the above referred interim relief sought by TPCL before, and the interim order passed by, the CERC is in the nature of an interim mandatory injunction, it is necessary to first understand the expressions “injunction” and “mandatory injunction” and their scope.

a. INJUNCTION: ITS SCOPE:

The tests which the CERC applied, in granting TPCL interim relief by way of the impugned order, relate to interim injunction. **P Ramantha Aiyar’s Law Lexicon (3rd Edition 2005)** defines “injunction” as a court order commanding or preventing an action. In a general sense, every order of a Court which commands or forbids is an injunction; but, in its accepted legal sense, an injunction is a judicial process or mandate operating in personam by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing. An injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing. In the former case it is called a restrictive injunction, and in the latter a mandatory injunction. (**HALSBURY, 4th Edn.**, Vol. 24, para 901, p. 511). A Court order requiring someone to do something or to refrain from doing something is an injunction. An injunction instructs a named person to perform a certain duty or forbids him or her to commit a specific act. An order of the Court directing a person to refrain from doing or continuing to do an act complained of, or restraining him from continuing an omission. An injunction is a judicial process, by which one who has invaded or is threatening to invade the rights, legal or equitable, of another, is restrained from continuing or commencing such wrongful acts. An injunction is an order, framed according to the circumstances of the case, commanding an act which the Court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience.

Black’s Law Dictionary (Eighth Edition) defines “injunction” as a court order commanding or preventing an action. To get an injunction, the complainant

must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted. In a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating in personam by which, upon certain established principles of equity, a party is required to do or refrain doing a particular thing.

Injunction is a judicial process by which a party is required to do or to refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent future possible injury. In other words, the court, on exercise of the power of granting ad interim injunction, is to preserve the subject matter of the suit in the status quo for the time being. **(Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719)**. An injunction is the proper method of restraining a defendant from committing a breach of a negative obligation or from interfering with the plaintiff's exercise of his right under the contract, whereas specific performance is the proper method of compelling a defendant to perform a positive obligation of his own under the contract. **(Halsbury's Laws of England, 4th Edition** re-issue, Vol. 44(1) Para 803 Page 462). Injunction is a form of specific relief. It is an order of a court requiring a party either to do a specific act or refrain from doing a specific act or acts either for a limited period or without limit of time. **(Adhunik Steels Ltd vs Orissa Manganese and Minerals Pvt Ltd: (2007) 7 SCC 125)**.

P Ramantha Aiyar's Law Lexicon (3rd Edition 2005) defines "interlocutory injunction" as those granted prior to the final hearing and determination of the trial, and continue until answer, or until the final hearing, or until the further order of the Court. Such orders do not conclude the rights of the parties. Their object is to maintain the status quo, to maintain property in its existing condition, to prevent further or impending injury not to determine the right itself. **Black's Law Dictionary (Eighth Edition)** defines "interlocutory

injunction” as an injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.

The grant of an interlocutory injunction during the pendency of legal proceedings is a matter at the discretion of the Court. While exercising the discretion, the Court applies the following tests- (i) whether the plaintiff has a prima-facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of a legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they get established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before the uncertainty could be resolved. The object of the interlocutory injunction is to prevent the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. (**Gujarat Bottling Co. Ltd vs Coca- Cola: (1995) 5 SCC 545; Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282**).

Temporary injunctions are governed by Order 39 Rule 1 CPC while permanent or perpetual injunctions are granted on principles given in the Specific Relief Act. Temporary injunctions are made in pending proceedings with the object of maintaining the status quo till the right of parties in the cause are determined. They are made “to prevent the ends of justice from being defeated. (**Best Sellers Retail (India) Pvt Ltd vs Aditya Birla Nuvo Ltd: (2012) 6 SCC 792**).

b. MANDATORY INJUNCTION:

While an order of injunction is, ordinarily, a preventive remedy, a mandatory injunction is issued to command the performance of some positive act. **P. Ramanatha Aiyar's ADVANCED LAW LEXICON (3rd Edition 2005)** defines 'Mandatory injunction' as (i) a mandatory injunction is one which commands the defendant to do some positive act; (ii) An injunction ordering a person to do a thing [S. 39, Specific Relief Act (47 of 1963)]; (iii) "Mandatory Injunctions" are those which require of a party the performance of some act. **BLACK'S LAW DICTIONARY (eighth Edition)** defines 'Mandatory injunction' as (i) An injunction that orders an affirmative act or mandates a specified course of conduct; (ii) Also termed affirmative injunction.

By way of a Mandatory injunction a party is compelled by the Court to perform a specific act, often to restore a situation to its original state before the wrongful action had occurred. Mandatory injunctions are distinct from prohibitory injunctions, which merely restrain a party from doing something. While the latter seeks to prevent future harm, the former is used to correct a wrong that has already occurred. Section 39 of the Specific Relief Act, 1963, empowers courts to issue mandatory injunctions to prevent the breach of an obligation and to compel the performance of the requisite acts. Courts often use mandatory injunctions to restore the last uncontested status or undo a wrongful act. Courts generally refuse to grant mandatory injunctions where monetary compensation is an adequate remedy or if granting the injunction would create a new state of affairs rather than restore it to a prior state.

Mandatory injunction is one where a direction is issued to a person to do a particular thing. A temporary mandatory injunction can be issued only in case of extreme hardship and compelling circumstances and mostly in those cases when status quo existing on the date of the institution of the suit is to be restored. **(Magnum Films v. Golcha Properties (P) Ltd : AIR 1983 Del 392)**. As regards granting mandatory relief at an interlocutory stage, that can be granted only to restore the status quo and not to establish a new set of things

differing from the state which existed at the date when the suit was instituted. **(Samir Narain Bhojwani v. Aurora Properties & Investments, (2018) 17 SCC 203).**

An interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie material clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction. **(Metro Marins v. Bonus Watch Co. (P) Ltd., (2004) 7 SCC 478, Kishore Kumar Khaitan v. Praveen Kumar Singh, (2006) 3 SCC 312, Purshottam Vishandas Raheja v. Shrichand Vishandas Raheja, (2011) 6 SCC 73 and Samir Narain Bhojwani v. Aurora Properties & Investments, (2018) 17 SCC 203).** Stricter judicial scrutiny is to be exercised in cases where, at the interim stage, mandatory injunction is sought. While adjudicating upon an application for mandatory injunction, the important consideration is that such a relief may be granted only to restore the *status quo* and not to establish a new set of things differing from the state which existed at the date when the suit was instituted. It is only in cases where the circumstances invite intervention of the court at an interim stage for the reason that there is a likelihood of alteration of the *status quo* that a relief of mandatory injunction may be granted. **(Dr. Ajit Annasaheb Shinde vs Indian Orthopaedic Association and Others: 2023 SCC ONLine Del 3027).**

The *ad interim* mandatory injunction is to be granted not at the asking but on strong circumstance so as to protect the rights and interest of the parties, and not to frustrate their rights. The Court would grant such an interim relief only if it is satisfied that withholding of it would prick the conscience of the Court and do violence to its sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate

the cause of justice. **(Deoraj v. State of Maharashtra, (2004) 4 SCC 697; Hammad Ahmed v. Abdul Majeed, (2019) 14 SCC 1).**

The principle that, under Order 39 Rules 1 and 2 of the Code, the Court has the jurisdiction to maintain the status of the parties on the date of filing of the suit or on the date of passing of the order, but cannot direct the parties to do something which was not in existence at the time of filing of the suit, is not a general rule of universal application. **(Hammad Ahmed v. Abdul Majeed, (2019) 14 SCC 1).** A temporary mandatory injunction can be issued only in case of extreme hardship and compelling circumstances and mostly in those cases when status quo existing on the date of the institution of the suit is to be restored. **(Zila Parishad v. Pashu Shav Chhedan Evam Haddi Chhoora Audyogik Utpadan Co-operative Society Limited: AIR 1991 All 18; Nandan Pictures Ltd. v. Art. Pictures Ltd., AIR 1956 Cal 428; Magnum Films v. Golcha Properties Pvt. Ltd., AIR 1983 Delhi 392).**

It is only in very rare cases that a mandatory injunction is granted on an interlocutory application. If a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and is not granted to establish a new state of things, differing from the state which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the

position which existed at the date of institution of the suit. **(Nandan Pictures Ltd. v. Art Pictures Ltd: AIR 1956 Cal 428).**

The power to issue injunction in a mandatory form, on an Interlocutory Application, should be exercised in very rare cases and with due care and caution. Unless there are exceptional circumstances, such a mandatory injunction would not normally be issued. The mandatory injunction can be granted to restore the status quo existing on the date of the suit. But the issue of such an injunction cannot be claimed as a matter of right nor can it be issued as a matter of course. The Court must satisfy itself about the necessity of issuing such a mandatory injunction and unless there are some compelling circumstances, or what is ordinarily known as exceptional circumstances, the order in the mandatory form should not be issued. What has to be seen in such cases is whether the injury complained of is immediate and pressing and irreparable, and clearly established by proof and not acquiesced in by the plaintiff. The onus to bring out the exceptional circumstances lies heavily upon the party who seeks the issue of a mandatory injunction. **(Malla Suranna v. Kalla Somulu: AIR 1969 AP 368).**

The Civil Court has jurisdiction to issue at an interlocutory stage a mandatory injunction so as to restore the status quo anterior to the date of institution of a suit. The power to issue mandatory injunction at an interlocutory stage is not to be exercised lightly or commonly. Ordering maintenance of status quo as on the date of institution of the suit as an interim measure is rare, and rarer still is the order of maintenance of status quo as on the date anterior to the institution of suit. But existence of jurisdiction and its proper exercise are two distinct topics. For the exercise of jurisdiction to grant an interlocutory mandatory injunction, there are two essential pre-requisites. First is that such power is not to be exercised unless the Court feels a high degree of assurance that at the trial a similar injunction would in all probabilities be granted and secondly, irreparable injury will be caused if the thing complained of is allowed to continue

until the final decision. (**Baban Narayan Landge v. Mahadu Bhikaji Tonchar: AIR 1989 Bom 247**).

Grant of mandatory interim relief requires the highest degree of satisfaction of the court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power. (**Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan, (2013) 9 SCC 221**). An order in the nature of a temporary mandatory injunction is an extraordinary relief to be granted in exceptional circumstances, such as a case where the damage done is irremediable. (**A.P. Mineral Development Corporation Ltd., Hyderabad v. Trimex Minerals Pvt. Ltd., Chennai, 1997 SCC OnLine AP 892 (DB)**).

The relief of interlocutory mandatory injunction is granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. (**Dorab Cawasji Warden v. Coomi Sorab Warden, (1990) 2 SCC 117**). Mandatory injunction, or the order or direction in the mandatory form at the interim relief stage, is an exceptional order and such temporary injunction in a mandatory form is not expected to be granted in a routine manner. It is only in rare cases that the Court sparingly exercises its jurisdiction in passing an order of injunction in the mandatory form. Unless there are compelling circumstances, Courts do not ordinarily pass the order of mandatory injunction at an interlocutory stage. (**Abdul Rehman Siddique v. Ahmed Mia Gulam Mohuddin Ahmedji, 1996 SCC OnLine Bom 248**). An interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear, and the prima facie material clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by

way of an interim mandatory injunction (**Kishore Kumar Khaitan v. Praveen Kumar Singh, (2006) 3 SCC 312**).

On the test to be applied in granting mandatory injunctions on interlocutory applications, it is stated in *Halsbury's Laws of England*, 4th edn., Vol. 24, para 948 thus: “A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.” (**Dorab Cawasji Warden v. Coomi Sorab Warden, (1990) 2 SCC 117**).

Since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are: (1) the plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction; (2) it is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money; and (3) the balance of convenience is in favour of the one seeking such relief; being essentially an equitable relief, the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for

the grant or refusal of such injunction would be a sound exercise of judicial discretion. (**Dorab Cawasji Warden v. Coomi Sorab Warden, (1990) 2 SCC 117**).

As noted hereinabove, mandatory injunction is an order of a court that mandates an affirmative act or a specific course of conduct, otherwise termed as affirmative injunction. Mandatory injunction is distinct from that of prohibitory injunction whereby a party is restrained from doing something. While prohibitory injunction seeks to prevent future harm, mandatory injunction is granted to correct a wrong that has already occurred. An interim mandatory injunction would be granted in circumstances where status quo has been altered by one of the parties and interest of justice demands restoration of the status quo ante (as prevailing on the date of the institution of the suit). An interim mandatory injunction is granted to restore the status quo and not to establish a new set of things different from that which existed when the suit was instituted. Mandatory injunctions are, ordinarily, granted to restore the last un-contested status and are, generally, refused where monetary compensation is an adequate remedy, or if granting the injunction would create a new state of affairs rather than restoring it to a prior stage.

Fulfilment of the tests, applicable to the grant of an interim prohibitory injunction, would not suffice for the grant of an interim mandatory injunction. The tests to be satisfied for the grant of an interim mandatory injunction are of a far higher standard than what is stipulated for grant of an interim prohibitory injunction. The plaintiff must show that he has a very strong case for trial which is of a standard higher than a prima facie case required for grant of a prohibitory injunction. The plaintiff must further show that such an order is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money, and the test of balance of convenience, required to be satisfied for grant of such a relief, is also of a higher standard.

In Para 28 of the impugned order, the CERC has itself noted the submissions, urged on behalf of the Appellant-Rajasthan Discoms, that the relief sought by TPCL was in the form of a mandatory injunction which required fulfilment of the stricter tests laid down in **Dorab Cawasji Warden v. Coomi Sorab Warden and Ors. [(1990) 2 SCC 117]**; and, apart from the fact that there was no prima facie case, there was no question of any serious injury being caused to TPCL which could not be compensated in monetary terms. Having noted the afore-said contentions, urged on behalf of the Appellant-Rajasthan Discoms, the CERC has failed to even consider these contentions, let alone determine whether or not (a) the interim relief sought by TPCL was in the nature of an interim mandatory injunction; and (b) if so, whether TPCL had satisfied the tests for grant of such a relief.

While the Appellants seek adjudication of this issue by this Tribunal, at the appellate stage, we must bear in mind that, in an appeal preferred against an interlocutory order passed by the Commission, this Tribunal must, ordinarily, refrain from determining issues which have not even been considered by the Commission while passing the impugned interim order. As a consequence of the failure of the CERC to even consider and adjudicate on this relevant aspect, this Tribunal would be required to set aside the order under appeal, and remand the matter to the CERC for its consideration afresh in accordance with law. Whether such an order should be passed, in the facts and circumstances of the present case, shall be examined later in this order.

VII. HAS TPCL FAILED TO SATISFY THE TESTS FOR GRANT OF INTERIM RELIEF BY THE CERC?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS-PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that the test for grant of interim relief has not been

satisfied in the present case— (a) **Prima Facie Case:** The Central Commission has held that the shortfall on account of the difference between the Committee rate and the actual cost incurred, would affect the financial viability of Tata Power to generate and supply under the Section 11 Directions; the above finding does not account for the fact that Tata Power was a profit making company, and the Procurers had been making weekly payment as per the Committee Rate; the Procurers had also raised objections regarding the lack of primary evidence (actual coal invoices, bill of lading, exchange rate, mining profit sharing, bidding for procurement of SPOT coal etc) furnished by Tata Power to establish the purported financial distress; instead of drawing an adverse inference, the Central Commission held that Tata Power had made out a prima facie case; this is particularly when it has been noted that Tata Power has not produced data regarding the premium paid over and above the FoB price of coal; the Central Commission, instead of conducting a prudence check and seeking the requisite justification from Tata Power, deferred the issue of premium and mining profit to the final stage, to the detriment of the Procurers. (b) **Balance of Convenience:** The Central Commission has held that the financial distress caused due to under-recovery will render it unviable for Tata Power to import coal for supply of power to the Procurers and force the Procurers to purchase costly power to meet the needs of their consumers; the above finding does not consider the counter claims of the Procurers (raised in Petition No. 179/MP/2023) including for the period of non-supply by Tata Power during the subsistence of Section 11 directions i.e. for the period from 15.03.2023 till 18.04.2023, and the availability of 68.75% for FY 2023-24 (as against the mandate for full availability under the Section 11 Directions); further, it was the case of the procurers that the adverse financial impact under Section 11(2) has to be considered against the benchmark of PPA rate (which is much lower than the committee rate); (c) **Irreparable Injury:** The Central Commission has held that the denial of interim relief would adversely affect Tata Power's ability to generate and supply, which cannot be compensated by payment of shortfall tariff with interest; there is no

finding as to how payment of Committee rate, on a weekly basis, would cause irreparable injury to Tata Power; when the final relief itself is for payment of money, there cannot be any claim that Tata Power cannot be compensated by money; this is particularly when financial viability has to be considered qua the corporate entity of Tata Power as a whole (which is a profit making company) and not with reference to Mundra Power Plant only; as per the Order dated 31.03.2022 passed by the National Company Law Tribunal, Mumbai, CGPL stands merged with Tata Power; in terms of the said Order, the obligations/liabilities of CGPL would be consolidated within Tata Power w.e.f. from the Appointed Date of 01.04.2020; and the said factum was also considered by this Tribunal in its Order dated 05.04.2024 in Appeal Nos. 92 of 2023, 168 of 2023 and 171 of 2023 preferred by the Procurers against the Order dated 03.01.2023 passed by the Central Commission.

Sri M. G. Ramachandran, Learned Senior Counsel appearing on behalf of PSPCL, would further submit that CERC, in Paras 46 to 54, has considered the tests for interim injunction in a perfunctory manner; there is no case, much less a prima facie case; there was no balance of convenience, or irretrievable loss to Tata Power (*Ref: Annual Reports, Order dt 05.04.2024*); conduct of Tata Power also disentitled any equitable relief; and directing Rs. 350 crores to be paid by GUVNL as interim relief, after GUVNL has already paid Rs.10,321 crores, is wholly unjustified.

B. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANTS

1. In Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1, the Supreme Court held that the Court, while hearing an application for grant of interim relief, was not really concerned with the factum of establishment of any truth or falsity but merely a prima facie case or an arguable case resulting in establishment of a prima facie; a prima facie case or at least an arguable case does not and cannot possibly suggest an order of injunction without any factual

support; and there ought to be some such support on facts without which there would not be any justification for grant of an interim order.

2. In *Kashi Math Samsthan v. Shrimad Sudhindra Thirtha Swamy*, (2010) 1 SCC 689, the Supreme Court observed that, when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the court to grant injunction in his favour even if he has made out a case of balance of convenience being in his favour, and that he would suffer irreparable loss and injury if no injunction order is granted.

3. In *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719, the Supreme Court held that the burden is on the plaintiff, by evidence aliunde by affidavit or otherwise, to show that there is “a prima facie case” in his favour which needs adjudication at the trial; the existence of the prima facie right and infringement of the enjoyment of his property or the right is a condition for the grant of temporary injunction; prima facie case is not to be confused with prima facie title which has to be established, on evidence, at the trial; a prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits; satisfaction that there is a prima facie case by itself is not sufficient to grant injunction; the Court further has to satisfy itself that non-interference by the Court would result in “irreparable injury” to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession; irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages; the third condition also is that “the balance of convenience” must be in favour of granting injunction; the Court, while granting or refusing to grant injunction, should exercise sound judicial discretion to find the amount of

substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted; if on weighing competing possibilities or probabilities of likelihood of injury, and if the Court considers that pending the suit the subject matter should be maintained in status quo, an injunction would be issued; and the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

C. ANALYSIS:

Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain, and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well-settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. **(Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282 ; Wander Ltd. v. Antox India (P) Ltd. (1990) Supp SCC 727; Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1; and Gujarat Bottling Co. Ltd. v. Coca Cola Co, (1995) 5 SCC 545).** The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. **(Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282; Wander Ltd. v. Antox India (P) Ltd. [1990 Supp SCC 727).** While passing an interim order of injunction, under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908, the court is required to consider three basic principles, namely, (1) prima facie case, (2) balance of convenience and inconvenience, and (3) irreparable loss and injury. In addition thereto a court, while granting injunction, must also take into consideration the conduct of the parties. **(Makers Development Services (P) Ltd. v. M. Visvesvaraya Industrial Research & Development Centre, (2012) 1 SCC 735; M. Gurudas v. Rasaranjan, (2006) 8 SCC 367).**

Grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that, on the facts before the court, there is probability of the plaintiff being entitled to the relief asked for; (2) the court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that is likely to arise from granting it. **(Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719)**. Further, the discretion to grant the equitable relief of temporary injunction will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands. **(Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282)**.

The three well established principles for grant or refusal of interlocutory relief are: (1) whether the Petitioner has made out a prima facie case, (2) whether the balance of convenience is in their favour i.e., whether it would cause greater inconvenience to them if interim relief is not granted than the inconvenience which the opposite party would be put to if it is granted, and (3) whether the Petitioner would suffer irreparable injury. With the first condition as a sine quo non, at least one of the other two conditions should be satisfied by the Petitioner conjunctively, and a mere proof of fulfilment of one of the three conditions does not entitle them to the grant of interlocutory relief in their favour. **(Nawab Mir Barkat Ali Khan v. Nawab Zulfiquar Jah Bahadur, AIR 1975 AP 187; Gone Rajamma v. Chennamaneni Mohan Rao, (2010) 3 ALD 175; Kishoresinh Ratansinh Jadeja v. Maruti Corpn, (2009) 11 SCC 229; Best Sellers Retail (India) Private Ltd. v. Aditya Birla Nuvo Ltd., (2012) 6 SCC 792; State of Mizoram v. Pooja Fortune Private Limited, 2019 SCC OnLine SC 1741)**.

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he cannot be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he cannot be adequately compensated. The court must weigh one need against another and determine where the “balance of convenience” lies. (**Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282; Wander Ltd. v. Antox India (P) Ltd: (1990) Supp SCC 727**). In other words, when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience should be found as tilting in favour of the plaintiff. (**Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai, (2006) 5 SCC 282**).

Certain specific considerations, in the matter of grant of interlocutory injunction, must be noted, the basic being non-expression of opinion as to the merits of the matter by the court, since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the court hearing the application or petition for the grant of injunction are: (i) extent of damages being an adequate remedy; (ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor; (iii) the court, while dealing with the matter, ought not to ignore the factum of strength of one party's case being stronger than the other's; (iv) no fixed rules or notions ought to be had in the matter of grant of injunction but ought to be decided on the facts and circumstances of each case — the relief being kept flexible; (v) the issue is to be looked at from the point of view as to whether on refusal of the injunction, the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case; (vi) balance of

convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or a prima facie case in support of the grant; (vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise. **(Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1)**. In addition to the afore-said requirements, Courts should, while deciding the issue of injunction, consider the cumulative factors i.e. prima facie case, balance of convenience and irreparable loss; and give definite findings on these aspects on a prima facie basis. **(Ajendraprasadji Narendraprasadji Pandey v. Swami K. Narayandasji, (2005) 10 SCC 11)**.

As noted hereinabove, with the requirement of a prima facie case being made out, being the sine qua non, one of the other two tests of balance of convenience and irreparable injury must also be satisfied. As the question of a prima facie case having been made out has been argued elaborately, we shall, before examining whether or not the test of a prima facie case has been fulfilled, first take note of what the CERC has held with regards irreparable injury and balance of convenience.

VIII. TEST OF IRREPARABLE INJURY:

As the grant of interim relief is discretionary, exercise thereof is subject to the court/tribunal satisfying itself that its interference is necessary to protect the party from the species of injury. In other words, irreparable injury would ensue before the legal right would be established at the trial **(Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 : AIR 1993 SC 276)**. Irreparable injury does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. **(Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 : AIR 1993 SC 276; Mahadeo Savlaram Shelke v. Puna Municipal Corporation, (1995) 3 SCC 33)**.

While dealing with the application for injunction, it should be kept in view that an injunction should not be granted on mere allegation of irreparable injury. The facts, on which the allegation is founded, must appear. **(Priti Dash v. Abhimanyu Behera, 2000 SCC OnLine Ori 25 : AIR 2000 Ori 116)**. The Court has to satisfy itself that non-interference by the Court would result in “irreparable injury” to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. **(Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719)** or in terms of money. **(Satya Prakash v. Ist Additional District Judge, 2002 SCC OnLine All 171: AIR 2002 All 198)**. As Interim injunction can be granted only if the plaintiff will suffer irreparable injury which cannot be compensated in terms of money, no injunction ought to be granted if the injury is such which can be compensated by way of damages. **(Som Datta Builders Ltd. v. Kanpur Jal Sansthan, 2002 SCC OnLine All 294 : AIR 2002 All 249)**.

On the test of irreparable injury, the CERC has, in the impugned order, referred to Section 61(d) of the Electricity Act to hold that the purpose of this principle was to enable the generating company to recover the cost of electricity in a reasonable manner so that it was not out of pocket to meet the expenditure to arrange material and services to generate and supply electricity; failure to pay reasonable cost of generation would not enable TPCL to discharge its obligations and meet the 2023 directions; and, as TPCL was not able to recover its cost of production, denial of interim relief would adversely affect their ability to generate and supply electricity which could not be compensated by payment of the short-fall tariff with interest subsequently. The irreparable injury test was held, by the CERC, to have been fulfilled in the present case as, according to it, denial of interim relief would adversely affect TPCL’s ability to generate and supply electricity which could not be compensated by payment of short-fall tariff with interest subsequently.

As noted hereinabove, the test of irreparable injury can be held to have been satisfied only if the injury suffered is one which cannot be adequately compensated by way of damages. If the injury is such which can be compensated by way of damages, no injunction ought, ordinarily, to be granted. What the CERC has ignored is that TPCL has itself only claimed payment of money both by way of interim relief and by way of final relief in the Petition filed by them under Section 11(2) of the Electricity Act. In short, TPCL invoked the jurisdiction of the CERC seeking its intervention to off-set the adverse financial impact caused to them as a result of the directions issued by the Central Government under Section 11(1). An adverse financial impact is off-set only by compensating the generator financially i.e. by making payment of money for the financial loss they had suffered as a result of the Section 11(1) directions. The CERC has skirted this aspect and has held that the test of irreparable injury is satisfied since failure to make payment could affect TPCL's ability to generate and supply electricity which cannot be compensated later.

As noted hereinabove, the obligation of TPCL to generate and supply electricity is in terms of the Section 11(1) directions issued by the Central Government and, irrespective of financial loss they may suffer in the process, the generator (TPCL) was obligated to generate and supply electricity, and later seek compensation, by filing a Petition before the Appropriate Commission, for the adverse financial impact caused to it as a result of the Section 11(1) directions. As the very Petition filed by TPCL was seeking financial compensation for the loss they suffered, the CERC ought to have considered this aspect before arriving at the conclusion that TPCL had satisfied the irreparable injury test.

**a. ORDER OF APTEL IN THE APPEAL PREFERRED AGAINST
THE EARLIER ORDER OF CERC DATED 03.01.2023:**

In Para 4, of the impugned order, the CERC has noted that the Petitioner had filed an Appeal before APTEL challenging the order in Petition

No.128/MP/2022 dated 03.01.2023 on those issues where reliefs were disallowed by the Commission; the Respondent Procurers had also challenged the order dated 03.01.2023 before APTEL, seeking stay on the implementation of the said order; and APTEL had granted interim stay on the order dated 03.01.2023 subject to payment of 50% of the dues towards the Petitioner in terms of the said order.

In this context it is relevant to note that Appeal No. 92 of 2023 was filed against the order passed by the CERC in Petition No. 128/MP/2022 dated 03.01.2023. IA No. 105 to & 175 of 2023 were filed in Appeal No. 92 of 2023 seeking stay of the impugned order passed by the CERC. In its order dated 06.04.2023, this Tribunal took note of the submissions that, unless an interim order is passed, the Appellant was likely to be denied short term access in the ISTS in the next few days. On the nature of the interim order to be passed, it was submitted on behalf of the second Respondent (Applicant in IA No. 1726 of 2023) that their interest should be reasonably protected, and the Appellant should be directed to pay at least 50% of the amount as directed by the CERC.

In its order dated 06.04.2023, this Tribunal took note of the divergence in views between the Learned Counsel on either side regarding the amount payable in terms of the impugned order; and, while it was contended on behalf of the Appellant that the amount due and payable in terms of the impugned order was Rs.581 crores, the contention of the second Respondent was that the amount payable was around Rs. 697 Crores. This Tribunal then observed that, even if Rs. 697 Crores was taken to be the amount due and payable in terms of the impugned order, 50% thereof would be around Rs. 350 Crores of which the Appellant had already paid Rs.205 Crores. This Tribunal observed that, in order to comply with the 50% requirement, the balance payable would be around Rs. 143 Crores. Interim stay of the order under appeal was granted on condition that the Appellant paid the second Respondent Rs. 143 Crores within two weeks from the date of the order, and filed proof of payment in the Registry within one

week thereafter. The payment of Rs. 205 Crores already made by the Appellant, and the amount payable by them in terms of the interim order dated 06.04.2023, were both made subject to the result of the main appeal.

Around four months after the afore-said interim order was passed on 06.04.2023, an application was filed by TPCL on 26.07.2023 seeking modification of the said order, and seeking a direction for payment of the balance 50% also, if need be, on TPCL furnishing security for the said amount. In its order, in **GUJARAT URJA VIKAS NIGAM LTD VS CERC** (Order in Appeal Nos. 92, 168 and 171 of 2023 dated 5th April, 2024), this Tribunal observed, among others, as under:-

“.....we must also take note of what Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, has stated regarding the financial status of the second Respondent-Applicant. Learned Senior Counsel had referred to the notes to the stand alone financial statements of the second Respondent-Applicant for the Financial Year 2022-23, wherein it is stated as under:-

“All these investment in companies and assets of UMPP constitute a single cash generating unit (CGU) and form part of same segment due to interdependency of cash flows. There are significant losses being incurred in UMPP on account of significant increase in coal prices due to change in Indonesian laws which is offset by the profits earned by the mining companies.”

Mr. M.G. Ramachandran, Learned Senior Counsel, also drew our attention to the statement of consolidated financial result for the quarter and 9 months ending 31.12.2023, to point out that, even as per the audited financial statements of the second Respondent-Applicant for year ending 31.03.2023, their net profit for the Financial year 2022-23 was Rs. 3809.67 Crores, and for the 9 month period ending 31.12.2023 their net profit was Rs. 3234.51 Crores. According to Mr. M.G. Ramachandran, Learned Senior Counsel, these figures

would clearly indicate that the financial condition of the second Respondent-Applicant is sound, and there is no justification in their seeking a direction from this Tribunal for payment of the balance Rs.340 Crores on their furnishing a bank guarantee for a like sum, since payment of such a huge sum would adversely impact the cash flow position of the Appellant.

While we find force in the submission of Mr. M.G. Ramachandran, Learned Senior Counsel, that the afore-said financial statements do indicate that the second Respondent-Applicant's financial condition is nowhere as grim as made out to be, it is unnecessary for us to dwell on this aspect any further since we are satisfied that the only ground of a change in circumstances, urged on behalf of the second Respondent-Applicant as warranting variation/modification of the interim order dated 06.04.2023, does not, as noted hereinabove, satisfy the requirements of the second proviso to Order 39 Rule 4 CPC. The IA is, accordingly, dismissed."

Before this Tribunal, it is also contended on behalf of the Appellants that the Annual Reports of TPCL show that they are a profit-making company and they cannot, therefore, claim to suffer irreparable injury if interim relief is not granted. The question which would necessitate examination is whether exercise of restraint by the CERC, and denying TPCL interim relief would, in such circumstances, have resulted in TPCL suffering irreparable injury. Without expressing any conclusive opinion in this regard, suffice it to observe that these were all relevant factors which the CERC ought to have taken into consideration, and should thereafter have recorded its findings thereon, before arriving at the conclusion that TPCL had satisfied the irreparable injury test.

IX. TEST OF BALANCE OF CONVENIENCE:

Generally, the interlocutory remedy by way of grant of an order of injunction is intended to preserve and maintain in status quo the rights of the parties and to protect the plaintiff, being the initiator of the action, against

incursion of his rights and for which there is no appropriate compensation being quantified in terms of damages. The basic principle of the grant of an order of injunction is to assess the right and need of the plaintiff as against that of the defendant, and it is a duty incumbent on to the law courts to determine as to where the balance lies. **(Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1).**

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before the uncertainty could be resolved. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the “balance of convenience” lies. **(Wander Ltd. v. Antox India (P) Ltd: 1990 Supp SCC 727; Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545).**

The “balance of convenience” must be in favour of granting interim relief. The Court/Tribunal, while granting or refusing to grant interlocutory relief, should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if interim relief is refused, and compare it with that which is likely to be caused to the other side if the interim relief is granted. If, on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the Appeal, status quo should be maintained, interim relief would be granted. **(Dalpat Kumar v. PrahladSingh, (1992) 1 SCC 719: AIR 1993 SC 276).** The Court/Tribunal must satisfy itself that the comparative hardship or mischief or inconvenience which is likely to occur from withholding grant of interim relief will

be greater than that which would be likely to arise from granting it. (**Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719: AIR 1993 SC 276**). The court/tribunal also, in restraining the Respondent from exercising what it considers to be its legal right but what the Appellant would like to be prevented, puts into the scales, as a relevant consideration, where the balance of convenience lies. (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1**).

A person who seeks a temporary injunction must satisfy the Court that the comparative inconvenience which is likely to ensue from withholding temporary injunction would be greater than that which is likely to arise from granting it. In ascertaining the balance of convenience, the Courts are to weigh and compare the substantial mischief that is likely to be done to the plaintiff, if injunction is refused. While considering balance of convenience, the Courts are also required to keep in mind the public convenience as well. (**Satya Prakash v. Ist Additional District Judge, 2002 SCC OnLine All 171: AIR 2002 All 198**). The question of balance of convenience is not merely dependent upon a comparison of the convenience of the parties. A plaintiff who wants an order of injunction must satisfy the court that he will suffer irreparable harm if the injunction is not issued. (**Nanak Chand Khanna v. Union of India: 1973 SCC OnLine All 357**).

The Court must compare the mischief done or threatened to the plaintiff and must weigh the same against that inflicted by the injunction upon the defendant. (**Nani Bala Saha vs Guru Bala Saha : AIR 1979 CAL 308**). The Court, while considering the question of balance of convenience, must pertinently put the question “will the plaintiff suffer irreparable damage, if no injunction is granted now?” (**M.K. Dasappa v. G. Ramachandra, 1975 SCC OnLine Kar 114 : AIR 1976 Kar 53; J. Krishnamoorthy v. Bangalore Turf Club Ltd: (1975) 2 Kant LJ 428**).

a. SECTION 11 OF THE ELECTRICITY ACT: ITS SCOPE:

Before examining whether or not the CERC was justified in its conclusion that TPCL had satisfied the test of balance of convenience for grant of the interim relief sought for, it is useful to take note of the scope and ambit of Sections 11(1) & (2) of the Electricity Act, 2003. Section 11 of the Electricity Act relates to the directions to generating companies. Sub-section (1) thereof enables the Appropriate Government to specify that a generating company shall, in extraordinary circumstances, operate and maintain any generating station in accordance with the directions of that Government. Section 11(1) of the Electricity Act uses mandatory language and provides that the generating company “*shall ... operate and maintain any generating station in accordance with the directions of that Government*” in extraordinary circumstances. **(Kerala State Electricity Board Ltd vs Jhabua Power Limited and Others: (Judgement of the Supreme Court in Civil Appeal Nos 10046-10047 of 2024 dated 30.09.2024)).**

While the power, conferred under Section 11(1), is a coercive power to direct generating companies to operate and maintain its generating stations in terms of the directions issued by the Appropriate Government, the said power is not unfettered but is circumscribed by the requirement that it be exercised only in extra-ordinary circumstances. The explanation below Section 11(1) defines the expression “extraordinary circumstances” to mean (i) circumstances arising out of threat to the security of the State, (ii) circumstances arising out of threat to public order, (iii) circumstances arising out of natural calamities, or (iv) such other circumstances which would arise in public interest. It is only in the aforesaid extra-ordinary circumstances can the Appropriate Government exercise its powers under Section 11(1) to direct generating companies to operate and maintain its generating stations in accordance with the directions issued by it.

While the generating company is required to comply with the directions issued by the Appropriate Government under Section 11(1), and operate and

maintain its generation stations accordingly, Section 11(2) enables the Appropriate Commission to off-set the adverse financial impact, of the directions issued by the Appropriate Government under Section 11(1), on any generating company in such manner as it considers appropriate.

As the Appropriate Commission (in this case the “CERC”) is a tribunal of limited jurisdiction, it must exercise its jurisdiction strictly within the limits of what the Electricity Act, 2003 expressly stipulates, and not beyond. Jurisdiction is the authority or power of the court to deal with a matter, and make an order carrying binding force in the facts of the case before it. **(Chiranjilal Shrilal Goenka v. Jasjit Singh, (1993) 2 SCC 507; and A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602)**. The power to create or enlarge jurisdiction is legislative in character. Parliament alone can do it by law and no court, whether superior or inferior or both combined, can enlarge the jurisdiction of a court (or statutory tribunal). Jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the legislature. The Court or Tribunal cannot confer a jurisdiction on itself which is not provided in the law. Thus, jurisdiction can be conferred by statute, and Courts cannot confer jurisdiction on an authority or a tribunal. **(Chiranjilal Shrilal Goenka v. Jasjit Singh, (1993) 2 SCC 507; and A.R. Antulay v. R.S. Nayak: (1988) 2 SCC 602)**.

As conferment of jurisdiction is a legislative function, it can neither be conferred with the consent of the parties nor by a Superior Court, and if the court passes an order/decreed having no jurisdiction over the matter, it would amount to a nullity as the matter would go to the root of the cause. **(United Commercial Bank Ltd. v. Workmen: AIR 1951 SC 230; Nai Bahu v. Lala Ramnarayan [(1978) 1 SCC 58; Natraj Studios (P) Ltd. v. Navrang Studios: (1981) 1 SCC 523; Sardar Hasan A.R. Antulay v. R.S. Nayak: (1988) 2 SCC 602; Union of India v. Deoki Nandan Aggarwal: 1992 Supp (1) SCC 323; Karnal Improvement Trust v. Parkash Wanti: (1995) 5 SCC 159; U.P. Rajkiya Nirman Nigam Ltd. v. Indure (P) Ltd: (1996) 2 SCC 667; State of**

Gujarat v. Rajesh Kumar Chimanlal Barot: (1996) 5 SCC 477; Kesar Singh v. Sadhu: (1996) 7 SCC 711; Kondiba Dagadu Kadam v. Savitribai Sopan Gujar: (1999) 3 SCC 722; CCE v. Flock (India) (P) Ltd: (2000) 6 SCC 650; and Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307).

For the CERC to be held to have jurisdiction to adjudicate the present dispute, under Section 11(2) of the Electricity Act, 2003, the jurisdictional fact of TPCL having suffered an adverse financial impact, in view of the directions issued by the Central Government under Section 11(1) of the Electricity Act, must exist, for it is only to off-set such an adverse financial impact, if any, on TPCL, could the CERC have exercised jurisdiction, under Section 11(2) of the Electricity Act, in such manner as it considered appropriate.

A 'jurisdictional fact' is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends the jurisdiction of a court, a tribunal or an authority. **(Arun Kumar vs. Union of India:(2007) 1 SCC 732; Ramesh Chandra Sankla v. Vikram Cement, (2008) 14 SCC 58).** If the "jurisdictional fact" exists, a court, Tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, Tribunal or authority cannot act. A court or a Tribunal cannot wrongly assume the existence of a jurisdictional fact, and proceed to decide a matter. The underlying principle is that, by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior Tribunal cannot confer upon itself jurisdiction which it otherwise does not possess. The existence of a jurisdictional fact is thus the sine qua non or the condition precedent for the assumption of jurisdiction by a court or Tribunal of limited jurisdiction. Once such a jurisdictional fact is found to exist, the court or Tribunal has the power to decide adjudicatory facts or facts in issue. **(Carona Ltd. v. Parvathy Swaminathan & Sons (2007) 8 SCC 559; Ramesh Chandra Sankla v. Vikram Cement, (2008) 14 SCC 58; Halsbury's Laws of England**

(Fourth Edition), Volume 1, para 55, page 61 ; Reissue, Volume 1(1), para 68, pages 114-15, Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi AIR 1959 SC 492; Arun Kumar v. Union of India [2006] 286 ITR 89 (SC) ; (2007) 1 SCC 732; BGR Energy Systems Ltd. v. ACCT, 2009 SCC OnLine AP 238; Bharat Electronics Ltd. v. Deputy Commr., (CT), 2011 SCC OnLine AP 1080; K. G. F. Cottons (P) Ltd. v. Asst. Commr. (CT): 2015 SCC OnLine Hyd 46; and Ad Age Outdoor Advertising P. Ltd. v. Govt., A. P., 2011 SCC OnLine AP 1077). No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. (Raza Textiles Ltd. v. ITO, (1973) 1 SCC 633**).**

The jurisdictional fact, necessary for the CERC to exercise its powers under Section 11(2) of the Electricity Act, is that TPCL should have suffered adverse financial impact, in view of the directions issued by the Central Government, under Section 11(1) of the Electricity Act. It is only if the aforesaid jurisdictional fact is found to exist, could the CERC be said to have jurisdiction to off-set such adverse financial impact, if any, in such manner as it considers appropriate, after considering the adjudicatory facts involved in such a lis.

As existence of a 'jurisdictional fact' is the *sine qua non* for the exercise of power, the CERC could only have proceeded with the case, and have taken an appropriate decision in accordance with law, if the jurisdictional facts existed. On the CERC being held to have jurisdiction in the matter, on existence of 'jurisdictional facts', it was then entitled to decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the CERC without jurisdiction or vulnerable provided essential or fundamental facts as to the existence of jurisdiction is present. (**Arun Kumar v. Union of India:(2007) 1 SCC 732; Ramesh Chandra Sankla v. Vikram Cement, (2008) 14 SCC 58; Carona Ltd. v. Parvathy Swaminathan & Sons, (2007) 8 SCC 559; Setrucherla Ramabhadraraju v.**

Maharaja of Jeypore: AIR 1919 PC 150; State of Gujarat v. Rajesh Kumar Chimanlal Barot: (1996) 5 SCC 477; Harshad Chiman Lal Modi v. D.L.F. Universal Ltd: (2005) 7 SCC 791; and Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136).

As noted hereinabove, the jurisdictional fact which must exist, for the Appropriate Commission to exercise its powers under Section 11(2), is that the generating company must have suffered an adverse financial impact as a result of the directions issued the Appropriate Government under Section 11(1). **P Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition 2005)** defines "Adverse" as having opposing interests; bad or, at the very least, unhelpful; acting in a contrary direction; opposing. It means making something difficult or problematic. **P Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition 2005)** defines "Impact" to means any effect caused by an action or activity. In other words, "impact" means effect. **Oxford English Dictionary, Seventh Edition** defines "Offset" to mean a consideration or amount that diminishes or balances the effect of an opposite one; counterbalance; compensate for. The word "offset", in the context of Section 11(2), is a verb used in a past tense, and means to make the effect of something less strong.

The jurisdiction conferred on the Appropriate Commission, by Section 11(2) of the Electricity Act, is to compensate the generating company for the financial loss caused to it by the directions issued by the Government under Section 11(1) of the Electricity Act. It is only if, and after, the generating company has suffered an adverse financial impact, as a result of the directions issued by the Appropriate Government under Section 11(1), can the Appropriate Commission exercise jurisdiction under Section 11(2) to off-set the adverse financial impact of such directions on the Generating Company. While the manner in which the adverse financial impact caused to a generating company, as a result of the directions of the Appropriate Government under Section 11(1), should be off-set is for the Appropriate Commission to consider, the jurisdictional

fact which must exist, for exercise of jurisdiction under Section 11(2), is that the generating company must have suffered an adverse financial impact, as a result of the directions issued by the Appropriate Government under Section 11(1), which is required to be off-set by the Appropriate Commission. It is only after the Generating Company has suffered an adverse financial impact as a result of the directions issued under Section 11(1), can it then invoke the jurisdiction of the Appropriate Commission under Section 11(2) requesting it to off-set such an adverse financial impact.

On a petition being filed before it by a Generating Company, under Section 11(2), the Appropriate Commission must first ascertain whether the directions issued by the Appropriate Government under Section 11(1) has caused an adverse financial impact on the generating company. If the Section 11(1) direction has not caused any adverse financial impact, then the Appropriate Commission would lack jurisdiction to exercise its powers under Section 11(2). Even in cases where an adverse financial impact has been caused, the manner in which such an adverse financial impact should be off-set is for the Appropriate Commission to determine as it considers appropriate.

The word “offset”, as referred to in Section 11(2), makes it clear that it is only for the adverse financial impact already caused to a Generating Company, as a result of the directions issued under Section 11(1), can the Appropriate Commission exercise jurisdiction to off-set such an adverse financial impact. The Appropriate Commission would be justified in entertaining a petition under Section 11(2) only to off-set the adverse financial impact which has already been caused to the generating company i.e. the adverse financial impact which the generating company has already suffered prior to its invoking the jurisdiction of the Appropriate Commission ie on the date on which it has filed the petition before the Commission under Section 11(2) requesting the Commission to off-set such adverse financial impact. It is impermissible for the Appropriate Commission, in the exercise of its jurisdiction under Section 11(2), to direct that

the generating company be protected against any possible future adverse financial impact which may be caused to a generating company as a result of the Section 11(1) directions, as it would result in rendering the word “off-set” in Section 11(2) redundant. Reading such a power into Section 11(2) may also result in the Appropriate Commission being held to have the power to nullify the Section 11(1) directions issued by the Appropriate Government even during the currency of its operation. Such a power has not been explicitly conferred by Parliament on the Appropriate Commission, and it is impermissible for us to hold that such a power inheres in the Commission. At the very best, the Appropriate Commission could, possibly, direct that the adverse financial impact caused, as a result of the Section 11(1) directions, to TPCL be offset till the date on which it passes the order under Section 11(2) of the Electricity Act ie 10.03.2025, and not beyond.

On the test of balance of convenience, the CERC has, in the impugned order, held that, unless the financial distress caused to TPCL due to under-recovery of the generation cost is mitigated through suitable interim relief, they would not be financially viable to arrange imported coal and supply power to the Respondents; and denial of interim relief would erode their financial viability and their ability to procure coal and supply power for the entire duration of the 2023 directions.

As noted hereinabove, the jurisdiction of the Commission under Section 11(2) can only be invoked to off-set the adverse financial impact already caused to the generator and not to protect them from a possible future loss they may suffer as a result of such directions. Their inability to procure coal to supply power in future is wholly extraneous to the proceedings under Section 11(2). Since this issue cannot even be examined while adjudicating the main petition under Section 11(2), it goes without saying that this could not have been applied as a yardstick for the grant of interim relief, for an interim relief is granted only in aid of and during the pendency of the main petition. It is well settled that Interim

relief can be granted only as ancillary to the main relief which may be available to a party in the final determination of his rights in the case. The Court should not, by its interim order, vest rights in the parties. It should only protect the rights already vested in them. **(Ch. Vijayanarasimha Reddy v. Joint Transport Commissioner, 1985 SCC OnLine AP 19 : AIR 1985 AP 361; State of Orissa v. Madan Gopal Rungtha: AIR 1952 SC page 12)**

Yet another reason which has been assigned by the CERC in the impugned order, to hold that the balance of convenience was in favour of TPCL, is that failure of TPCL to generate and supply power to the Appellants would force them to purchase costly power to meet the needs of their consumers as shortage has been recognized by the Ministry of Power while issuing directions under Section 11(1). At the cost of repetition, it must be reiterated that exercise of jurisdiction under Section 11(2) is only to off-set the adverse financial impact already caused to a generating company as a result of the Section 11(1) directions, and is not a jurisdiction to be exercised to prevent any future loss or damage which may possibly occur to either of the parties.

No material has been referred to by the CERC, in the impugned order, in arriving at the conclusion that inability of TPCL to supply power would result the Appellants having to procure costly power from others. While GUVNL has no doubt raised a contention in ground (H) of its Appeal before this Tribunal, the impugned order does not disclose such a contention having been raised by them before the CERC or of the CERC having accepted any such claim raised by GUVNL. The findings recorded by the CERC, without reference to any material on record, is a justifiable ground for this Tribunal to interfere at the appellate stage.

As noted hereinabove, the balance of convenience test required the Commission to assess the rights and needs of TPCL as against that of the Appellants herein and to weigh the need for protecting the petitioner against the corresponding need of the defendants (Appellants) against the injury resulting

from their having been prevented from exercising their own legal right for which they cannot be adequately compensated. After weighing one need against the other, the Commission was then required to determine where the balance of convenience lay. In other words, the CERC was required to satisfy itself that the comparative hardship or inconvenience which TPCL was likely to suffer on withholding grant of interim relief was greater than that which the Respondents (Appellants herein) were likely to suffer by granting the interim relief, and to put in scales, as a relevant consideration, where the balance of convenience lay. The burden was on TPCL to satisfy the CERC that the comparative inconvenience which would be caused to them if interim relief was not granted, would be greater than that which was likely to arise to the Appellants on its being granted. Without considering the afore-said relevant aspects, the CERC ought not to have arrived at the conclusion that the balance of convenience also lay in favour of TPCL and against the Appellants.

We, however, refrain from expressing any opinion on whether or not the TPCL can be said to have suffered irreparable injury on the basis of the material on record before the CERC and whether the balance of convenience lies in their favour for, in an appeal preferred against an interlocutory order, this Tribunal would, ordinarily, refrain from arriving at its independent conclusion on re-appreciation of the relevant material on record.

As the rival contentions, on whether or not TPCL has satisfied the test of a prima-facie case, are several and each of the heads, on which submissions are made by Learned Senior Counsel and Learned Counsel on either side, necessitate examination, it is convenient to first examine the submissions regarding TPCL's conduct disentitling them to the grant of interim relief, before taking up the contentions on whether or not the prima-facie case test has been satisfied by them.

X. FAILURE TO CONSIDER APPELLANT'S CONTENTIONS REGARDING THE CONDUCT OF TATA POWER:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS- PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that the CERC did not examine the material placed by GUVNL/Procuree on the conduct of Tata Power; in the present case, relief granted by CERC is without any material being placed on record by Tata Power, contrary to admissions of Tata Power itself as well as ignoring all material placed by the Procurees.

B. ANALYSIS:

Under Order 39 of the Code of Civil Procedure, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct is free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of affairs complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings. **(Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545).**

Other than contending that the conduct of Tata Power disentitled them from being granted any equitable relief; and directing Rs. 350 crores to be paid by GUVNL as interim relief, after GUVNL has already paid Rs.10,321 crores, is wholly unjustified, the only other ground, on the basis of which the Appellants' claim that the conduct of TPCL was such as to disentitle them from being

granted interim relief, is that no material was placed by them in support of their claim for interim relief.

It is not even the Appellants' case that TPCL were themselves responsible for bringing about the state of affairs complained of, or that they were unfair or inequitable in their dealings with the Appellants against whom they were seeking relief, or that their conduct was unfair and dishonest. Payment of Rs.10,321 crores by GUVNL in terms of the Section 11(1) directions, by itself, would not disentitle TPCL from filing a Petition under Section 11(2) of the Electricity Act seeking to have the adverse financial impact caused to them, as a result of the Section 11(1) directions, off-set by the CERC. Whether they have, in fact, suffered any adverse financial impact which necessitates being off-set was, however, for the CERC to consider in accordance with law.

While production of evidence such as invoices, bills of lading etc, in support of their contention to have imported coal at the price claimed by them, may well have fortified the claim of TPCL for grant of interim relief, their failure to do so did not, by itself, reflect on their conduct or disentitle them from being granted interim relief as they have filed sworn affidavits in support of such pleas. Ordinarily, the claim for interim relief is adjudicated on the basis of affidavits. **(M.K. Dasappa v. G. Ramachandra, 1975 SCC OnLine Kar 114 : AIR 1976 Kar 53; J. Krishnamoorthy v. Bangalore Turf Club Ltd: (1975) 2 Kant LJ 428; Ghanshyamdas Baheti v. Jamuna Transport Corporation Ltd., 2011 SCC OnLine Cal 557).** It goes without saying that a conscious false plea, in an affidavit filed in judicial/quasi-judicial proceedings, would amount to perjury, and if such pleas were to be found to be false later, institution of criminal and other proceedings against them may be warranted. At this stage, we have no reason to suspect the bonafides of TPCL with respect to the price they claim to have paid for each of the shipments of imported coal for November, 2023 as reflected in the affidavits filed by them. Needless to state that evidence, such as invoices, bills of lading etc, must, necessarily, be produced by them when the main

Petition is finally heard and adjudicated to enable the CERC to determine the actual adverse financial impact, if any, which TPCL may have suffered as a result of their having to comply with the Section 11(1) directions issued by the Central Govt.

XI. PRIMA FACIE CASE:

This leaves us with the question whether the Appellant has made out a prima facie case for grant of interim relief. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were to be believed. While determining whether a prima facie case had been made out or not, the relevant consideration is whether, on the evidence led, it was possible to arrive at the conclusion in question, and not whether that was the only conclusion which could be arrived at on that evidence. **(Nirmala J. Jhala v. State of Gujarat, (2013) 4 SCC 301; Vidya Drolia v. Durga Trading Corporation - (2021) 2 SCC 1)**. The burden is on the Appellant by evidence aliunde, by affidavit or otherwise, to show that there is “a prima facie case” in its favour which needs adjudication. Prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. **(Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 : AIR 1993 SC 276; Mahadeo Savlaram Shelke v. Puna Municipal Corporation, (1995) 3 SCC 33)**.

For the purpose of determining whether or not a prima facie case has been made out, this Tribunal should satisfy itself that the averments in the interlocutory application, if taken to be true, is a possible view, and that it raises substantial questions which need investigation, and a decision on merits. A finding on “prima facie case” would be a finding of fact. While arriving at such a finding of fact, the court must arrive at a conclusion that a case for trial has been made out, but also other factors requisite for grant of injunction exist. **(M. Gurudas v. Rasaranjan, (2006) 8 SCC 367)**. A prima facie case means a case which can be said to be established if the evidence which is led in support of the

same were believed. The probability of the Appellant's success must be comparatively higher (**Gujarat Electricity Board v. Maheshkumar & Co., 1982 SCC OnLine Guj 29**). A prima facie case, or at least an arguable case, does not and cannot possibly suggest an order of injunction without any factual support. There ought to be some such support on facts without which there would not be any justification for grant of an interim order. (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1**).

Further, the contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not merely a triable issue. (**Dorab Cawasji Warden v. Coomi Sorab Warden: (1990) 2 SCC 117, Dalpat Kumar v. Prahlad Singh: (1992) 1 SCC 719, United Commercial Bank v. Bank of India: (1981) 2 SCC 766, Gujarat Bottling Co. Ltd. v. Coca Cola Co. (1995) 5 SCC 545, Bina Murlidhar Hemdev v. Kanhaiyalal Lokram Hemdev: (1999) 5 SCC 222, Transmission Corpn. of A.P. Ltd: (2006) 1 SCC 540, and M. Gurudas v. Rasaranjan, (2006) 8 SCC 367**). The existence of the prima facie right and infringement of the enjoyment of the right is a condition for the grant of temporary injunction. (**Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719**). A person who seeks a temporary injunction must satisfy the Court that there is a serious question to be tried in the suit to dispel the cloud of doubt relating to his entitlement and there is probability of the plaintiff being entitled to the relief sought by him. A prima facie case can be said to be established if a substantial question needs investigation, and decision. (**Satya Prakash v. Ist Additional District Judge, 2002 SCC OnLine All 171: AIR 2002 All 198**).

As the rival contentions, urged on whether or not the CERC was justified in holding that TPCL had satisfied the prima-facie case test, are several, it is convenient to examine them under different heads.

1. DO THE FINDINGS IN THE IMPUGNED ORDER CONTRADICT EACH OTHER?

**A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS-
PROCURERS:**

Sri M. G. Ramachandran, Learned Senior Counsel appearing on behalf of PSPCL, would submit that relief has been granted by the CERC (Para 82(e)) on the basis of the HBA Index, as decided in the previous Order dated 03.01.2023, which does not have application for determining adverse financial impact under the 2023 Directions; in Paras 67 and 68 of the Impugned Order, the CERC has held that the applicable index is Argus based on the admission by Tata Power itself; the method adopted in the Order dated 03.01.2023 wrongly proceeded on the basis that, as per the Indonesian Regulations, the export of coal below the HBA derived prices i.e. from 6322 kcal/kg is prohibited; subsequent to the Order dated 03.01.2023, the Central Government (Ref: Letter dated 25.04.2023) as well as the CERC (Ref: Order dated 25.09.2023 in Petition 12/SM/2023) duly recognized that the export of coal based on HBA Derived Benchmark Price was not mandatory under the Indonesian Regulations; in addition to the above, even during the meeting dated 26.12.2023 of the Committee, constituted by the Ministry of Power regarding finalization of benchmark ECR, none of the plants (including Tata Power) raised any issue in relation to the index used (Argus/Platts); and, therefore, no relief could have been granted on the basis of the earlier Order dated 03.01.2023 passed by the CERC.

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would further submit that, in paras 67 and 68 of the Impugned Order, CERC has unequivocally held that the applicable index is Argus, based on substantial unimpeachable material placed by GUVNL; though Tata Power claimed interim relief based on the CERC Order dated 03.01.2023, which is based on HBA 1, and had persisted with the same before the CERC, Tata Power had to accept Argus Indices, and in para 70 CERC had concluded that Argus Indices should be the basis; the financial implication under Argus indices vis-a-vis HBA/HPB significantly vary; the CERC Order dated 03.01.2023 proceeded

on the basis that the Indonesian Regulations prohibited export of coal below the benchmark prices as notified under published HBA-1 for 6322 kCal/kg coal (GCV) adjusted for lower GCV Coal being HPB [Appeals filed against the Order]; however, Indonesian Regulations only regulate payment of royalties at such HBA/HPB rate; the other aspects of sale price is allowed to be contractually/bilaterally settled; such prices, based on market conditions, is reflected in the Argus Indices; the Committee also noted that none of the plants (including Tata Power) had raised any issue relating to the index used (Argus/Platts); further Tata Power has a long-term agreement with its group company PT Kaltim Indonesia for supply of coal, and is in a position to get coal at a discount with reference to Argus Indices; and, in the circumstances, CERC ought to have considered the appropriate Argus applicable for GCV 5219 Kcal/kg or actuals whichever is lower in the place of 91.80\$/MT for November, 2023 consumption in the table detailed in the Impugned Order.

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would also submit that the published monthly Argus index is for GCV of 4200, 5000, 5800, 6500 kcal /kg coal, and there exists a standard formula for computing the price for GCV value in between the said ranges; it was incumbent on Tata Power to place, and for CERC to insist on Tata Power to provide, the computation of FOB price of coal of the relevant GCV as per Argus Indices as well as the true actual FOB price paid by Tata Power in a comparative table, instead of the comparative table of GCV of each shipment and price as per the CERC Order dated 03.01.2023; Tata Power did not do so, and no data or supporting document for premium over Argus Indices price was given in para 70 of the Impugned Order; and Tata Power is seeking to camouflage the huge difference between HBA and Argus, in regard to the FOB price of coal, as premium with no data, no details, and no supporting documents.

B. ANALYSIS:

In Para 82(e) of the impugned order, the CERC, while holding that TPCL's claim for interim relief had merit on certain counts only, observed that the Commission had allowed interim relief in line with the order in Petition No. 128/MP/2022 dated 03.01.2023 and some of the aspects accepted by the Commission and the Respondents; and some of the issues, such as premium and mining profit wherein the Respondents had strong contention, the effect of these factors could not be included in the interim relief without detailed examination on merits. While Shri M.G. Ramachandran, Learned Senior Counsel, would contend that the earlier order of the CERC in Petition No. 128/MP/2022 dated 03.01.2023 has no application to determine adverse financial impact under the 2023 directions, we must bear in mind that appeals against the said order of the CERC dated 03.01.2023 are pending on the file of this Tribunal and any observations made herein, which may touch upon the validity or otherwise of the order of CERC dated 03.01.2023, may not be justified.

In so far as inconsistencies in the impugned order are concerned, it is true that the CERC, in Para 67 of the impugned order, has itself recorded that TPCL, in Para 8 of its written submissions dated 06.05.2024, had submitted that majority of the coal was being procured based on Argus indices plus premium at the relevant grade; and, even for procurement from Indonesia under the spot market, the data of TPCL was benchmarked based on Argus indices plus premium. In Para 68 of the impugned order, the CERC, while noting that it had, in its earlier order in Petition No. 128/MP/2022 dated 03.01.2023, adopted the HBA price or the actual price of coal whichever was lower while deciding the FOB price of coal in connection with the determination of the adverse financial impact of the 2022 directions, had also observed that TPCL had calculated the adverse financial impact in terms of the principles decided in the said order and had sought reimbursement of ECR way of interim relief; however, in its submissions (written submissions dated 16.05.2024) TPCL had admitted that it had procured coal on Argus indices plus premium at the relevant grade and not

on the basis of the HBA index. The CERC has, therefore, held that determination of adverse financial impact in connection with the 2023 directions would no longer be with reference to the FOB price based on HBA index since TPCL was, admittedly, procuring coal at Argus indices plus premium; and further the HBA index had been supplemented by HBA-1 and HBA-2 index since March, 2023 and the HBA-3 index since August, 2023 linking the indices to different dates of coal being exported from Indonesia.

While the afore-said observations do appear to be inconsistent with what has been held by the CERC in the first limb of Para 82(e) of the very same order, such inconsistencies may not be material, more so as what is required to be examined in an appeal against an interim order is mainly whether the CERC was justified in granting the interim relief. It is relevant to note that the CERC had thereafter, in the very same paragraph 82(e), observed that it was following a cautious approach and was allowing interim relief of (i) 50% of the difference in the energy charge rate on account of the FOB price of coal between the energy charge rate as the methodology decided in the CERC order dated 03.01.2023 as claimed by TPCL (duly certified by the Auditors) and as worked out by the committee on account of the coal price along with corresponding taxes and duties on a monthly basis during the operation of the 2023 directions; and (ii) the transportation charges and coal handling charges as per the PPA after adjustment of the amounts recovered as per the MOP committee rate on this count.

As noted hereinabove the grant of interim relief is discretionary and, save perversity or findings based on no evidence or cases where the impugned order is ex facie contrary to law, interference at the appellate stage may not be justified on the ground that there are some inconsistencies in the impugned order. As shall be detailed later, the effective FoB price allowed by CERC seems to be lower than GUVNL's own calculated FoB price, and the transportation charges and coal handling charges granted to TPCL is as per the PPA. The CERC has

assigned reasons for increasing the transit time and in providing for transit loss of GCV 72 kCal/kg as part of the ECR. The Appellants have not been able to show that such conclusions are either perverse or that they suffer from such patent illegality as to warrant interference in appellate proceedings. The observations of the CERC regarding station heat rate and auxiliary power consumption, for the purpose of arriving at the energy charge rate, and mining profit with respect to coal consumed from other sources do not also suffer from any such infirmity. It is unnecessary for us to delve further on these aspects, except to observe that, unlike the final order to be passed in the Petition filed under Section 11(2), the Commission cannot be expected, while granting interim relief, to compute the adverse financial impact caused to the Generator with mathematical precision. Some leeway ought to be granted to the Commission in arriving at an approximate figure and, as long as such approximation is not wholly unreasonable, interference at the appellate stage may not be justified.

2. ARE THERE FALLACIES IN THE IMPUGNED ORDER RELATING TO COMPUTATION?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS-PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that the obvious fallacies in the computation in Para 65 of the Impugned Order are: (a) CERC has taken FOB Price for November 2023 as 91.80\$/MT from Tata Power Statements in their Reply which is alleged by Tata Power to be the 'actual FOB cost' throughout the hearing; the shipment details include 'FOB/CFR' price claimed, GCV at load port, FOB/CFR cost, actual freight, PPA Freight and freight as per CERC order dated 03.01.2023; details of the 13 shipments related to November, 2023 coal consumption are given with aggregate FOB value as 91.80\$/MT; seven shipments out of the 13 were, however, on CFR basis, and were therefore required to be converted to FOB basis by excluding freight; however Tata Power

consistently maintained (wrongly) that, for November 2023, 'Allowed FOB' price of coal, both on actual and as per CERC order dated 03.01.2023 - was USD 91.80, without adjustment; (b) no supporting documentation has been placed in regard to the actual price claimed by Tata Power; despite GUVNL repeatedly seeking primary evidence, i.e. FOB Invoice by the coal supplier, the Bill of Entry etc, Tata Power did not place it on record; GUVNL had specifically stated before the CERC that the cost claimed is unfounded and lacks merit; (c) taking 91.80 \$ /MT as FOB Cost, CERC, in Para 65 of the impugned order, has computed the impact on ECR as Rs.3.34/kWh as against the impact considered by the Committee as Rs. 2.98/kWh; the freight charges reduced in respect of 7 shipments, as per charges of relevant indices, brings down the real FOB price to 82.74\$/MT for November 2023 (*Ref: Ground WW*); this calculation has not been denied or dealt with either in the Reply or in the oral arguments; (d) in the sur-rejoinder arguments, Tata Power urged that Actual FOB price for November 2023 was only 88.34\$/MT as per invoices raised by it subsequent to the Impugned Order; in fact, the invoices indicate actual reduction in FOB Prices claimed in the statement, in regard to 4 shipments bearing S.No. 647, 648, 650-B, 656 which were on FOB basis only, and only one shipment (S. No. 663) was on CFR basis; this clearly establishes that Tata Power has been wrongly claiming actual FOB cost as 91.80\$/MT before the CERC, and the entire determination based on 91.80\$/MT is wrong; and, if effect is given as per Invoices of Tata Power, the FOB price for November, 2023 actually works out to 79.28\$/MT.

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would further submit that there is no explanation from Tata Power for the above differences in actual FOB price which Tata Power claimed at 91.80\$/MT, and it becoming 88.34\$/MT at the time of raising of invoices, when the shipment remained the same; it is Tata Power which gave shipment details and claimed 91.80\$ as actual cost for November, 2023 which turns out to be false to the knowledge of Tata Power even in respect of the 4 shipment which

were not on CFR basis; further, as a substantial part of the shipment was on CFR basis, Tata Power was not entitled to claim it as actual FOB price; the Committee had allowed freight charges separately over and above the FOB price considered, and the CERC considers it as per PPA; and allowing freight as part of FOB Cost will amount to double allowance, besides being a mockery of the very definition of FOB.

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would also submit that, in Para 65 of the Impugned Order if FOB price of 82.74\$/MT (after converting CFR to FOB) is substituted in the place of 91.80\$/MT, the impact of FOB price on ECR would be Rs 3.01/kWh in the place of Rs 3.34/kWh compared to the impact considered by the Committee of Rs 2.98/kWh; if actual invoices raised are taken into account, FOB price for November 2023 would reduce further to 79.28\$/MT, and the impact on ECR would be Rs 2.89/kWh only as against Rs.2.98/kWh by the Committee; and, in the context of the above, it is clear that Tata Power deliberately did not place documents in support of actual FOB price and further attempted to claim interim relief in terms of the CERC order dated 03.01.2023 based on inapplicable HBA/HPB, and purported 91.80\$/MT as actual FOB price.

B. SUBMISSIONS URGED ON BEHALF OF TATA POWER:

Sri P. Chidambaram, Learned Senior Counsel appearing on behalf of TPCL, would submit that the prices disclosed by TPCL, prior to the Interim Order, are not comparable to the prices disclosed by TPCL after the Interim Order dated 10.03.2025; the former were based on actual FoB or CIF prices; the latter was based on the methodology directed in the Interim Order; and none of the invoices raised by TPCL, after the Interim Order, have been challenged by GUVNL.

C. ANALYSIS:

It does appear, from the impugned order, that the CERC has taken the FOB price, as claimed by TPCL for November, 2023, as 91.80 USD/MT. The tables, in Para 65 (c) and 65 (e) of the impugned order, relate to the 13 shipments during November, 2023 indicating coal procurement. It does also appear that the price shown in the tables, with respect to 7 of these 13 shipments, were not the FOB value, but were on CFR basis ie they included freight; and, consequently, the coal price of these 7 shipments were required to be converted from CFR to FOB basis by excluding freight therefrom. That there is an error in these tables is, in fact, indirectly acknowledged by TPCL itself. The claim, made on their behalf before this Tribunal, is that, in the invoices raised by them pursuant to the interim order passed by the CERC, they had only claimed 88.34 USD/MT and not 91.80 USD/MT. This ex facie and undisputed error would amount to a perverse finding falling within the parameters for interference in an appeal preferred against an interlocutory order.

3. CONSIDERING ONLY ONE ELEMENT FOR ONE MONTH FOR GRANTING INTERIM RELIEF: ITS CONSEQUENCES:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS-PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that the impugned Order considers only one cost element, namely 'FOB cost of imported coal', to decide on the alleged adverse financial impact on Energy Charge Rate (ECR) for grant of interim relief; in Para 65-Table, the impact for November, 2023 has been computed as Rs 3.34/kWh (as per Actual FOB cost claimed by Tata Power (91.80\$/MT) as per CERC order dated 03.01.2023), in comparison with FOB cost of 78\$/MT as per the Committee; the decision for November, 2023 has been considered as the basis for relief at Para 82(e) for the entire duration of the 2023 Directions; the above finding of the CERC is perverse, patently arbitrary and founded on misleading claims of Tata Power; the view taken is without any prudence check, and even

though Tata Power deliberately did not place primary evidence in its power and possession; and the claim of Tata Power is founded on HBA-1 indices and the CERC Order dated 03.01.2023, which indisputably has no application for determining adverse financial impact under the 2023 Directions.

B. SUBMISSIONS URGED ON BEHALF OF TATA POWER:

Sri P. Chidambaram, Learned Senior Counsel appearing on behalf of TPCL, would submit that the CERC, for the purpose of determining interim relief, has undertaken a detailed examination of the facts / data provided by the parties, and has assessed the (in)adequacy of the MoP Benchmark ECR, using the month of November 2023 as a representative sample; in Para. 64 of the Interim Order, CERC has recorded the competing positions of the parties: while TPCL reported the actual coal cost of \$ 91.80 for blended coal with a GCV of 5291 kCal/kg, GUVNL applied a pro-rata Argus index to compute the FoB price of \$ 84.35 for the same GCV; notably – (a) to evaluate the validity of these competing figures, CERC worked out the FoB price based on actual quality and quantity data submitted by TPCL and relevant reference indices; (b) as recorded in Para. 64(g) of the impugned order, using ICI3 (Argus 5000 GCV) yielded an FoB of \$ 81.39, but adjusting for quality using Argus indices for higher GCV (5800–6400) resulted in a more realistic weighted average of \$ 83.41; (c) CERC observed, in Para. 64(h), that international indices reflect a non-linear increase in price with GCV, validating the higher cost of blended coal used by TPCL for technical reasons; this supported the *prima facie* case for a higher ECR than the MoP Benchmark; based on a sample analysis of November 2023, CERC found that the actual FoB price submitted by TPCL (\$ 91.80) was \$ 8.39 higher than the calculated pro-rata price (\$ 83.41) using the ICI3 (Argus 5000 GCV) index; and, even assuming a premium of \$ 4/MT, the residual differential of \$ 4.39 still established a *prima facie* case for interim relief on account of the higher FoB price of coal even after excluding the premium.

In response to GUVNL's contention that CERC erroneously treated CIF-based shipments as FoB, in Para 64(c) and 64(e) of the Interim Order, Sri P. Chidambaram, Learned Senior Counsel appearing on behalf of TPCL, would submit that the same is a non-issue; while granting interim relief, the methodology applied is based on the Order dated 03.01.2023; TPCL's affidavits dated 25.08.2023, 18.04.2024 and 10.10.2024 clearly disclose the actual prices at which each shipment was procured (FoB + freight or CIF); the "*Freight incld insurance*" column in the chart only applies to FoB shipments and not the CIF shipments; in the case of CIF shipments, the freight costs are already embedded in the CIF price; TPCL has complied fully with all directions of the CERC, and has disclosed the relevant price data in its Affidavits.

C. ANALYSIS:

It is true that, in granting interim relief to TPCL, for the entire duration of the Section 11(1) 2023 directions period, the CERC has considered only the adverse financial impact caused to them during November, 2023. It is also true that what the Commission was required to do, under Section 11(2) of the Electricity Act, is to off-set the actual adverse financial impact caused to TPCL as a result of the Section 11(1) directions. While determining whether TPCL has actually suffered an adverse financial impact as a result of the Section 11(1) directions, the CERC, when the main petition is finally heard, would be required in law to ascertain the actual adverse financial impact caused to TPCL each month during which Section 11(1) directions were in force ie for the period for which the Petition under Section 11(2) of the Electricity Act was filed.

If we were to hold that a similar exercise ought to have been undertaken by the CERC, even at the interlocutory stage, there would then be no need for the CERC to pass an interim order, since, having examined and adjudicated upon TPCL's claim for each month of the 2023 directions, it could very well have passed the final order itself, obviating the need to pass an interim order. For the purpose of grant of interim relief, a sample period of one month (November,

2023) as, prima-facie, representing each month's adverse financial impact, during the period when the 2023 Section 11(1) directions were in force, cannot be said to suffer from perversity or illegality of the kind which would necessitate interference in an appeal preferred against an interlocutory order passed by the CERC.

4. IS THE FOB COST SUPPORTED BY CHARTERED ACCOUNTANTS CERTIFICATES?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS-PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that Tata Power wrongly claims, and the CERC has wrongly accepted that the Actual FOB cost of 91.80\$/MT is supported by CA certificates; admittedly, there is no CA certificate for November 2023; recording by CERC in para 47 of the impugned order is absolutely wrong, and is contrary to the record; the Tabular statements furnished by Tata Power are not certified by the Chartered Accountant; except for a vague claim that FOB price was 91.80\$/MT, which is also wrong on the face of it, there is no support for the actual cost incurred and there is no basis for allowing an impact of 50% of 36 paise per unit on the ECR.

B. SUBMISSIONS URGED ON BEHALF OF TATA POWER:

On the submission, urged on behalf of GUVNL regarding absence of the CA Certificate for November, 2023, Sri P. Chidambaram, Learned Senior Counsel appearing on behalf of TPCL, would submit that the certificate, certifying the weighted average price of \$91.80/ MT (based on actuals) for November 2023, was issued after TPCL's rejoinder dated 12.12.2023, and hence could not be filed with the rejoinder; after the interim Order, TPCL revised its Invoices using the lower of actual or HBA-based FoB prices, in terms of the interim Order; this recalculated FoB price for November, 2023 stood at

\$88.34/MT, as certified in the CA Certificate dated 15.03.2025; accordingly, both the CA Certificates dated 19.12.2023 (pre-Interim Order and actual cost-based) and 15.03.2025 (post-Interim Order and in terms of the Order), are correct; after the Interim Order, consistent with the methodology prescribed by the CERC, Invoices were raised by TPCL supported by CA Certificates; and, in view of the above, GUVNL's allegation that CERC erroneously treated CIF-based shipments as if they were FoB is misconceived and unsupported by the record; the treatment of freight and insurance components has been transparently disclosed, and TPCL has not engaged in any double counting of freight or misrepresentation; GUVNL has failed to produce any contrary data or establish any computational error; and, hence, its objection warrants no credence.

C. ANALYSIS:

In para 47 of the impugned order, the CERC has observed that TPCL had placed on record a statement supported by Auditor's certificate that the rates fixed by the committee fell short of the actual cost of generation. Reference is again made, in para 82(e)(i) of the impugned order, to the claim of TPCL being duly certified by the Auditor.

It is not in dispute, and is in fact acknowledged before us on behalf of TPCL, that the FOB cost of 91.80 USD/MT for November 2023 was not supported by any Auditor's Certificate when the IA for interim relief was heard by the CERC. While what is recorded, in Para 46 of the impugned order, does not appear to specifically relate to the data furnished for November, 2023, the fact remains that the impugned order passed by the CERC was based only on the data for November, 2023 which was, admittedly, not supported, at least during the hearing of the IA before the CERC, by the Auditor's Certificate. Reference in para 82(e)(i) of the impugned order, to the Auditor's certificate, is evidently an error.

We must, however, bear in mind that, at the interlocutory stage of proceedings, the CERC was not expected to conduct a mini trial and that interlocutory orders are generally based on affidavits. In determining the question, whether or not a prima-facie case has been made out by the plaintiff for grant of interim relief, the Court should be guided more and more by the apparent strength or otherwise of the plaintiff's case as revealed by affidavits and other material. **(M.K. Dasappa v. G. Ramachandra, 1975 SCC OnLine Kar 114 : AIR 1976 Kar 53; J. Krishnamoorthy v. Bangalore Turf Club Ltd: (1975) 2 Kant LJ 428)**. At the stage of granting temporary injunction, the court forms its opinion only on the basis of affidavits and, at this stage, there is no scope for a detailed enquiry. **(Ghanshyamdas Baheti v. Jamuna Transport Corporation Ltd., 2011 SCC OnLine Cal 557)**. It may not be appropriate for any court to hold a mini-trial at the stage of grant of temporary injunction. **(Anand Prasad Agarwalla v. Tarkeshwar Prasad, (2001) 5 SCC 568)**. Since the request of TPCL for grant of interim relief was based on the affidavits filed by them, the CERC cannot be faulted for relying on the data of November, 2023, as reflected in the said affidavits, even in the absence of an Auditor's certificate.

5. WEIGHTED AVERAGE METHOD OF CALCULATION OF GCV:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS- PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that Argus Price Indices weighted average method calculation for GCV is undoubtedly the appropriate methodology, and this was accepted by the computation thereof made and placed by GUVNL before the CERC; such a computation reflects the premium; for November, 2023, Argus Indices for 5000 kCal/kg considered by the Committee was 78\$/MT; the Weighted average method for 5291 kCal/kg works out to 85.37\$/MT; as against the above, the linear method calculation for 5291 worked

out by CERC is 84.35/MT; the difference between 85.37\$/MT and 84.35\$/MT is the premium; there can be no other premium on the ground that Tata Power had to incur higher cost; there can certainly be no premium of 50% of the amount computed with reference to the CERC Order dated 03.01.2023; the reference, in Paras 70 and 71 of the Impugned Order, that coal could be procured at premium or discount, is, in fact, with reference to the weighted average method of determining Argus price for the relevant GCV qua 5000 GCV considered by the Committee; it is also not correct to proceed on the basis that coal will always be procured on premium, as can be seen in regard to November, 2023 computation; to the extent of Argus price for GCV of 5291 kCal/kg determined on linear basis at 84.35\$/MT based on the increased heat value, there is lesser quantum of coal; not only is reduced quantum of coal only to be paid, lesser quantum transported and handled in port equalizes the higher price as compared with 5000 kCal/kg; and, further, CERC has left it to Tata Power to compute the claim without any verification by CERC.

B. SUBMISSIONS URGED ON BEHALF OF TATA POWER:

Sri P. Chidambaram, Learned Senior Counsel appearing on behalf of TPCL, would submit that GUVNL's understanding of "premium", as paid by TPCL, is grossly incorrect; and, be that as it may, CERC, for reasons recorded in Paras 70–71 of the Interim Order, has declined to consider the premium component for interim relief.

C. ANALYSIS:

In Paragraph 64 of the impugned order, the CERC has taken note of the reasons for the difference in the FOB price of coal between the committee, TPCL and GUVNL. In Para 64 (h) the CERC observed that the Commission had, in Para 6.3 of the order in Petition No. 12/SM/2023, recognized decoupling of high CV and mid CV Coal in the international Coal index, ie Argus, Platts, etc; this implied that the rate of increase of International Index price with an increase of

quality was non-linear, and hence the blending of coal based on a weighted average of quantity and shipment-wise price of higher quality coal led to a higher weighted average coal price; TPCL had used higher GCV blended coal of more than 5000 GCV due to technical requirement; and there was, prima facie, a case for allowing ECR based on the higher FOB price of the blended coal compared to the pro-rata FOB price of coal worked out by the Committee with reference to the Argus *ICI-3*, which was for 5000 GCV.

It has been fairly stated, on behalf of the Appellants, that the Argus Indices Weighted Average Method of calculation of GCV is the appropriate method; this method of computation was accepted by GUVNL before the CERC; and GUVNL also acknowledges that the weighted average method for 5291 kCal/kg works out to 85.37 USD/MT whereas the linear method of calculation for 5291 kCal/kg works out to 84.35 USD/MT. The submission urged on behalf of TPCL, which does not seem unjustified, is that the effective FOB price allowed by CERC, for the purpose of grant of interim relief, is \$ 84.90/MT which is lower than the FOB price calculated by GUVNL itself of 85.37 \$/MT. If that be so, it is wholly unnecessary for us to examine whether any premium, other than the difference between the weighted average and the linear method, should be granted or not.

It does not appear to be in dispute that what was required to be taken is the weighted average FOB price of blended coal of GCV 5291 kCal/kg, and not to adopt the linear mode of computation. Adopting a linear method would result in the FOB price, for November, 2023, to be 84.35\$/MT whereas adopting the weighted average method (even according to GUVNL) would work out to 85.37 \$/MT. As shall be detailed later in this order, what appears to have been granted by the CERC, by way of interim relief, is the FOB price of \$ 84.90 which, though higher than the FOB price computed on a linear basis of 84.35\$/MT, is lower than even the weighted average price computed by GUVNL of 85.37 \$/MT.

We find force in the submission urged on behalf of GUVNL that the CERC ought to have computed and quantified the entitlement of TPCL in terms of the

interim order passed by it, and ought not to have left it to TPCL to compute and claim the said amounts. The aforesaid directions may, possibly, have been issued by the CERC since the 2023 directions were still in force when it passed the impugned order on 10.03.2025. As we have now made it clear that the CERC could not have granted TPCL any interim relief, under Section 11(2) read with Section 94(2) of the Electricity Act, for the period after it had passed the impugned order on 10.03.2025, the interim relief which TPCL would be entitled to is only for the period from 16.04.2023 till 10.03.2025, and not beyond.

6. IS TATA POWER DISENTITLED TO ANYTHING MORE THAN THE PPA TARIFF?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS-PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that GUVNL had raised a specific plea that Tata Power is not entitled to anything more than PPA Tariff (Refer: Para 5 of GUVNL's Reply, and Para 7(a) of its affidavit).

B. ANALYSIS:

In Para 5 of the reply filed by them before the CERC on 04.10.2023, in response to Petition No. 179/MP/2023 filed by TPCL, GUVNL referred to the letter addressed by them to TPCL on 09.03.2023 expressing their intent to off-take power in terms of the Section 11 directions dated 20.02.2023 wherein they had clarified that they were making timely payment of all the legitimate claims raised by CGPL (TPCL) from time to time, and there were no pending outstandings prior or post Section 11. After referring to the key points of the directions issued by the Ministry of Power, Govt. of India vide notification dated 20.02.2023, under Section-11 of the Electricity Act, 2003, GUVNL had stated, in the said letter dated 09.03.2023, that this was without prejudice to their rights and contentions available under the PPA dated 22.04.2007 and under Law.

Neither the letter dated 09.,03.2023 nor Para 5 of the Reply filed by GUVNL before the CERC make any specific reference to their present contention that TPCL was entitled only for PPA tariff and nothing more.

In response to the affidavit filed by the TPCL before the CERC on 10.10.2024, GUVNL filed its reply thereto vide Affidavit dated 04.05.2024. In Para 7(a) of the said reply GUVNL stated that the statement in the earlier paragraphs were being made without prejudice to all their contentions including and in particular that Tata Power was entitled only to PPA tariff. Apart from this stray sentence, the Appellant GUVNL has not even contended before this Tribunal that they had raised any such contention before the CERC during the hearing of the IA for interim relief. While the elaborate impugned interim order refers to various contentions urged on behalf of GUVNL, this specific contention finds no mention therein, evidently because no such contention appears to have been raised by them during the hearing of the IA for interim relief.

Failure of the CERC to consider such a plea urged by GUVNL in the affidavit dated 04.05.2024, without any such contention having been urged during the hearing of the IA, cannot be said to vitiate the impugned order. We, however, make it clear that we have not expressed any opinion on the merits or otherwise of the said contention of GUVNL that TPCL is not entitled for anything more than the PPA tariff. Needless to state that, in case any such contention is urged by GUVNL during the hearing of the main petition, the CERC shall consider the same in accordance with law.

7. NON-CONSIDERATION OF THE COUNTER-CLAIMS OF GUVNL AND THEIR PLEA FOR SET-OFF: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS-PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that the CERC was wrong in selectively

considering the FOB price of coal, and in deferring consideration of the Procurers' claims which are directly related to the Section 11 directions, and have not been complied by Tata Power; CERC has not considered the substantial claim which Tata Power owes to GUVNL/Procurers on account of non-compliance on the part of Tata Power as set out in Ground H and BB of the Appeal, in particular: (a) sharing of mining profit as per Section 11 directions (profits related to the equity stake of Tata Power in the Indonesian Mining Companies in particular PT Kaltim Prima Coal); the Government, in its Letter dated 25.04.2023, had clarified that Tata Power is liable if coal is not procured from PT Kaltim; computation of Mining Profit; and (b) compensation payable by Tata Power for violation of the Section 11 directions for not supplying from 16.03 to 16/18.4.2023, and during 2023-24 only at 72% availability much below normative availability of 85% (in fact not maximizing generation even beyond) has not been considered.

B. ANALYSIS:

In Ground H, of their Appeal filed before this Tribunal, the Appellant-GUVNL contends that the CERC had failed to consider its counter claim while considering TPCL's request for grant of interim relief; for the period 18.04.2023 to 16.03.2025 TPCL did not generate and supply power; and, on account of their failure to do so, GUVNL was required to procure more expensive power from the exchange and other alternate short-term resources to meet their requirement. It is not in dispute that TPCL's claim for interim relief is only for the period from 18.04.2023 onwards, and not for the period from 18.04.2023 till 16.03.2025.

Order 8 Rule 6 CPC stipulates that particulars of set-off should be given in the Written Statement. Sub-Rule (1) thereof provides that where, in a suit for recovery of money, the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff not exceeding the pecuniary limits of the jurisdiction of the Court and both parties fill

the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards, unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off. Sub-Rule (2) relates to the Effect of set-off, and stipulates that the Written Statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgement in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Order 8 Rule 6A CPC relates to the counter-claim by the defendant. Sub-Rule (1) thereof provides that a defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of a counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action according to the defendant, but before the defendant has delivered his defence or before the time limit for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not. Sub-Rule (2) stipulates that such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgement in the same suit, both on the original claim and on the counter-claim.

As noted hereinabove, Section 11(2) of the Electricity Act enables the Appropriate Commission to off-set the adverse financial impact, of the directions issued by the Appropriate Government under Section 11(1), on any generating company. It does appear prima-facie, from a plain and literal reading of Section 11(2), that the jurisdiction of the Commission can be invoked only by a generating company seeking to have the adverse financial impact, caused to it as a result of Section 11(1) directions, off set.

Among the larger questions which may arise for consideration before the CERC, in Petition No. 179/MP/2023, are whether a counter claim or a claim for set off can be sought by a distribution licensee in such Section 11(2) proceedings, and whether the provisions of Order 8 Rules 6 & 6A CPC would

apply to proceedings under Section 11(2) of the Electricity Act. These questions, touching upon its jurisdiction, may necessitate examination by the CERC before the Appellant's claim for set off, or the validity of their counter claim, is entertained and adjudicated upon.

In so far as GUVNL's contentions regarding sharing of mining profit as per Section 11 directions even if coal is not procured from PT Kaltim, is concerned, the CERC, in the impugned interim order, has observed that this issue would be examined when the main Petition is finally heard and decided.

Since the main petition (ie Petition No. 179/MP/2023) is still pending consideration and adjudication before the CERC, it may not be proper for us to express any opinion on the afore-said aspects. Suffice it to observe that, since these issues would be required to be considered in Petition No. 179/MP/2023, failure of the CERC to consider the counter claim of GUVNL or their plea for set off or on the issue of sharing of mining profit, while examining TPCL's request for grant of interim relief in Petition No. 179/MP/2023 filed by them, cannot be said to vitiate the impugned order.

Except for the patent error in the tables in Para 65 (c) and 65 (e) of the impugned order showing the price of 13 shipments of imported coal in November, 2023 as its FOB value, though 7 of them were on CFR basis and included freight, and which ought to have been converted from CFR to FOB basis by excluding freight therefrom in order to arrive at its FOB value, none of the other objections taken on behalf of the Appellants, on the conclusion of CERC that TPCL had made out a prima-facie case, are so grave as to warrant interference in an appeal preferred against an interlocutory order.

XII. HAS GUVNL ADMITTED TO THE COMPUTATION OF GCV?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS- PROCURERS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-GUVNL, would submit that, for determination of the Argus Indices price for each relevant shipment, GCV is only a mathematical calculation as per the standard formula; GUVNL had placed such computation before the CERC; such computation does not constitute admission by GUVNL of the costs incurred by Tata Power; Tata Power has not disputed any specific entry, except consistently making the wrong comment that GUVNL has considered the linear/proportionate method of computation from published Argus indices of 5000 GCV, and has not considered transit time for coal to reach the project site; GUVNL had specifically denied the said allegation, and had pointed out that the above two aspects were duly considered by GUVNL in its computation; in Ground VV specific references are given to the pleadings before the CERC; CERC has, in Paras 62 and 64 of the Impugned Order, re-iterated the claim of Tata Power on the above two aspects without referring to the pleadings and submissions of GUVNL placing the correct facts; there is no specific denial/response by Tata Power in its Reply to the Appeal; and, even during oral submissions, Tata Power had only referred to Paras 62 and 64 where CERC has wrongly recorded on GUVNL not factoring the weighted average computation and the transit time, and has ignored the material placed by GUVNL that the conclusions in the Impugned Order are contrary to the record.

B. SUBMISSIONS URGED ON BEHALF OF TATA POWER:

Sri P. Chidambaram, Learned Senior Counsel appearing on behalf of TPCL, would submit that, ultimately, the interim relief formula set out in Para 82(e) of the Interim Order allows for recovery of fifty percent of the difference in the energy charge rate between the rate claimed by TPCL (duly certified by its Chartered Accountant and based on the methodology adopted in the CERC's Order dated 03.01.2023 in Petition No. 128/MP/2022), and the rate worked out by the MoP-appointed Committee, along with applicable taxes and duties, on a monthly basis during the operation of the 2023 Directions; resultantly, by the

Interim Order, the CERC has effectively allowed: *50% of the difference in FoB price of coal between the Petitioner's claim (\$91.80) and the Committee's calculation (\$78.00)*. So the allowed adjustment is: $50\% \times (91.80 - 78.00) = \$ 6.90$; therefore, the effective FoB price allowed by CERC would be \$ 84.90 (*MoP Committee's benchmark Price of \$ 78 + \$ 6.90*) which is lower than GUVNL's own calculated FoB price of \$ 85.37 (Refer: copy of GUVNL's calculation in Appendix B2 to GUVNL's Note dated 27.05.2025); and thus, while GUVNL first admitted a price of \$ 84.35 (para 64 of the Interim Order), and later admitted a price of \$ 85.37 (Note at EXHIBIT A), the CERC has, by its interim Order, allowed only \$ 84.90; TPCL's total claim in the subject Petition amounts to approximately Rs. 2,584 crores (up to 30.04.2025), but the relief actually accruing under the Interim Order is only Rs. 753 crores which demonstrates the restrained and equitable nature of the interim relief granted; and GUVNL has failed to dislodge or rebut the findings recorded by the CERC or demonstrate any perversity or legal infirmity in the Interim Order.

C. ANALYSIS:

From a reading of Para 64 of the impugned order, it does appear that GUVNL had considered USD 79.91/ MT with the GCV of 5000 kCal/ kg to arrive at the FoB price for blended coal of 5291 kCal/ kg of \$84.35/ ton. The calculation worked out by GUVNL is said to be $\text{USD } 79.71 \times (5291/5000) = \$84.35/\text{ton}$. The contention of TPCL before the CERC appears to be that, while they had considered the weighted average GCV and the actual price of each shipment of coal to arrive at the FoB price of blended coal, GUVNL had merely considered the coal price of blended coal with reference only to Argus ICI 3 index (5000 GCV) without working out the weighted average price of each shipment during the month.

In ground VV of the present appeal, the Appellant-GUVNL contends that the conclusion of CERC, in para 64(e) of the impugned order that GUVNL has not considered the weighted average GCV of coal for each shipment, was

contrary to the pleadings filed by GUVNL. After referring to their affidavit dated 04.05.2024, to Annexure-1 of their written submissions dated 14.05.2024, Appendix-A of their affidavit dated 05.10.2024, and their consolidated written submissions dated 15.11.2024, GUVNL claims that they had taken into consideration the weighted average GCV of each shipment of coal.

During the hearing before this Tribunal, GUVNL submitted a Note dated 27.05.2025 furnishing the points on aspects of the FoB price. In para 6 of the said Note it is submitted, on behalf of GUVNL, that computation of premium needs to be based on the Argus indices between which the GCV of the shipment falls; if such GCV is between 5000 to 5200, the proportionate increase over price of 5000 GCV is to be given; if it is between 5600 to 5800, the proportionate decrease from the price of 5800 GCV is to be given; if it is between 5200 to 5600 weighted average of 5000 and 5800 prices are to be considered; these are done by the established formulae; the computation has been done by GUVNL on that basis for November 2023; para 82 (e) of the Impugned Order considers premium with reference to inapplicable HBA price and arbitrarily considers 50% of the difference from committee determined price; Appendix B2 is the tabular statement of the coal consumed by TPCL in the month of November 2023 along with computation of FoB cost of coal as claimed by TPCL visa-a-vis the Argus Index with corrected values of CFR cost to FoB. Appendix B2 is a tabular statement which reads thus:

Coal Consumed by Tata Power in November 2023

S. No	Ship ment No.	Vessel Name	Country of Origin	Supplier	B/L month	Procurement Basis	As Claimed by Tata Power							As per Argus Index						
							GCV at Load Port	Consumption Qty	Consumption GCV	FOB Value from CFR	Index Weightage				Argus Price (USD/MT)				FOB Price as per Argus	Premium qua Argus Index
											Kcal/kg	MT	Kcal/kg	USD/MT	4200	5000	5800	6500		
	Ref: Page Nos. 556, 559 and 560 Vol 3 Reply Tata Power													Ref Page : 684 and 685, Vol III, Appeal						
1	643	Clear Horizon	Mozambique	AGM	Aug-23	FOB	5653	22,207	5,585	78.39			97%				86.4		84.23	-5.84
2	647	Samjohn Argonaut	Indonesia	R-WOOD	Sep-23	FOB	4863	33,233	4,793	74.38		97%				73.4			71.35	3.03
3	649	Dan May	Indonesia	KIDECO	Sep-23	FOB	4195	80,848	4,125	57.37	100%				52.8				52.70	1.67
4	650-B	Cape Cynthia	Indonesia	TRAFIGUR A	Sep-23	FOB	4543	25,906	4,474	66.48	57%	43%			52.8	73.4			51.59	4.89
5	651	SSI Dignity	Australia	VISA	Sep-23	CFR	5793	37,747	5,721	90.63			100%				88.5		88.39	2.24
6	655	MV JOHANA	Russia	JSW	Sep-23	CFR	6374	63,310	6,303	99.25				98%				116.5	114.24	-14.99

7	648	FPMC B Majesty	Indonesia	R-WOOD	Oct-23	FOB	4081	79,945	4,010	54.64	97%				60.1				58.37	-3.73
8	654	Pentagruel	Indonesia	ITOC HU	Oct-23	CFR	6112	64,672	6,040	112.64			55%	45%			95.5	121.7	107.19	5.45
9	656	Ludolf Oldendorff	Indonesia	KPC	Oct-23	FOB	4945	94,760	4,873	82.03		99%				80.9			80.02	2.01
10	653	MV Sirocco	USA	Javelin	Sep-23	CFR	6502	79,057	6,433	103.23				100%				116.5	116.54	-13.31
11	662	Jabal Harim	Indonesia	Visa	Oct-23	CFR	5792	10,475	5,720	100.27			100%				95.5		95.35	4.88
12	663	MV Herun China	Australia	JSW	Oct-23	CFR	4677	88,841	4,510	75.5	40%	60%			50.1	80.9			72.50	3.00
13	657	Cerntex Dominance	USA	Javelin	Oct-23	CFR	6542	44,028	6,473	104.78				101%				121.7	122.49	-17.71
								7,25,029	5219	82.75									85.37	-2.62

The 2nd last column of the afore-said table relates to the FoB price as per Argus in USD/ MT. The weighted average GCV, of the 13 shipments of imported coal received by TPCL in November 2023, has been computed by GUVNL itself, in the said column of the table, as 85.37 USD/ MT.

In Para 18 of the Note, submitted by GUVNL of their rejoinder arguments dated 14.07.2025, it is stated that, for November, 2023 consumption, 13 shipments were considered with GCV ranging from 4010 kCal/ kg to 6473 kCal/ kg namely lower as well as higher; to the extent of considering the increase or decrease on linear method or proportionate method, the higher GCV value and higher price paid proportionately compensate by requiring lesser quantum, and in addition thereto lesser shipment, lesser freight, etc; thus for 5291 kCal/ kg considered on proportionate basis at the cost of USD 84.35/ MT there is in fact no extra cost as the increased heat value reduces the quantum of coal; the FoB price is not however proportionate and, in the example, it is USD 85.37, namely USD 1.02/ MT higher; this needs to be compensated and not anything more; and this may be called premium and in the reverse direction discount.

It is clear, from what is stated in para 18 of the Note submitted by GUVNL of their rejoinder arguments dated 14.07.2025, that, even according to GUVNL, the FoB price, computed on weighted average basis for the 13 shipments of November 2023, is USD 85.37 per Tonne. In para 21 of the said submissions, it is further stated that the difference between 85.37/ MT or 84.35/ MT and HBA 1 price or 50% of these cannot be allowed as premium. Enclosed thereto, as Annexure B2, is the very same table referred to earlier which shows that the weighted average GCV, for the 13 shipments of coal imported by TPCL in November 2023, works out to 85.37 USD/ MT.

The submission urged on behalf of TPCL is that the CERC, by the impugned interim order, has effectively allowed 50% of the difference in FoB price of coal between the TPCL's claim (\$91.80) and the Committee's

calculation (\$78.00), so that the allowed adjustment is $50\% \times (91.80 - 78.00) = \6.90 ; therefore, the effective FoB price allowed by CERC would be \$84.90 (MoP Committee's benchmark price of $78.00 + \$6.90$) which is lower than GUVNL's own calculated FoB price of \$85.37.

It does appear that the FoB price determined in terms of the impugned order of 84.90 USD/ MT is lower than the FoB price computed by GUVNL itself as 85.37 USD/ MT. Consequent on GUVNL's computation being higher than the FoB price granted by the impugned interim order, the Appellant herein cannot, prima facie, claim that the FoB price allowed by CERC is excessive or unreasonable. Besides granting TPCL interim relief, with respect to transportation charges and coal handling charges, only in terms of the PPA, the CERC has assigned reasons for allowing a time gap of 8 weeks, between the loading port and discharge port or the actual free time whichever was less as considered by the Committee, as transit time in the computation of the energy charge rate, It has also explained why it has considered transit loss of GCV 72 kCal/kg, and has given reasons for holding that the station heat rate and the auxiliary power consumption, for the purpose of arriving at the energy charge rate, should be lower than the actuals or as worked out in accordance with the 2009 CERC Regulations. With regard mining profit the CERC observed that TPCL had not consumed any KCP Shipment, and the issue whether or not mining profit was applicable for coal consumed from other sources would be examined at the time of the final order.

Since the FoB price constitutes a substantial portion of the ECR, and as the FoB price determined in terms of the impugned order is lower than the FoB price computed by the Appellant-GUVNL itself, notwithstanding the deficiencies in the impugned order (which may otherwise have justified interference in appeal), we must exercise restraint, more so as the opinion expressed by the CERC, for granting TPCL the benefit of the other components of the ECR, is a possible view.

XIII. CONCLUSION:

We would, ordinarily, have set aside the impugned order, and remanded the matter to the CERC directing it to consider afresh: (i) whether or not (a) the interim relief sought by TPCL was in the nature of an interim mandatory injunction; and (b) if so, whether TPCL had satisfied the tests for grant of such a relief; (ii) as the test of irreparable injury can be held to have been satisfied only if the injury suffered is one which cannot be adequately compensated by way of damages, and as TPCL has itself only claimed payment of money both by way of interim relief and final relief in the Petition filed by them under Section 11(2) of the Electricity Act, whether the Appellants could have been directed to pay TPCL money, by way of interim relief, on the ground that they would suffer irreparable injury if such payment is not made; (iii) as the Annual Reports of TPCL, and the interim order passed earlier by this Tribunal, appear to show that they are a profit-making company, whether TPCL could claim to suffer irreparable injury if interim relief is not granted in their favour; (iv) as noted hereinabove, the CERC could not have applied as yardsticks, for the grant of interim relief, (a) TPCL's inability to procure coal to supply power in future, and (b) their consequent failure to generate and supply power possibly forcing the Appellants in future to purchase costly power to meet the needs of their consumers, as these aspects are wholly extraneous to proceedings under Section 11(2) of the Electricity Act. As these were the only grounds on which the balance of convenience was held in favour of TPCL, whether failure of TPCL to satisfy this test would still require interim relief to be granted in their favour? (v) whether TPCL had discharged its onus to satisfy the CERC that the comparative inconvenience which would be caused to them if interim relief was not granted, would be greater than that which was likely to arise to the Appellants on the interim relief being granted; and (vi) as the price shown in the tables in Para 65 (c) and 65 (e) of the impugned order, with respect to 7 of these 13 shipments,

were not the FOB value, but were on CFR basis ie they included freight, should the coal price of these 7 shipments not have been converted from CFR to FOB basis by excluding freight therefrom, in order to arrive at the FOB value of the coal imported in November, 2023.

We are, however, of the view that no useful purpose would be served in remanding the matter to the CERC, directing it to consider the afore-said aspects afresh and then decide if an interim order should be passed, and if so the nature of such an interim order, in the light of the interim relief granted by the CERC by way of the impugned interim order.

As noted hereinabove, a substantial portion of the interim relief sought, ie for payment of interim/ Provisional Tariff towards ECR, represents the FOB price of imported coal. The interim relief granted by the CERC is, effectively, considering the FoB price of imported coal to be 84.90 USD/ MT which is lower than the FoB price as computed by GUVNL itself as 85.37 USD/ MT. As what has been granted as interim relief, by the impugned order of the CERC, is lower than GUVNL's computation of FoB price of imported coal, we see no reason to direct the CERC to re-examine the afore-said issues, more so as the Appellants' interests are being adequately safeguarded on TPCL being directed to furnish an unconditional bank guarantee as security for the amount which the Appellants are required to pay them in terms of the impugned order.

We, therefore, pass an order of limited remand directing the CERC to compute the entitlement of TPCL, in terms of its earlier order dated 10.03.2025 (wherein, among others, the FoB price of imported coal was effectively determined at 84.90 USD/ MT), after hearing parties on either side in this regard. We make it clear that the hearing to be afforded is only with respect to computation of the amounts payable in terms of the order dated 10.03.2025 for the period from 16.04.2023 till 10.03.2025, and not on merits. On the said amount being computed and determined by the CERC, TPCL shall, in terms of

its submissions before this Tribunal, furnish unconditional bank guarantees from a scheduled bank, for the entire amount determined by the CERC as payable to it in terms of the order dated 10.03.2025. Further, the said Bank Guarantees shall be renewed periodically and kept alive during the pendency of the main Petition before the CERC. The Appellants shall, within two weeks of receipt of the unconditional bank guarantees, make payment of the amounts, determined by CERC, to TPCL.

In order to protect the Respondent, while granting an interlocutory injunction in his favour, the court can also require the Petitioner to furnish an undertaking so that the Respondent can be adequately compensated if the uncertainty were resolved in his favour at the trial. (**Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545**). With a view to further protect the interest of the Appellants herein, with respect to their claim for restitution in case the main petition filed by TPCL were to be dismissed by the CERC later, we also direct TPCL to furnish an undertaking, in favour of each of the Appellants, to pay them carrying cost for the period from the date of receipt of the amounts from them, till the main petition is finally disposed of. Furnishing of such an undertaking shall be without prejudice to TPCL's right to avail their judicial remedies if they are aggrieved by the final order passed by the CERC. Needless to state that the amounts paid by the Appellants to TPCL, the unconditional bank guarantee furnished by TPCL as security for the said amount, and the undertaking furnished by them, shall all be subject to the result of the main petition pending before the CERC.

As it is in the interest of all the parties concerned to have the Section 11(2) Petition, filed by TPCL before the CERC, adjudicated at the earliest, we request the CERC to consider adjudicating the Section 11(2) Petition with utmost expedition, and pass a final order at the earliest, preferably within a period of six months from the date of receipt of a copy of this order.

All the Appeals, and the IAs therein, stand disposed of accordingly.

Pronounced in the open court on this the **31st day of October, 2025.**

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~