

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO. 327 OF 2018 & IA Nos. 1342 of 2018 & 1258 of 2019
APPEAL NO. 338 OF 2018 & IA No. 1336 of 2018
&
APPEAL NO. 51 OF 2019 & IA No. 1646 of 2018 & 1254 of 2019

Dated: 19th August, 2020

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

APPEAL NO. 327 OF 2018 & IA Nos. 1342 of 2018 & 1258 of 2019

In the matter of:

M.P. Power Management Company Ltd.
Shakti Bhawan, Vidyut Nagar, Rampur,
Jabalpur – 482008, Madhya Pradesh
Through its Authorised Signatory

... Appellant

Versus

1. Madhya Pradesh Electricity Regulatory Commission
5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal 462 016

..Respondent No.1

2. Lanco Amarkantak Power Limited
Lanco House, Plot No. 4, Software Units Layout,
HITEC City, Madhapur
Hyderabad – 500081, Telangana

Also at:

Lanco House, Plot No.397 Phase III,
Udhyog Vihar, Gurgaon – 122 016
Through its Authorised Signatory

..Respondent No.2

3. PTC India Limited
2nd floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi - 110066,
Through its Authorised Signatory

..Respondent No.3

Counsel for the Appellant : Mr. Paramhans Sahani

Counsel for the Respondent(s) : Mr.Parinay Deep Shah for R-1

Mr.Ravi Kishore
Mr. Niraj Singh'
Mr. Deepak Jaiswal
Ms.Rajshree Chaudhary for R-3

APPEAL NO. 338 OF 2018 & IA No. 1336 of 2018

Lanco Amarkantak Power Limited
Lanco House,Plot No. 4,
Software Units Layout,
HITEC City, Madhapur
Hyderabad – 500081, Telangana

Also at:

Lanco House, Plot No.397 Phase III,
Udhyog Vihar, Gurgaon – 122 016
Through its Authorised Signatory
Mr. Anil Sharma

... Appellant

Versus

1. Madhya Pradesh Electricity Regulatory Commission
5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal 462 016
Through its Secretary

...Respondent No.1

2. Madhya Pradesh Power Management Company Ltd.
Shakti Bhawan, Vidyut Nagar, Rampur,
Jabalpur – 482008, Madhya Pradesh
Through its Chairman and Managing Director

...Respondent No.2

3. PTC India Limited
2nd floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi - 110066,

Through its Chairman-cum-Managing Director **...Respondent No.3**

Counsel for the Appellant : Mr. Deepak Khurana
Mr. Tejasv Anand

Counsel for the Respondent(s) : Mr. Parinay Deep Shah for R-1

Mr. Paramhans Sahani for R-2

Mr. Aashish Anand Bernard for
R-3

APPEAL NO. 51 OF 2019 & IA No. 1646 of 2018 & 1254 of 2019

PTC India Limited
2nd floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi - 110066,
Through its Authorised Signatory

... Appellant

Versus

1. Madhya Pradesh Electricity Regulatory Commission
5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal 462 016
Through its Secretary **...Respondent No.1**

2. Madhya Pradesh Power Management Company Ltd.
Shakti Bhawan, Vidyut Nagar, Rampur,
Jabalpur – 482008, Madhya Pradesh
Through its Chairman and Managing Director **...Respondent No.2**

3. Lanco Amarkantak Power Limited
Lanco House, Plot No. 4, Software Units Layout,
HITEC City, Madhapur
Hyderabad – 500081, Telangana

Also at:

Lanco House, Plot No.397 Phase III,
Udhyog Vihar, Gurgaon – 122 016
Through its Authorised Signatory **...Respondent
No.3**

Counsel for the Appellant : Mr. Aashish Anand Bernard

Counsel for the Respondent(s) : Mr.Parinay Deep Shah for R-1
Mr. Paramhans Sahani for R-2
Mr. Deepak Khurana
Mr. Tejasv Anand for R-3

J U D G M E N T

PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

1. The Appellants have filed the present Appeals namely Appeal Nos.327 of 2018 and 51 of 2019 under Section 111 of the Electricity Act, 2003 (hereinafter 'the Act') against the Order dated 23.08.2017 passed by the Madhya Pradesh Electricity Regulatory Commission (hereinafter 'the Commission') in Petition No. 35/2016 and order dated 25.4.2018 passed in Review Petition no. 66 of 2017 filed for seeking a review of the order dated 23.8.2017 (hereinafter 'the impugned order').
 - 1.1 In Appeal No.338 of 2018, the Appellant has also challenged the impugned order dated 23.08.2017 passed by the Madhya Pradesh Electricity Regulatory Commission in Petition No. 35/2016.
 - 1.2 In Appeal No. 327 of 2018, the Appellant, M.P. Power Management Company Limited is a wholly owned company of the State of Madhya Pradesh and is the holding company of the three distribution companies in the State of Madhya Pradesh.
 - 1.3 In Appeal No.338 of 2018, the Appellant, Lanco Amarkantak Power Limited is a generating company within the meaning of Section 2(23) of the Electricity Act, 2003. The Appellant is operating a 600 MW coal based Thermal Power Project in District Korba, Chhattisgarh comprising two units of 300 MW each. (Unit-1 and Unit-2). The present matter pertains to Unit-1 of the Appellant.

- 1.4 In Appeal No.51 of 2019, the Appellant (PTC) is an Inter-State Trading Licensee under the provisions of the Electricity Act, 2003.
- 1.5 The Respondent No. 1 is the Madhya Pradesh Electricity Regulatory Commission ('**MPERC/Commission**') which has passed the impugned Order dated 23.08.2017 and 25.4.2018.
- 1.6 In the batch of appeals, the Appellants are other Respondents in the cross appeals.

2. FACTS OF THE CASE (Appeal No.327 of 2018)

- 2.1 The present appeal is against the Order dated 23.08.2017 passed by the State Commission in Petition No. 35/2016 and order dated 25.4.2018 passed in Review Petition no. 66 of 2017 for seeking a review of the order dated 23.8.2017 by virtue of which the MPERC has incorrectly held that it does not have jurisdiction to determine the tariff of a generating company on a regular annual basis.
- 2.2 The instant appeal is in furtherance of the order dated 01.12.2012 in Petition No.78 of 2012, vide which this Commission has accorded approval to the process of procurement of power and has determined the annual fixed cost and the energy charges as per relevant provision of the Central Electricity Regulatory Commission (Terms and Conditions for determination of Tariff) Regulations, 2009 ('CERC Tariff Regulations, 2009'), under the Settlement Agreement and Implementation mechanism filed by the parties herein under Section 86(1)(b) of the Electricity Act, 2003 ('Order of 2012'). The annual fixed cost was determined by this Commission as Rs.314.05 crores for the Financial Year (FY) 2012-13.

2.3 With the issuance of the Central Electricity Regulation Commission (Terms and Conditions of Tariff) Regulations, 2014, which regulations have come into force on 01.04.2014 ('CERC Tariff Regulations, 2014') and shall remain in force for the period of five years from 01.04.2014 to 31.03.2019, the appellant had filed the Petition no. 35 of 2016 under Section 86(1)(b) read with Section 61 and 62 of the Electricity Act, 2003 for fixation of annual fixed cost and energy charges for the FY 2014 to FY 2019.

2.4 The brief relevant facts of the case, leading to the filing of the instant appeal are as under:-

- i. Lanco (Respondent no.2) and PTC (Respondent no.3) entered into a PPA on 11th May, 2005 for supply/purchase of power from LANCO Unit No.1 having capacity of 300 MW located at Village Pathadi, District Korba, Chhattisgarh.
- ii. PTC and MPSEB (now MP Power Management Co. Ltd.) who had been assigned the job of procurement of power on behalf of the Discoms of the State entered into a PSA on 30.05.2005 for supply of power from Unit No.1 of 300 MW of LANCO.
- iii. The Respondent no.1 Commission was approached by the MPSEB for approval of the PSA between MPSEB and Respondent No.1. The Commission vide order dated 07.03.2008 granted in principle approval to the PSA between PTC and MPSEB.
- iv. On 14.03.2008, LANCO served termination notice to PTC in respect of PPA signed by PTC. Following which, on 31.03.2008 the Hon'ble High Court of MP restrained LANCO from giving effect

to the termination notice in W.P. No.4103/08 filed by the MP Power Trading Company. Thereafter, on 06.05.2008, this Commission passed another order allowing provisional tariff of 220 paise per unit (levelised), which tariff was 95% of the tariff as indicated in the PPA. At the same time the Respondent no.1 Commission observed that irrespective of LANCO's refusal to submit to MPERC jurisdiction, MPERC has jurisdiction to determine their tariff and approve the PSA in this case.

- v. On 16.06.2008, the Hon'ble High Court of MP dismissed the interim application filed by LANCO seeking vacation of the interim stay granted on 31.03.2008 in W.P. No.4103/08. On 21.10.2008, the Hon'ble APTEL on the Appeal of LANCO (No.71/2008) set aside MPERC order dated 06.05.2008 holding that the Respondent no.1 Commission has no jurisdiction to determine the generation tariff of M/s Lanco in this case. Subsequently, the order of APTEL dated 06.05.2008 was challenged before the Hon'ble Supreme Court by M.P. Power Trading Company vide Civil Appeal No.6676 of 2008, MPERC vide Civil Appeal No.1335/2009 and PTC vide Civil Appeal No.7379/2009.
- vi. Meanwhile, LANCO filed a Writ Appeal No.687/2008 before the Hon'ble High Court of MP. On 29.06.2009 the Hon'ble High Court ordered that the petition of the M.P. Power Tradeco (W.P. 4103/08) in the subject matter was not maintainable. M.P. Power Trading Company challenged the Hon'ble M.P. High Court's order through SLP 16101/2009 before the Hon'ble Supreme Court and on 08.04.2010 the Hon'ble Supreme Court dismissed the SLP.

- vii. PTC had approached the Respondent no.1 Commission vide petition no.55/2008 to adjudicate the dispute between PTC and LANCO. MPERC adopted the Hon'ble High Court's stay and passed an order on 25.08.2008 stating that the MPERC has jurisdiction to adjudicate the dispute. MPERC order dated 25.08.2008 was challenged by LANCO before the Hon'ble APTEL vide Appeal No.7/2009. The Hon'ble APTEL on 06.08.2009 set aside MPERC order dated 25.08.2008.
- viii. M/s Lanco Amarkantak Power Ltd. achieved the CoD for their Unit-I of 300 MW on 09.04.2010 and the supply was ready to be availed.
- ix. M.P. Power Management Company Ltd. had filed petition before this Commission under Section 86(1)(b) of the Electricity Act, 2003 for determination of Annual Capacity Charges and Energy Charges for 300 MW contracted power from PTC India Ltd. sourced from 300 MW Unit-1 of Lanco Amarkantak Power Ld. For FY 2014-19. The appellant herein had earlier filed Petition bearing number 78 of 2012 before this Commission under Section 86(1)(b) of the Electricity Act, 2003 for approval of procurement of 300 MW contracted power, from PTC India Ltd. by the appellant under the PSA dated 30.05.2005 executed between the erstwhile MPSEB and PTC, which has been sourced from 300 MW unit 1 of Lanco Amarkantak Power Ltd. under the PPA dated 11.05.2005 executed between PTC and Lanco, pursuant to the Settlement Agreement dated 16.10.2012 signed amongst the appellant and Respondents.

- x. During the hearing of the Petition bearing number 78 of 2012, that there has been a Settlement Agreement between the appellant, Respondent No.2 and Respondent No.3 whereby certain amendments in the earlier PPA between the Respondent Nos.2 & 3 and consequently in the PSA between the Appellant and the Respondent No.1, have been agreed. The parties in the matter i.e. the Appellant, Respondent No.2 and Respondent No.3 have agreed in the Settlement Agreement to resolve the dispute. Therefore, all disputes between the Appellant, and the Respondents herein were resolved by stating to withdraw all disputes raised/and were pending at that point in time before various forum. The parties herein also submitted the Settlement Agreement to the Hon'ble Supreme Court of India.
- xi. The Respondent no.1 Commission vide order dated 01.12.2012, accorded approval to the process of the subject power procurement under the Settlement Agreement and Implementation Mechanism filed by the appellant herein-under 86(1)(b) of Electricity Act, 2003 read in line with the CERC Tariff Regulations, 2009. The Commission vide the said order, determined annual fixed cost and energy charges for the period 2012-13 as per the relevant provisions of the CERC Tariff Regulations, 2009.
- xii. Following the order of this Commission in Petition No.78 of 2012 dated 1.12.2012, the appellant herein approached to this Commission by way of a Petition No.04 of 2015 under Section 86(1)(b) of the Electricity Act, 2003 for determination of Annual Capacity Charges and Energy Charges for 300 MW contracted power from PTC India Ltd. sourced from 300 MW Unit-1 of Lanco

Amarkantak Power Ltd. for FY 2013-14. However, the said petition was disposed of by way of order dated 12.02.2015.

- xiii. The order dated 12.02.2015 was passed which was an order passed under Section 86(1)(b) of the Electricity Act in Petition No.4 of 2015. The appellant herein after due deliberations filed petition being Petition No.35 of 2016 under Section 61 read along with Section 62 and 86(1)(b) of the Electricity Act, 2003 read along with CERC Tariff Regulations, 2014 and it was prayed that the Commission may be pleased to fix the annual fixed charges and energy charges for FY 2014-2019 under Section 86(1)(b) read along with Section 61 and 62 of the Electricity Act.

2.5 By virtue of the impugned order dated 23.08.2017 passed in petition no. 35 of 2016, the Commission after discussing the entire litigation history in the said matter and the various orders passed by it in Petition No.78 of 2012 held in para 12 (ix) and (x) that the scope of functions of the Commission under Section 86(1)(b) cannot be equated with the functions of the Commission under Section 62 of the Electricity Act for determination of tariff for a generating company on a regular annual basis. Meaning thereby that once the Commission has approved the power procurement process under Section 86(1)(b) by virtue of the order dated 01.12.2012 passed in Petition No.78 of 2012, thereafter nothing further is required to be done by the Commission for determination of tariff under Section 62 for the next control period of FY 2014-19.

2.6 As per the Appellant, the instant finding on behalf of the Commission wherein it has held that Section 86(1)(b) is de-hors and not connected with Section 62 of the Act are erroneous and not in accordance with the provisions and principles of the Electricity Act, 2003.

2.7 The term “regulate” used in Section 86(1)(b) is of very wide import and interpretation and the Commission gravely erred in holding that the scope of functions under Section 86(1)(b) cannot be equated and are not connected with the provisions of Section 62 of the Electricity Act, 2003 and thereby holding that there is no jurisdiction under Section 86(1)(b) of the Electricity Act for determination of tariff as per CERC Tariff Regulations, 2014 for the control period 2014-2019. For perusal, para 12(ix) and (x) is reproduced hereunder:-

“(ix) Section 62 of the Act provides for determination of tariff for supply of electricity **by a Generating Company** to a Distribution Licensee whereas, Section 86(1)(b) provides that the State Commission shall regulate electricity purchase and procurement process of Distribution Licenses including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements **for purchase of power for distribution and supply within the state.**

(emphasis supplied)

(x) The scope of the functions of this Commission under Section 86(1)(b) may not be equated with the functions of this Commission under the provisions of Section 62 of the Electricity Act 2003 for determination of tariff for a Generating Company on a regular/annual basis. Therefore, the contention of petitioner invoking Section 62 of the Electricity Act and seeking determination of tariff for the power project in the subject matter on annual basis for FY 2014 to 2019 in terms of CERC Tariff Regulations, 2014 is against the provisions of Electricity Act, 2003, Clause 3 of the ‘Settlement Agreement’ and also beyond the jurisdiction of this Commission as held by the Hon’ble Tribunal for Electricity.”

2.8 Being aggrieved by the impugned order dated 23.08.2017 the appellant herein filed a review petition being Petition No.67 of 2017 under Section 94 of the Electricity Act for review of the order passed on 23.08.2017. However, the Commission vide order dated 25.04.2018 dismissed the

review petition without even issuing any notice and in a most summarily and perfunctory manner.

2.9 The Commission has failed to appreciate that if the power purchase cost is examined for which tariff determination is sought, it will be seen that the tariff is continuously reducing and the fixed charges also are on continuously reduction basis and this is very cheap power which will be available to the consumers of the State of Madhya Pradesh for utilization on a long term basis and, therefore, it is in public interest also that the tariff be determined in accordance with the CERC Regulations for the period 2014-2019 as this cheap power would lead to reduction in power purchase cost of the appellant and also providing cheap power to the consumers of the State of Madhya Pradesh.

2.10 It is, therefore, submitted by the Appellant that even in public interest the Commission ought to have taken note of the matter and determine the tariff under Section 61 read with Section 62 and Section 86(1)(b) of the Electricity Act, 2003 and not taken an erroneous and hyper-technical view that once the approval is taken under Section 86(1)(b) this tariff petition under Section 62 is beyond the scope of jurisdiction of the Commission as Section 86(1)(b) and Section 62 cannot be equated and read together.

3. FACTS OF THE CASE (Appeal No.338 of 2018)

3.1 The Appellant entered into a Power Purchase Agreement dated 11.05.2005 (amended on 02.08.2005) for sale of power of 300 MW (273 MW Net) from the Power Station for a term of 25 years ('PPA').

- 3.2** In turn, the Respondent No. 3 entered into a Power Sale Agreement dated 30.05.2005 ('PSA') with Madhya Pradesh State Electricity Board for further sale of the aforesaid 300 MW power purchased from the Appellant. The said PSA is now vested with Madhya Pradesh Power Management Company Limited i.e. Respondent No. 2. That certain disputes arose in relation to the PPA and the Appellant terminated the PPA vide letter dated 14.01.2008 addressed to the Respondent No. 3. and thereafter the Respondent No. 3 terminated the PSA with Madhya Pradesh State Electricity Board vide its letter dated 10.08.2009.
- 3.3** Further the Appellant and the Respondent Nos. 2 and 3 amicably resolved their above said disputes and accordingly signed a Settlement Agreement dated 16.10.2012. The Settlement Agreement dated 16.10.2012, the Appellant entered into an Implementation Mechanism for PPA dated 24.11.2012 containing modified terms and conditions of the PPA with Respondent No. 3, which are necessary for implementing the sale of 300 MW power from the Power Station to the Respondent No. 3.
- 3.4** The Respondent No. 3 and the Respondent No. 2 entered into an Implementation Mechanism for PSA dated 26.11.2012 containing modified terms and conditions of the PSA, which are necessary for implementing the sale of 300 MW power from the Respondent No. 3 to the Respondent No. 2.
- 3.5** The Respondent No. 1 Commission vide its order dated 01.12.2012 accorded its approval to the process of power procurement from the Power Station of the Appellant under the Settlement Agreement dated 16.10.2012, the Implementation Mechanism for PPA dated 24.11.2012 and Implementation Mechanism for PSA dated 26.11.2012 filed by the

Respondent No. 2. Further, the Respondent No. 1 Commission in the same order conducted prudence check and approved the capital cost of Unit 1 and fixed the price of electricity in accordance with the then applicable CERC (Terms & Conditions for Determination of Tariff) Regulations, 2009 ('CERC Tariff Regulations, 2009').

- 3.6** The Appellant has been supplying power from the Power Station on long term basis since 03.12.2012 pursuant to the aforesaid Order of the Respondent No. 1 Commission. The Respondent No. 2 filed a Petition bearing No. 04 of 2015 before the Respondent No.1 Commission for determination of annual capacity charges and energy charges for the year 2013-14. The Commission passed an Order dated 12.02.2015 in the said Petition and observed that neither there was any change in the agreements amending the PPA which were approved by the Commission, nor was there any change in the capital cost of Rs. 1236.40 crores as approved by the Respondent No. 1 Commission in Petition No.78/12. The Commission thus disposed-of the Petition.
- 3.7** Pursuant to coming into force of the CERC (Terms and Conditions of Tariff) Regulations, 2014 w.e.f. 01.04.2014, the Respondent No. 2, on 27.5.2016, filed a Petition bearing no.35 of 2016 before the Respondent No. 1 Commission for fixing annual fixed charges and energy charges for the financial year 2014 to 2019 as per the said Regulations.
- 3.8** The Respondent No. 1 Commission vide order dated 23.08.2017 dismissed the said petition observing that the parties in the matter were already following the provisions under Settlement Agreement for computing Annual Fixed Charges and Energy Charges based on the same capital cost fixed/considered by the Commission in terms of same Settlement Agreement, yet the Respondent No. 2 was seeking

determination of tariff on annual/year to year basis under Section 62 of the Act based on CERC Tariff Regulations for new control period, which was beyond the jurisdiction of the Commission. The Respondent No. 1 Commission further observed that the contention of the Respondent No. 2 in invoking Section 62 of the Electricity Act and seeking determination of tariff for the power project on annual basis for F.Y. 2014 to 2019 in terms of CERC Tariff Regulations, 2014 was against the provisions of Electricity Act 2003, Clause 3 of the 'Settlement Agreement' and also beyond the jurisdiction of the Commission.

4. FACTS OF THE CASE(Appeal No. 51 of 2019)

4.1 The instant appeal is in pursuance of the order dated 01.12.2012 in Petition No.78 of 2012, vide which the Commission has accorded approval to the process of procurement of power and has determined the annual fixed cost and the energy charges as per relevant provision of the Central Electricity Regulatory Commission (Terms and Conditions for determination of Tariff) Regulations, 2009 ('CERC Tariff Regulations, 2009'), under the Settlement Agreement and Implementation mechanism filed by the parties herein under Section 86(1)(b) of the Electricity Act, 2003 ('Order of 2012'). The annual fixed cost was determined by this Commission as Rs.314.05 crores for the Financial Year (FY) 2012-13.

4.2 With the issuance of the Central Electricity Regulation Commission (Terms and Conditions of Tariff) Regulations, 2014, which regulations have come into force on 01.04.2014 ('CERC Tariff Regulations, 2014') and shall remain in force for the period of five years from 01.04.2014 to 31.03.2019, the appellant had filed the Petition no. 35 of 2016 under Section 86(1)(b) read with Section 61 and 62 of the Electricity Act, 2003

for fixation of annual fixed cost and energy charges for the FY 2014 to FY 2019.

- 4.3** The Appellant entered into a Power Purchase Agreement dated 11.05.2005 (as amended on 02.08.2005) for sale of power of 300 MW (273 MW Net) from the Power Station for a term of 25 years ('PPA') with the Respondent no.3.
- 4.4** In turn, the Appellant and the Respondent No. 2 entered into a back-to-back Power Sale Agreement dated 30.05.2005 ('PSA') with Madhya Pradesh State Electricity Board (MPPMCL) for further sale of the aforesaid 300 MW power purchased from the Appellant and the said PSA is now vested with Madhya Pradesh Power Management Company Limited i.e. Respondent No. 2. Certain disputes arose in relation to the PPA and the Respondent no.3 terminate the PPA with the Appellant vide letter dated 14.01.2008 and thereafter and consequently the Appellant terminated the PSA with Madhya Pradesh State Electricity Board vide its letter dated 10.08.2009.
- 4.5** The Appellant and the Respondent Nos. 2 and 3 amicably resolved their above said disputes of termination and accordingly they signed a Settlement Agreement dated 16.10.2012. In terms of the Settlement Agreement dated 16.10.2012, the Appellant entered into an Implementation Mechanism for PPA dated 24.11.2012 containing modified terms and conditions of the PPA with Respondent No. 3, which are necessary for implementing the sale of 300 MW power from the Power Station to the Respondent No. 3.
- 4.6** The Respondent No. 3 and the Respondent No. 2 also entered into an Implementation Mechanism for PSA dated 26.11.2012 containing

modified terms and conditions of the PSA, which are necessary for implementing the sale of 300 MW power from the Respondent No. 3 to the Respondent No. 2.

- 4.7** The Respondent No. 1 Commission vide its order dated 01.12.2012 accorded its approval to the process of power procurement under the Settlement Agreement dated 16.10.2012, the Implementation Mechanism for PPA dated 24.11.2012 and Implementation Mechanism for PSA dated 26.11.2012 filed by the Respondent No. 2 (MPPMCL).
- 4.8** Further, the Respondent No. 1 Commission in the same order dated 1.12.2012 conducted prudence check & approved the capital cost of Unit 1 and fixed the price of electricity in accordance with the then applicable CERC (Terms & Conditions for Determination of Tariff) Regulations, 2009. The Appellant has been supplying power from the Power Station of the Respondent no.3 (Lanco) on long term basis since 03.12.2012 after the Respondent No. 1 Commission approved the power purchase price for supply of power based on the CERC Tariff Regulations vide its order dated 01.12.2012.
- 4.9** The Respondent No. 2 (MPPMCL) filed a Petition bearing No.4 of 2015 before the Respondent No.1 Commission for determination of annual capacity charges and energy charges for the year 2013-14. The Commission passed an Order dated 12.02.2015 in the said Petition and observed that neither there was any change in the Agreements amending the PPA which were approved by the Commission vide its order dated 01.12.2012, nor was there any change in the capital cost of Rs. 1236.40 crores as approved by the Respondent No. 1 Commission in Petition No.78/12. The Commission thus disposed-of the Petition stating the same was not maintainable on the ground that the Petitioner

had approached the Commission with a different prayer this time i.e. for determination of Annual Fixed Charges and Energy Charges on annual basis.

4.10 Pursuant to coming into force of the CERC (Terms and Conditions of Tariff) Regulations, 2014 w.e.f. 01.04.2014, the Respondent No. 2 (MPPMCL), on 27.5.2016, filed a Petition bearing no.35 of 2016 before the Respondent No. 1 Commission for fixing annual fixed charges and energy charges for the financial year 2014 to 2019 as per the said Regulations. The Respondent No. 1 Commission vide order dated 23.08.2017 (Impugned Order) dismissed the said petition holding that there was no substantial change in the contention of the Respondent No. 2 as was raised in the previous Petition No.4 of 2015. The Commission observed that the parties in the matter were already following the provisions under Settlement Agreement for computing Annual Fixed Charges and Energy Charges based on the same capital cost fixed/considered by the Commission in terms of same Settlement Agreement, yet the Respondent No. 2 was seeking determination of tariff on annual/year to year basis under Section 62 of the Act based on CERC Tariff Regulations for new control period, which was beyond the jurisdiction of this Commission. The Respondent No. 1 Commission further observed that the contention of the Respondent No. 2 in invoking Section 62 of the Electricity Act and seeking determination of tariff for the power project on annual basis for F.Y. 2014 to 2019 in terms of CERC Tariff Regulations, 2014 was against the provisions of Electricity Act 2003, Clause 3 of the 'Settlement Agreement' and also beyond the jurisdiction of the Commission.

- 4.11** Thereafter, after much internal deliberations and discussions the Respondent No. 2 herein filed the petition being Petition No. 66/2017 under section 94 (1) (f) of the Electricity Act 2003 seeking review of the order dated 23.08.2017 passed by the Respondent No. 1 Commission.
- 4.12** The Respondent no.1 / Commission thereafter without issuing notice to the Appellant or the Respondent no.3 condoned the delay in filing of the Review Petition no. 66 of 2017 by the Respondent no.2 (MPPMCL) vide its order dated 25.01.2018 and then vide the Impugned Order also dismissed the Review Petition without even giving the Appellant the notice or opportunity to make submissions on the review petition filed by MPPMCL. The aforesaid Review Petition was dismissed by the Respondent No. 1 Commission vide order dated 25.04.2018 observing that there was no error apparent in the order dated 23.08.2017 passed by the Respondent No. 1 Commission.
- 4.13** By virtue of the impugned order dated 23.08.2017 passed in petition no. 35 of 2016 the Commission after discussing the entire litigation history in the said matter and the various orders passed by it in Petition No.78 of 2012 held in para 12 (ix) and (x) that the scope of functions of the Commission under Section 86(1)(b) cannot be equated with the functions of the Commission under Section 62 of the Electricity Act for determination of tariff for a generating company on a regular annual basis. Meaning thereby that once the Commission has approved the power procurement process under Section 86(1)(b) by virtue of the order dated 01.12.2012 passed in Petition No.78 of 2012, thereafter nothing further is required to be done by the Commission for determination of tariff under Section 62 for the next control period of FY 2014-19.

- 4.14** The instant finding on behalf of the Commission wherein it has held that Section 86(1)(b) is de-hors and not connected with Section 62 of the Act are erroneous and not in accordance with the provisions and principles of the Electricity Act, 2003.
- 4.15** The term “regulate” used in Section 86(1)(b) is of very wide import and interpretation and the Commission gravely erred in holding that the scope of functions under Section 86(1)(b) cannot be equated and are not connected with the provisions of Section 62 of the Electricity Act, 2003 and thereby holding that there is no jurisdiction under Section 86(1)(b) of the Electricity Act for determination of tariff as per CERC Tariff Regulations, 2014 for the control period 2014-2019.
- 4.16** The Commission has failed to examine that if the power purchase cost is examined for which tariff determination is sought, it will be seen that the tariff is continuously reducing and the fixed charges also are on continuously reduction basis and this is very cheap power which will be available to the consumers of the State of Madhya Pradesh for utilization on a long term basis and, therefore, it is in public interest also that the tariff be determined in accordance with the CERC Regulations for the period 2014-2019 as this cheap power would lead to reduction in power purchase cost of the appellant and also providing cheap power to the consumers of the State of Madhya Pradesh.
- 4.17** Even in public interest the Commission ought to have taken note of the matter and determine the tariff under Section 61 read with Section 62 and Section 86(1)(b) of the Electricity Act, 2003 and not taken a view that once the approval is taken under Section 86(1)(b) this tariff petition under Section 62 is beyond the scope of jurisdiction of the Commission

as Section 86(1)(b) and Section 62 cannot be equated and read together.

4.18 It is submitted that the term “regulate” used in section 86(1)(b) of the Electricity Act, 2003 is of wide import as mentioned hereinabove and section 62 is a sub-set of the same. Therefore, as submitted hereinabove, admittedly the Commission has exercised its jurisdiction under section 86(1)(b) and has “regulated” the sale of power to the Respondent vide order dated 1.12.2012 in which it also determined the indicative capital cost and tariff for FY 2012-13. It is therefore most surprising and incorrect on the part of the Commission to change its stand in the Impugned Order and observe that it does not have jurisdiction to determine tariff for FY 2014-19 control period when it has determined the same for previous control period of FY 2012-13.

5. QUESTIONS OF LAW:-

The following questions of law have been raised in the batch of these appeals:-

- i. Whether the impugned order is contrary to the provisions of the Electricity Act, 2003?
- ii. Whether the impugned orders is contrary to the Order dated 01.12.2012 passed by the Respondent No. 1 Commission itself?
- iii. Whether the impugned order is contrary to the Settlement Agreement executed between the parties, which agreement was approved by the Respondent No. 1 Commission?

- iv. Whether the Respondent No. 1 Commission ought to have exercised jurisdiction under Section 64(5) of the Electricity Act, 2003 for determination of tariff?
- v. Whether the impugned order tantamount to avoiding discharge of its functions under the Electricity Act, 2003 by the Respondent No. 1 Commission?
- vi. Whether the Commission has failed to examine that if the power purchase cost is examined for which tariff determination is sought, it will be seen that the tariff is continuously reducing and the fixed charges also are on continuously reduction basis and this is very cheap power which will be available to the consumers of the State of Madhya Pradesh for utilization on a long term basis and, therefore, it is in public interest also that the tariff be determined in accordance with the CERC Regulations for the period 2014-2019?
- vii. Whether the finding on behalf of the Commission wherein it has held that Section 86(1)(b) is de-hors and not connected with Section 62 of the Act are erroneous and not in accordance with the provisions and principles of the Electricity Act, 2003?
- viii. Whether the term “regulate” used in Section 86(1)(b) is capable of very wide import and interpretation and the Commission gravely erred in holding that the scope of functions under Section 86(1)(b) cannot be equated and are not connected with the provisions of Section 62 of the Electricity Act, 2003 and thereby erred in holding that there is no jurisdiction under Section 86(1)(b) of the Electricity Act for determination of tariff as per CERC Tariff Regulations, 2014 for the control period 2014-2019.

6. The issues involved in all these appeals are common in nature, therefore, we decide to adjudicate the batch of appeals by this common judgment.

7. Learned counsel, Mr. Paramhans, appearing for the Appellant in Appeal No.327 of 2018 has filed his note of arguments in the batch of Appeals for our consideration as follows :-

7.1 By the impugned Order, the State Commission (MPERC) has refused to determine tariff for supply of electricity from the Appellant's 300 MW Unit to MPPMCL (Holding Company of State Discoms) under the PPA between the Lanco and PTC (trader) and PSA between PTC & MPPMCL. The State Commission in its earlier order dated 01.12.2012 had approved the above stated power procurement process along with the agreements for procurement of power from the Lanco's 300 MW Unit to PTC for onward supply to MPPMCL for a period of 25 years from the date of commencement of power supply and had fixed the power procurement price for FY 2012-13 after prudence check of the capital cost of the 300 MW Unit.

7.2 All three parties i.e. the Generator, PTC (Trader) and MPPMCL (Holding company of State Discoms) have challenged the impugned Order. The State Commission is the only contesting party in the present set of Appeals.

7.3 The only argument raised by the State Commission in the hearing of the Appeals before this Hon'ble Tribunal is that the Appellant herein has a composite scheme for generation and sale of electricity in more than one state namely Madhya Pradesh, Haryana & Chhattisgarh and therefore in terms of Section 79(1)(b) of the Act as interpreted based on the Hon'ble Supreme Court in Energy Watchdog case, the CERC would have jurisdiction to determine tariff for supply to Madhya Pradesh. Apart from

this objection, no other argument or objection was urged before this Hon'ble Tribunal by the State Commission.

- 7.4** The generator, the trader and the Discoms have placed reliance on Section 64 (5) of the Act which, if the parties want (generator, trader and Discoms in the present case) confers jurisdiction on State Commission to determine tariff, notwithstanding anything contained in Part X of the Act (which includes Section 79 & therefore composite scheme) to determine the tariff of the generating unit.
- 7.5** Section 64(5) begins with a non-obstante clause and overrides specifically Part X (which contains Section 79(1)(b)). Section 64(5) is a special provision and preserves jurisdiction of State Commission over the Discoms of that State who are purchasing power even from the generators who have otherwise composite scheme, which jurisdiction otherwise is vested with the CERC. Section 64(5) is a special provision whereas Section 79(1)(b) is a general provision. A special provision prevails over a general one even within the same statute. Section 64(5) is squarely attracted in the present case inasmuch as all three parties want the State Commission to determine tariff for supply of power from Lanco to MPPMCL through PTC.
- 7.6** State Commission's argument that Section 64(5) uses the expression '*involving the territories of two states*' suggest that if supply is to more than two States then Section 64(5) is not attracted. This is contrasted with the expression '*more than one state*' occurring in Section 79(1)(b), which, as argued by the State Commission, can be more than two States.
- 7.7** The Appellant submits that such distinction sought to be drawn is non-existent. There is no prohibition or bar in Section 64(5) of the Act to

suggest that in case supply from a Project is to more than two States, then the State Commission in respect of a particular supply would not have jurisdiction to determine tariff for supply to its Discom. The State Commission is reading something in Section 64(5) which does not exist, thereby resulting in misinterpretation of the provision. The governing factor of Section 64(5) is not the number of States but the supply to the State where Discom is located.

7.8 The reliance placed by State Commission on two Orders of the CERC in Petition No. 305/MP/2015 (Order dated 06.06.2018) and Petition No. 327/MP/2018 (Order dated 01.07.2019) is totally misplaced. In neither of the Orders, did the CERC hold that in case power is being supplied from the Project to more than two States, Section 64(5) cannot be invoked in respect of a particular supply to a Discom.

7.9 In view of the above, it is evident the sole objection raised by the State Commission as to jurisdiction is misconceived & based on misreading & misinterpretation of the provisions of the Act. The Appeal deserves to be allowed and the impugned Order of the State Commission refusing to determine tariff deserves to be set aside with a direction to the State Commission to determine the tariff for the supply of power as per its tariff regulations.

8. Learned counsel, Mr. Deepak Khurana, appearing for the Appellant in Appeal No.338 of 2018 has filed his written submissions in the batch of Appeals for our consideration as follows :-

8.1 By the impugned Order, the State Commission (MPERC) has refused to determine tariff for supply of electricity from the Appellant's 300 MW Unit to MPPMCL (Holding Company of State Discoms) under the PPA

between the Appellant and PTC (trader) and PSA between PTC & MPPMCL.

- 8.2** All three parties i.e. the Generator (Appellant), PTC (trading licensee) and MPPMCL (Distribution licensee) have challenged the impugned Order. State Commission is the only contesting party in the present set of Appeals.
- 8.3** It is pertinent to note that the State Commission by its earlier Order dated 01.12.2012 had approved the above stated power procurement process along with the agreements for procurement of power from the Appellant's 300 MW Unit to PTC for onward supply to MPPMCL for a period of 25 years from the date of commencement of power supply and had fixed the power procurement price for FY 2012-13 after prudence check of the capital cost of the 300 MW Unit.
- 8.4** The only argument raised by the State Commission in the hearing of the Appeals before this Tribunal is that the Appellant herein has a composite scheme for generation and sale of electricity in more than one state namely Madhya Pradesh, Haryana & Chhattisgarh and therefore in terms of Section 79(1)(b) of the Act as interpreted based on the Hon'ble Supreme Court in Energy Watchdog case, the CERC would have jurisdiction to determine tariff for supply to Madhya Pradesh. Apart from this objection, no other argument or objection was urged before this Hon'ble Tribunal by the State Commission.
- 8.5** The generator, the trader and the Discoms have placed reliance on Section 64 (5) of the Act. Section 64(5) confers jurisdiction on the State Commission to determine tariff for supply of power, if the parties so want (generator, trader and Distribution licensee in the present case),

notwithstanding anything contained in Part X of the Act (which includes Section 79 & therefore the composite scheme).

- 8.6** Section 64(5) begins with a non-obstante clause and overrides specifically Part X [which contains Section 79(1)(b)]. Section 64(5) is a special provision in the nature of exception and preserves jurisdiction of State Commission over the Distribution Licensees of that State who are purchasing power from the generators who otherwise have composite scheme, which jurisdiction otherwise is vested with the CERC under Section 79(1)(b). Section 64(5) is a special provision whereas Section 79(1)(b) is a general provision. A special provision prevails over a general one even within the same statute. Section 64(5) is squarely attracted in the present case inasmuch as all three parties want the State Commission to determine tariff for supply of power from Appellant to MPPMCL through PTC.
- 8.7** State Commission's argument that Section 64(5) uses the expression '*involving the territories of two states*' suggest that if supply is to more than two States then Section 64(5) is not attracted. This is sought to be contrasted with the expression '*more than one state*' occurring in Section 79(1)(b), which, as argued by the State Commission, can be more than two States.
- 8.8** Such distinction sought to be drawn is non-existent. There is no prohibition or bar in Section 64(5) of the Act to suggest that in case supply from a Project is to more than two States, then the State Commission in respect of a particular supply would not have jurisdiction to determine tariff for supply to its Discom. '*two states*' occurring in Section 64(5) means the State where the licensee is located (Madhya Pradesh in the present case) and the State where the generator

(Chhattisgarh in the present case) is located. The State Commission is reading something in Section 64(5) which does not exist, thereby resulting in misinterpretation of the provision. The governing factor of Section 64(5) is not the number of States but involvement of territories of two states in respect of a particular supply i.e. generation and supply in different states.

- 8.9** The reliance placed by State Commission on two Orders of the CERC in Petition No. 305/MP/2015 (Order dated 06.06.2018) and Petition No. 327/MP/2018 (Order dated 01.07.2019) is totally misplaced. In neither of the Orders, did the CERC hold that in case power is being supplied from the Project to more than two States, Section 64(5) cannot be invoked in respect of a particular supply to a Distribution Licensee. In both the said cases (which are completely distinguishable on facts), the generators having composite scheme within the meaning of Section 79(1)(b) wanted the CERC to regulate the tariff and not the State Commission. Therefore, requirements of Section 64(5) were apparently not fulfilled.
- 8.10** In any event & without prejudice, the Appellant does not have a composite scheme of generation and sale of power in more than one State, as laid down by the Hon'ble Supreme Court in *Energy Watchdog* judgment. It is to be noted that the Hon'ble Supreme Court has expressly relied upon the definition of Composite Scheme contained in Para 5.11 (j) of the National Tariff Policy, which requires a long term PPA (paras 26 & 27 of the judgment). In the present case, the Appellant is supplying power to Haryana from its other 300 MW Unit on ad-hoc interim basis based on Hon'ble Supreme Court interim order dated 16.12.2011 and not under a long term PPA, & for which supply, the

Haryana Electricity Regulatory Commission (HERC) is determining the tariff as per the Order of the Hon'ble Supreme Court.

8.11 Further, reference is also made to the Judgment dated 03.10.2014 of this Hon'ble Tribunal (in respect of Haryana supply) holding that supply is not under the PPA. Besides the tariff for supply of home state share of power to Chhattisgarh is being determined by the Chhattisgarh State Electricity Regulatory Commission (CSERC) in terms of the provisions of the Tariff Policy issued under Section 3 of the Act.

8.12 In view of the above, it is evident the sole objection raised by the State Commission as to jurisdiction is misconceived & based on misreading & misinterpretation of the provisions of the Act. The Appeal deserves to be allowed and the impugned Order of the State Commission refusing to determine tariff deserves to be set aside with a direction to the State Commission to determine the tariff for the supply of power as per its tariff regulations.

9. Learned counsel, Mr. Aashish Anand Bernard, appearing for the Appellant in Appeal No.51 of 2019 has filed his note of arguments in the batch of Appeals for our consideration as follows :-

9.1 By the impugned Order, the State Commission (MPERC) has refused to determine tariff for supply of electricity from the Appellant's 300 MW Unit to MPPMCL (Holding Company of State Discoms) under the PPA between the Lanco and PTC (trader) and PSA between PTC & MPPMCL. The State Commission in its earlier order dated 01.12.2012 had approved the above stated power procurement process along with the agreements for procurement of power from the Lanco's 300 MW Unit to PTC for onward supply to MPPMCL for a period of 25 years from the date of commencement of power supply and had fixed the power

procurement price for FY 2012-13 after prudence check of the capital cost of the 300 MW Unit.

- 9.2** All three parties i.e. the Generator, PTC (Trader) and MPPMCL (Holding company of State Discoms) have challenged the impugned Order. State Commission is the only contesting party in the present set of Appeals.
- 9.3** The only argument raised by the State Commission in the hearing of the Appeals before this Hon'ble Tribunal is that the Appellant herein has a composite scheme for generation and sale of electricity in more than one state namely Madhya Pradesh, Haryana & Chhattisgarh and therefore in terms of Section 79(1)(b) of the Act as interpreted based on the Hon'ble Supreme Court in Energy Watchdog case, the CERC would have jurisdiction to determine tariff for supply to Madhya Pradesh. Apart from this objection, no other argument or objection was urged before this Hon'ble Tribunal by the State Commission.
- 9.4** The generator, the trader and the Discoms have placed reliance on Section 64 (5) of the Act which, if the parties want (generator, trader and Discoms in the present case) confers jurisdiction on State Commission to determine tariff, notwithstanding anything contained in Part X of the Act (which includes Section 79 & therefore composite scheme) to determine the tariff of the generating unit.
- 9.5** Section 64(5) begins with a non-obstante clause and overrides specifically Part X (which contains Section 79(1)(b)). Section 64(5) is a special provision and preserves jurisdiction of State Commission over the Discoms of that State who are purchasing power even from the generators who have otherwise composite scheme, which jurisdiction otherwise is vested with the CERC. Section 64(5) is a special provision

whereas Section 79(1)(b) is a general provision. A special provision prevails over a general one even within the same statute. Section 64(5) is squarely attracted in the present case inasmuch as all three parties want the State Commission to determine tariff for supply of power from Lanco to MPPMCL through PTC.

- 9.6** State Commission's argument that Section 64(5) uses the expression '*involving the territories of two states*' suggest that if supply is to more than two States then Section 64(5) is not attracted. This is contrasted with the expression '*more than one state*' occurring in Section 79(1)(b), which, as argued by the State Commission, can be more than two States.
- 9.7** The Appellant submits that such distinction sought to be drawn is non-existent. There is no prohibition or bar in Section 64(5) of the Act to suggest that in case supply from a Project is to more than two States, then the State Commission in respect of a particular supply would not have jurisdiction to determine tariff for supply to its Discom. The State Commission is reading something in Section 64(5) which does not exist, thereby resulting in misinterpretation of the provision. The governing factor of Section 64(5) is not the number of States but the **supply** to the State where Discom is located.
- 9.8** The reliance placed by State Commission on two Orders of the CERC in Petition No. 305/MP/2015 (Order dated 06.06.2018) and Petition No. 327/MP/2018 (Order dated 01.07.2019) is totally misplaced. In neither of the Orders, did the CERC hold that in case power is being supplied from the Project to more than two States, Section 64(5) cannot be invoked in respect of a particular supply to a Discom.

9.9 In view of the above, it is evident the sole objection raised by the State Commission as to jurisdiction is misconceived & based on misreading & misinterpretation of the provisions of the Act. The Appeal deserves to be allowed and the impugned Order of the State Commission refusing to determine tariff deserves to be set aside with a direction to the State Commission to determine the tariff for the supply of power as per its tariff regulations.

10. **Learned counsel, Mr. Parinay Deep Shaw, appearing for the Respondent Commission has filed his written submissions in the batch of Appeals for our consideration as follows :-**

10.1 The instant appeals have been filed by the Appellants challenging the Order dated 23.08.2017 passed by the Respondent No.1, Madhya Pradesh Electricity Regulatory Commission, in Petition No. 35 of 2016. The Petition No. 35 of 2016 was filed by the Respondent No. 2, Madhya Pradesh Power Management Company Ltd., which is the holding company of the three distribution licensees in the State of Madhya Pradesh. MPPMCL filed Petition No. 35 of 2016 with the following prayer:

“Approval of purchase of power including the price at which electricity shall be procured from PTC India Limited (PTC) by the Petitioner under the Power Sale Agreement dated 30.05.2005 (PSA) executed between the erstwhile MPSEB and PTC, which has been executed between the erstwhile MPSEB and PTC, which has been sourced from 300 MW Unit I of Lanco Amarkantak Power Limited (Lanco) under the Power Purchase Agreement dated 11.05.2005 (PPA) executed between PTC & Lanco, pursuant to a Settlement Agreement dated 16.09.2012 executed between the Petitioner and the Respondent herein.”

10.2 Vide the Impugned Order, the State Commission dismissed Petition No. 35 of 2016 and held as follows:

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(x) The scope of the functions of this Commission under Section 86 (1) (b) may not be equated with the functions of this Commission under the provisions of Section 62

of the Electricity Act 2003 for determination of tariff for a Generating Company on a regular/annual basis. Therefore, the contention of petitioner invoking Section 62 of the Electricity Act and seeking determination of tariff for the power project in the subject matter on annual basis for FY 2014 to 2019 in terms of CERC Tariff Regulations, 2014 is against the provisions of Electricity Act 2003, Clause 3 of the 'Settlement Agreement' and also beyond the jurisdiction of this Commission as held by the Hon'ble Tribunal for Electricity."

10.3 The Lanco is a power generating company operating a 600MW coal based Thermal Power Project in District Korba, Chhattisgarh. Lanco supplies power to the distribution licensees of three States, namely, Madhya Pradesh, Haryana and Chhattisgarh. There are two issues before this Hon'ble Tribunal:

- (i) Whether the State Commission or the Central Commission has the jurisdiction to determine the tariff of Lanco's Project?
- (ii) Whether the Order dated 21.10.2008 passed by the Hon'ble Tribunal in Appeal No. 71 of 2008, which held that the State Commission does not have any jurisdiction to determine Lanco's tariff, can be reviewed by way of the present

10.4 The Project is located in the State of Chhattisgarh. The Project supplies power to the States of Chhattisgarh, Haryana and Madhya Pradesh. Therefore, there is an inter-State generation and supply of power. The EA 2003 provides for determination of tariff by the Appropriate Commission, i.e., the Central Commission or the State Commission. In order to determine whether the jurisdiction vests with the Central Commission or the State Commissions, the test is to see whether generation and supply of power takes places inter-State or intra-State. As long as the generation and supply of power takes place, intra-State, it is the concerned State Commission that has the jurisdiction to determine tariff but the moment generation and supply of power takes place inter-

State, the Central Commission assumes jurisdiction. The relevant sections 62, 86 (1) (a) and 79 (1) (b) which deal with determination of tariff have been extracted below for reference:

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

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

...”

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

- (b) *To regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;”*

“86. Functions of State Commission-(1) *the State Commission shall discharge the following functions, namely:*

- (a) *Determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case maybe, within the State.*

***”

10.5 The Hon’ble Supreme Court of India, in the matter of *Energy Watchdog v. CERC & Ors*, in CA No. 5399-5400 of 2016 categorically held that in all cases of inter-State generation and supply of power, there exists a composite scheme and the jurisdiction is with the Central Commission.

The relevant extracts of the judgment are extracted below for reference:

“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the

appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.

23. This also follows from the dictionary meaning [(Mc-Graw-Hill Dictionary of Scientific and Technical Terms (6th Edition), and P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition)] of the expression "composite": (a) 'Composite'-"A re-recording consisting of at least two elements. A material that results when two or more materials, each having its own, usually different characteristics, are combined, giving useful properties for specific applications. Also known as composite material." (b) 'Composite character'-"A character that is produced by two or more characters one on top of the other." (c) 'Composite unit'-"A unit made of diverse elements. The aforesaid dictionary definitions lead to the conclusion that the expression "composite" only means "consisting of at least two elements". In the context of the present case, generation and sale being in more than one State, this could be referred to as "composite".

24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.

25. We must also hasten to add that the Appellant's argument that there must be commonality and uniformity in tariff for a "composite scheme" does not follow from the Section.

26. Another important facet of dealing with this argument is that the tariff policy dated 6th June, 2006 is the statutory policy which is enunciated Under Section 3 of the Electricity Act. The amendment of 28th January, 2016 throws considerable light on the expression "composite scheme", which has been defined for the first time as follows: 5.11 (j) Composite Scheme: Sub-section (b) of Section 79 of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State. Explanation: The composite scheme as specified Under Section 79(1) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such project is located.

27. That this definition is an important aid to the construction of Section 79(1) (b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been

relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante Clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

10.6 Therefore, in view of the express provisions in EA 2003 and the judgment in *Energy Watchdog*, it is abundantly clear that the instant case falls squarely within the definition of composite scheme and therefore, it is the Central Commission that has the requisite jurisdiction to determine tariff of Lanco's Project.

10.7 It is the contention of the Appellant that the supply of power to the State of Haryana is under a terminated PPA and on orders of the Hon'ble Supreme Court, therefore, the same must not be considered as supply of power within the EA 2003 and the State of Haryana must not be considered while taking into account the number of States to which power is supplied from the Project. It is submitted that the Appellant has for the first time, at the Appellate state, put documents on record which constitute facts. These facts were never brought to the notice of the State Commission and the State Commission never had the opportunity to deliberate upon its jurisdiction on the basis of these facts. In any event, whether or not the Project supplies power to the State of Haryana on account of directions of the Hon'ble Supreme Court or under a terminated PPA (which is still under adjudication), the admitted fact is that the Appellant supplies power to three States, Haryana, Madhya Pradesh and Chhattisgarh and is paid tariff by the Discoms of each of

these States for such supply of power. Therefore, supply of power from the Project to Madhya Pradesh, Haryana and Chhattisgarh constitutes inter-State supply of power involving territories of three States and is a composite scheme under EA 2003.

10.8 The Tribunal vide its Order dated 21.10.2008 in Appeal No. 71 of 2008 held that the State Commission cannot determine the generation tariff of the Project as exercising such a power would be against Section 62 and 86 (1) (a) of EA 2003. This Hon'ble Tribunal reasoned that the State Commission cannot determine the generation tariff of the Project as exercising of such a power would be against Sections 62 and 86(1)(a) of EA 2003. The Hon'ble Tribunal relying on the judgment of *Gajendra Haldea v/s. Central Electricity Regulatory Commission & Others* held that since in the present case, power is supplied from the Appellant to a power trading company, i.e. PTC which has been granted its license to trade in electricity by CERC, the State Commission is not empowered to determine tariff. Relevant extracts of Order dated 21.10.2008 are as under:

"7. This Tribunal has already gone into the issue in the case of Gajendra Haldea Vs. Central Electricity Regulatory Commission & Others in Petition No.1 of 2005 reported in 2008 Energy Law Reporter (APTEL 203). This Tribunal went into the interpretation of Section 62 of the Act which is as under:

Section 62.....

8. Issue before the Tribunal as framed in that judgment was as under:

9. The issue is whether the Electricity Regulatory Commissions can fix tariff for sale of electricity by;

(i) a generator to a trader or intermediary, (ii) a distributor to a trader and (iii) by a trader to any other person."

9. The Tribunal interpreting Section 62 held as under:

26. Thus, we cannot alter the provisions of Section 62(1) of the Act by a process of interpretation requiring the Appropriate Commission to determine the tariff

for supply of electricity by a generator to an intermediary or to a trader or supply of electricity by a distributor to a trader or supply of electricity by a trader to any other person, especially when it is not stated in Section 62(1) of the Act that the Appropriate Commission shall determine tariff for supply of electricity by a generator to a trader or an intermediary etc. rather what is stated is that the Appropriate Commission shall determine tariff for supply of electricity by a generator to a distributor. We cannot rewrite the provisions. The clear language employed in the statute is the determinative factor of the legislative intent.”

*15. The basic provision for determination of tariff is given in Section 62. So far as the question of tariff is concerned, Section 62 has to be read as the principal provision and the other provisions have to be read as supportive provisions. Sections 62, 79 & 86 have to be read harmoniously. **Just as clauses (a) & (b) of sections 79 & 86 could not empower the Commissions to determine tariff for sale by a Generator to a trader, clause (f) of Sections 79 & 86 cannot empower the Commissions in this regard.”(Emphasis supplied)***

Therefore, the Hon’ble Tribunal vide its Order dated 21.10.2008, has clearly held that the State Commission does not have jurisdiction under Section 62 of EA 2003 to determine tariff for the Project. The State Commission has relied on the Order dated 21.10.2008 to hold that it does not have the jurisdiction to determine the tariff of Lanco’s Project.

10.9 Subsequent to the Order dated 21.10.2008 Lanco, PTC and MPPCL signed a Settlement Agreement dated 16.10.2012. At the time the Settlement Agreement was signed amongst the three parties, appeals against the Order dated 21.10.2008 filed by PTC (Respondent No. 3 herein), MPPMCL and the State Commission were pending before the Hon’ble Supreme Court. At the same time, Petition No. 78 of 2012 filed by MPPMCL was also pending before the State Commission for approval of power procurement process under Section 86 (1) (b) of EA 2003. Since the appeals were pending before the Hon’ble Supreme Court (these appeals were subsequently disposed of, pursuant to signing of the Settlement Agreement, and Order dated 21.10.2008 passed by the Hon’ble Tribunal therefore attained finality. It is the case of the Appellant that consequent to signing the Settlement Agreement,

the PPA and PSA signed between Lanco and PTC, and PTC and MPPMCL respectively have become back to back arrangements and therefore, the reasoning of the Hon'ble Tribunal in Appeal No. 71 of 2008 no more stands good. The State Commission has not examined the issue in passing its Order in Petition No. 78 of 2012. In light of the same, the Hon'ble Tribunal may if it deems necessary revisit its Order passed in Appeal No. 71 of 2008 and pass appropriate direc

10.10 One of the contentions of the Appellants is that the State Commission ought to have determined the tariff under Section 64 (5) of EA 2003. Section 64 (5) has been extracted below for reference:

"64. Procedure for tariff order-

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor."

10.11 It is submitted that Lanco, PTC and MPPMCL never approached the State Commission under Section 64 (5) of EA 2003 for determination of tariff. Therefore, State Commission never had the chance to determine whether or not it has the jurisdiction under Section 64 (5) to determine the tariff of the Project. The issue of jurisdiction under Section 64 (5) has been raised for the first time only at the appellate stage. The issue of jurisdiction under Section 64 (5) is a mixed question of law and fact. Firstly, the parties have to agree and approach the State Commission by making a joint application under Section 64 (5). Thereafter, it has to be determined whether or not the parties have a back to back arrangement. Therefore, in the event Hon'ble Tribunal permits the parties to approach the State Commission under 64 (5), the question of jurisdiction may be

left open. In the event the Hon'ble Tribunal determines the issue of jurisdiction under Section 64 (5), the State Commission humbly submits the following to aid the Hon'ble Tribunal in determining the issue.

10.12The essential ingredients of Section 64 (5) are as follows:

- There must be an inter-State supply, transmission or wheeling of electricity
- Such supply, transmission or wheeling of electricity must involve territories of two States only.
- The parties can jointly make an application to the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity.

10.13The Central Commission has taken the view that in the event the power from a generating station is supplied to territories of more than two States, Section 64 (5) is not applicable and the jurisdiction is only of the Central Commission. The Central Commission, in two separate Orders dated 06.06.2018 in Petition No. 305/MP/2015 in *Adhunik Power and Natural Resources Ltd. v. West Bengal State Electricity Distribution Company Ltd. & Ors.* and Order dated 01.07.2019 in Petition No. 327/MP/2018 in *Dhariwal Infrastructure Ltd. v. TANGEDCO* has held that parties can approach the State Commission, in case of composite scheme, under section 64 (5), only when generation and sale of power is in **two** States only *and not when it involves territories of 3 or more States.*

10.14The Section 64 (5) is abundantly clear in its wordings and a literal interpretation of the provision leads to the understanding, that there must necessarily be an inter-State supply of power and that such inter-State supply of power must involve territories of two States. The Hon'ble

Supreme Court in the case of *Bombay Dyeing & Manufacturing v. Bombay Environmental Action Group & Ors.* Passed on 07.03.2006, held that the golden rule of interpretation is that unless the literal rule of interpretation leads to absurdity or anomaly, the principles of literal interpretation must be adhered to. In the case of *B. Premanand and Ors. vs. Mohan Koikal and Ors.* (16.03.2011), the Hon'ble Supreme Court has held that

"16. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB v. Securities and Exchange Board, India AIR 2004 SC 4219. As held in Prakash Nath Khanna v. C.I.T. 2004 (9) SCC 686, the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect or an omission in the words used by the legislature, the Court cannot correct or make up the deficiency, vide Delhi Financial Corporation v. Rajiv Anand 2004 (11) SCC 625. Where the legislative intent is clear from the language, the Court should give effect to it, vide Government of Andhra Pradesh v. Road Rollers Owners Welfare Association 2004(6) SCC 210, and the Court should not seek to amend the law in the garb of interpretation."

10.15 Therefore, Section 64 (5) ought to be literally construed the terms "*inter-State*" and "*involving the territories of two States*" must be given their due importance. Provision 64(5) begins with the phrase "*the tariff for any inter State supply*" and the scope of the provision is limited by the phrase "*involving the territories of two States*". If the interpretation of the Appellant is to be accepted and parties are given the liberty to approach the State Commissions in all cases of *inter-State supply* by filing a joint application, then this will render the words "*involving the territories of two States*" as redundant and meaningless. This cannot be the intent of the legislature and this such a forced interpretation cannot be given to the

provision which renders its words meaningless. The Supreme Court in (2005) 10 SCC437, has held in the *State of Jharkhand and Ors. Vs. Govind Singh* as under:-

*“... As a consequence, as construction which requires for its support addition or substitution of words or **which results in rejection of words as meaningless has to be avoided**. As was noted by the Privy Council in *Crawford v. Spooner* (1846) 6 Moore PC1: “We cannot aid the Legislature’s defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there”. The view was reiterated by this Court in *State of Madhya Pradesh v. G.S. Dall and Flour Mills* (AIR 1991 SC 772), and *State of Gujarat v. Dilipbhai Nathjibhai Patel* (JT 1998(2) SC 253). Speaking briefly the Court cannot reframe the legislation, as noted in *J.P. Bansal’s case* (supra), for the very good reason that it has no power to legislate.”*

At page 5, para c, the Hon’ble Supreme Court has noted that *“Where, therefore, the “language” is clear, the intention of the legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been said. **A construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided**, unless it is covered by the rule of exception, including that of necessity, which is not the case here. (See: *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests* (AIR 1990 SC 1747 at p. 1752); *Shyam Kishori Devi v. Patna Municipal Corpn.* (AIR 1966 SC 1678 at p. 1682); *A.R. Antulay v. Ramdas Srinivas Nayak* (1984 (2) SCC 500, at pp. 518, 519)]. Indeed, the Court cannot reframe the legislation as it has no power to legislate. [See *State of Kerala v. Mathai Verghese* (1986 (4) SCC 746, at p. 749); *Union of India v. Deoki Nandan Aggarwal* (AIR 1992 SC 96 at p.101)”*

10.16 The language of Section 64(5) may be contrasted with the language used in Section 79(1)(b) which is *“have a composite scheme for generation and sale of electricity in more than one State”*. The legislature has naturally deliberately used the phrase *“more than one State”* in

provision 79(1)(b) to encompass all cases of interstate generation and sale of electricity. Obviously, the legislature has used the phrase “*involving the territories of two States*” in Section 64(5) with the intent of limiting the scope of the provision to only those interstate supply of electricity where territories of two States are involved. If the intention of the legislature was to cover all cases of interstate supply in Section 64(5) it would have used the phrase “*more than one State*” in Section 64(5), but it deliberately chose not to do so.

10.17The contention of the Appellants that it would be ideal if the State Commission and not the Central Commission determined tariff of the distribution licensee in its State since the consumers of that State will pay the tariff, is contrary to the concept of “composite scheme” in the Act. The exception to the jurisdiction of the Central Commission in cases of interstate supply is in Section 64(5) but limited in scope to the involvement of territories two states. Such preconceived notions of ideological structures as propounded by the Appellant ought to be avoided as has been held by the Supreme Court in *Govind Singh* matter (supra) as extracted below:

“In Dr. R. Venkatchalam and Ors. etc. v. Dy. Transport Commissioner and Ors. etc. (AIR 1977 SC 842), it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.”

10.18Not only will the interpretation of the Appellants be against the principles of literal interpretation, this will also defeat the objective of EA 2003, which does not envisage concurrent jurisdiction of the Central Commission and the State Commission over the same Project. If the interpretation propounded by the Appellant is taken to be correct then while parties may agree to approach State Commission in case of one

interstate transaction but the parties may approach the Central Commission in another interstate transaction for the same project. This will lead to absurdity of concurrent jurisdiction of either two State Commissions or of Central Commissions alongside jurisdiction of one or more State Commissions. This cannot be the legislative intent of the Act. If the interpretation of Section 64(5) propounded by the Appellants is accepted, in one stroke there would be chaos in the whole country relating to jurisdiction over interstate supply of electricity. It is submitted that EA 2003, provides for the jurisdiction of Appropriate Commission to determine tariff under Section 86 (1) (b) and 79 (1) (a) and (b). The parties approach either of the two Commissions, depending on whether the generation of supply is intra-State or inter-State. This is also the reason why the CERC Tariff Regulations provide for determination of tariff of a Project and not unit. In fact the word unit is nowhere mentioned in the EA 2003. Now, if we were to read Section 64 (5), firstly under the principles of literal interpretation and secondly to continue with the framework of EA 2003 which does not provide for concurrent jurisdiction in determination of tariff of any generating station, the following can be concluded:

- i. There must be an inter-State supply of power
- ii. Such supply of power must be limited to two-States. i.e. generation in one State and its supply to the other.

10.19The Electricity Act, 2003 provides for jurisdiction of the Central Commission or the State Commission with respect to the complete Project with all its units and not the individual units. Section 79 (1) (b) provides that the Central Commissions shall regulate the tariff of '*generating companies*'. Section 2 (28) defines a '*generating company*', "*any company or body corporate or association or body of individuals,*

*whether incorporated or not, or artificial judicial person, which owns or operates or maintains a **generating station.***” It is submitted that the in determining tariff of a project, various components which constitute the capital expenditure of the Project are taken into consideration. It would be appropriate if only one Commission, be it one State Commission or the Central Commission exercised the jurisdiction to determine the costs incurred under each component and determine the tariff for any power project.

10.20A statute must be read as a whole. Therefore, the provisions of 64 (5) must be read along with the other provisions of EA 2003 to be in conformity with the overall scheme of the EA 2003. The purpose of 64 (5) seems to be to give jurisdiction to a State Commission in the event it is the only State where power is supplied from a generating Station of another State.

10.21It is the contention of the Appellant that the State Commission has already determined tariff in its Order dated 01.12.2012 passed in Petition No. 78 of 2012. It is submitted that during the adjudication of Petition No. 78 of 2012, the appeals filed by the State Commission, PTC and MPPMCL against the order dated 06.05.2008 in Appeal No. 71 of 2008, was pending. Furthermore, the State Commission exercised its jurisdiction only under Section 86 (1) (b) and not under Section 62. As has been mentioned before, these appeals were subsequently disposed of, since the parties (Lanco, PTC and MPPMCL) had arrived at a settlement, and the Hon’ble Supreme Court had left the question of law open. Moreover, the State Commission, vide Order dated 01.12.2012, accorded approval to the process of power procurement under the Settlement Agreement and the Implementation Mechanism for PSA. The

State Commission further determined the Annual Fixed Cost and the Energy Charges for the FY 2012-13. It is submitted that these determinations were only indicative in nature. With respect to the issue of fixing the price at which electricity was to be procured by the Appellant, the capital cost of INR 1236.40 Crores, which was mentioned/quantified and agreed to between the parties in the Settlement Agreement, was examined by the State Commission in light of the documents placed before it. On the basis of the aforesaid details and documents, the State Commission conducted prudence check and found the capital cost to be in order. The breakup of the same has been detailed in the Order dated 01.12.2012. This indicative determination of Capacity Charges and Energy Charges was to indicate clarity based on the aforesaid capital cost and to enable the parties to rely upon in the event they approach the appropriate forum for determination of tariff. The State Commission has reiterated its directions passed in order dated 01.12.2012

in the Impugned Order.

10.22The Tribunal may take into consideration these submissions made by the State Commission in adjudicating the instant appeal.

11. We have heard learned counsel appearing for the Appellants and the learned Counsel appearing for the Respondent Commission at considerable length of time and gone through their written submissions carefully and after thorough critical evaluation of the relevant material available on records, the issue that arises in the appeals for our consideration is as follows:-

- Whether in the facts and circumstances of the case, the Respondent Commission was justified in refusing the

determination of tariff at which the DISCOMs would procure powers from the generator.

12. Our Consideration& Findings:-

12.1 The learned counsel for the Appellants outrightly submitted that all the three parties i.e. the generator (LANCO), the trader (PTC) and DISCOM (through MPPMCL– a holding company of State Discoms) have challenged the impugned order and the State Commission is the only contesting party in the present set of appeals. Learned counsel for the Appellants were quick to submit that by the impugned order, the State Commission has refused to determine tariff for supply of electricity from generators's 300 MW unit to MPPMCL under the PPA between the LANCO and the PTC and PSA between PTC & MPPMCL. Learned counsel vehemently submitted that the State Commission in its earlier order dated 01.12.2012 had approved the above stated power procurement process along with the agreements for procurement of power from LANCO 300 MW unit to PTC for onward supply to MPPMCL for a period of 25 years from date of commencement of power supply and had fixed the power procurement price for FY 2012-13 after prudence check of the capital cost of the 300 MW unit.

12.2 Learned counsel for the Appellants further submitted that the instant appeals are in furtherance of the Order dated 01.12.2012 in Petition No.78 of 2012 vide which the State Commission had accorded approval to the process of procurement of power and in the process has determined the annual fixed cost and the energy charges as per relevant provision of CERC (Terms & Condition for determination of Tariff) Regulations, 2009. Learned counsel brought out that the exercise carried out by the State Commission was envisaged under the settlement agreement and implementation mechanism filed by the

parties under Section 86 (1) (b) of the Electricity Act, 2003 and the annual fixed cost was determined as Rs.314.05 crores for the financial year 2012-13. With the issuance of the CERC Tariff Regulation, 2014 which came into force on 01.04.2014 and that remained in force for a period of five years up to 31.03.2019, the Appellants had filed the Petition No.35 of 2016 under Section 86 (1) (b) read with Section 61 & 62 of the Electricity Act for fixation of annual fixed cost and energy charges for the FY 2014 to 2019.

12.3 Learned counsel for the Appellants contended that by virtue of impugned order dated. 23.08.2017 passed in petition no. 35 of 2016, the Commission after discussing the entire litigation history in the said matter and the various order passed by it in petition no. 78 of 2012 held that scope of function of the State Commission under Section 86 (1) (b) cannot be equated with the functions of the Commission under Section 62 of the Act for determination of tariff of the generating company on a regular annual basis. The State Commission further indicated that once the Commission has approved the power procurement process under section 86 (1) (b) by virtue of the order dated 01.12.2012 passed in Petition no.78 of 2012 thereafter nothing further is required by the Commission for determination of tariff under Section 62 for the next control period of FY 2014-19. Being aggrieved by the impugned order dtd. 23.08.2017, a review petition no.67 of 2017 was filed under Section 94 of the Act for review of the order. However, the State Commission vide its order dated 25.04.2018 dismissed the Review Petition without even issuing any notice and in a most summarily and perfunctory manner. Learned counsel for the Appellants alleged that in fact the Commission failed to appreciate that if the Power Purchase cost is examined for which tariff determination is sought, it will be seen that the

tariff is continuously reducing and the fixed charge also are on continuously reduction basis and thus a very cheap power will be available to the consumers of the State of the Madhya Pradesh for utilisation on a long term basis and hence it is in public interest that the tariff be determined in accordance with the CERC Regulations for the period 2014-19.

12.4To substantiate their contentions, the learned counsel for the generator, the trader and the DISCOMs have placed reliance on the Section 64 (5) of the Electricity Act. It stipulates that if the parties so desire (as in present case), the State Commission has jurisdiction to determine tariff notwithstanding anything contained in Part X of the Electricity Act which includes Section 79 and, therefore, composite scheme, to determine the tariff of the generating unit. Learned Counsel vehemently submitted that Section 64(5) begins with a non-obstante clause and overrides specifically Part X (which contains Section 79(1)(b)). Section 64(5) is a special provision and preserves jurisdiction of State Commission over the Discoms of that State who are purchasing power even from the generators who have otherwise composite scheme, which jurisdiction otherwise is vested with the CERC. Section 64(5) is a special provision whereas Section 79(1)(b) is a general provision. A special provision prevails over a general one even within the same statute. Section 64(5) is squarely attracted in the present case inasmuch as all three parties want the State Commission to determine tariff for supply of power from Lanco to MPPMCL through PTC.

12.5Learned counsel for the Appellants submitted that the arguments of the State Commission is entirely in contrast with the expression "*more than one state*" appearing in Section 79(1)(b) while comparing with the expression "*involving the territories of two states*". It is the contentions

of the Appellants that such distinction sought to be drawn by the State Commission is completely non-existent. In fact, there is no prohibition or bar in Section 64(5) of the Act to suggest that in case supply from a project is to more than two States, then the State Commission in respect of a particular supply could not have jurisdiction to determine tariff for supply to its Discom. Learned counsels pointed out that the State Commission is reading something in Section 64(5) which does not exist, thereby resulting in misinterpretation of the provision. The governing factor of Section 64(5) is not the number of states but the supply to the state where Discom is located. To strengthen their submissions, learned counsel for the Appellants also relied upon the judgment of the Hon'ble Supreme Court in Energy Watchdog case (Supra) wherein the definition of the composite scheme has been elucidated and a clear distinction drawn between the Section 64(5) and Section 79(1)(b) of the Electricity Act. Learned counsel also emphasised that the tariff for supply of home state share of power to Chhattisgarh is being determined by the State Regulatory Commission of Chhattisgarh in terms of the provisions of the tariff policy of Section 3 of Electricity Act.

12.6 Learned counsel for the appellants highlighted that in view of the above, it is evident that the sole objection raised by the State Commission as per jurisdiction is misconceived and is based on the misinterpretation of the provisions of the Act. The appeals, therefore, deserve to be allowed and the impugned order of the State Commission deserves to be set aside with a direction to determine the tariff for the supply of power as per prevalent tariff regulations.

12.7 *Per contra*, Learned Counsel for the State Commission contended that the project is located in the State of Chhattisgarh and supplies power to

the States of Haryana, Madhya Pradesh & Chhattisgarh. Therefore, there is an inter-state generation and supply of power. He further submitted that the Electricity Act, 2003 provides for determination of tariff by the Appropriate Commission as per their jurisdiction. In order to determine whether the jurisdiction vests in Central Commission or the State Commission, the test is to see whether generation and supply of power takes places in inter-State or intra- State. Learned counsel was quick to submit that as long as generation of power takes place intra-state, it is the concerned State Commission that has the jurisdiction to determine tariff and for the moment generation of power supply takes place inter-State, the Central Commission assumes jurisdiction. In fact, the State Commission exercises its jurisdiction only under Section 86 (1) (b) and not under Section 62. As has been mentioned before, these appeals were subsequently disposed of, since the parties (Lanco, PTC and MPPMCL) had arrived at a settlement, and the Hon'ble Supreme Court had left the question of law open. Moreover, the State Commission, vide Order dated 01.12.2012, accorded approval to the process of power procurement under the Settlement Agreement and the Implementation Mechanism for PSA.

- 12.8** Learned Counsel for the State Commission further submitted that it is a case of composite scheme for generation and sale of electricity in more than one state namely Madhya Pradesh, Haryana & Chhattisgarh and therefore in terms of Section 79(1)(b) of the Act as interpreted based on the Hon'ble Supreme Court in Energy Watchdog case, the CERC alone would have jurisdiction to determine tariff for supply to Madhya Pradesh. Learned counsel further contended that Section 64(5) uses the expression '*involving the territories of two states*' suggest that if supply is to more than two States then Section 64(5) is not attracted. To

substantiate his argument, learned counsel for the State Commission placed reliance on two orders of CERC namely order dated 06.06.2018 and order dated 01.07.2019. Learned counsel further made reference to the order dated 21.10.2008 passed by this Tribunal in Appeal No.71 of 2008 which held that the State Commission does not have any jurisdiction to determine LANCO's tariff. He further submitted that the above order of the Tribunal cannot be reviewed by way of the present proceedings. To be more precise, this Tribunal had held that the State Commission cannot determine the generation tariff of the project as exercising such a power would be against Section 62 & 86 (1)(a) of the Electricity Act. The Tribunal while passing the order dated 21.10.2008 also relied upon the judgment in the case of *Gajendra Haldea v/s. Central Electricity Regulatory Commission & Others*.

12.9 Learned counsel for the Commission highlighted that the State Commission does not have the jurisdiction to determine the tariff under Section 64(5) of the Act as has been contended by the Appellants. He submitted that LANCO/PTC/MPPMCL never approached the State Commission under Section 64(5) of the Act for determination of tariff. Therefore, the State Commission never had the chance to determine whether or not it has the jurisdiction under section 64 (5) to determine the tariff of the project. Hence, the issue of jurisdiction under section 64(5) is a mixed question of law and at first a party has to agree and approach the State Commission by making a joint application under section 64(5). Thereafter, it has to be determined whether or not the parties have a back to back arrangement. Learned counsel also indicated that in the event, this Tribunal permits the party to approach the State Commission under section 64(5), the question of jurisdiction may be left open. However, in the event, this Tribunal determines the issue of jurisdiction under section

64(5), the essential ingredients of Section 64(5) have to be considered as under:-

- a) There must be an inter-State supply, transmission or wheeling of electricity
- b) Such supply, transmission or wheeling of electricity must involve territories of two States only.
- c) The parties can jointly make an application to the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity.

12.10 Learned counsel for the State Commission further submitted that the contentions of the Appellant that it would be ideal if the State Commission and not the Central Commission determines the tariff of the distribution licensee in its state that the consumer of the state will pay the tariff is contrary to the concept of the composite scheme in the Act. Exception to the jurisdiction of the Central Commission in cases of interstate supply is in Section 64(5) but limited to the scope of the territories of the two states. Hence, the pre-conceived notion of ideological structures as propounded by the Appellants ought to be avoided as has been held by the Supreme Court in *Govind Singh* matter as stated below:-

“In Dr. R. Venkatchalam and Ors. etc. v. Dy. Transport Commissioner and Ors. etc. (AIR 1977 SC 842), it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.”

12.11 While summing up his submissions, learned counsel for the Commission emphasised that the Electricity Act, 2003 provides for jurisdiction of the

Central Commission or the State Commission with respect to the complete project with all its units and not the individual unit. Further, Section 2 (28) defines the generating company. Accordingly, in determining tariff of the project, various components which constitute the capital expenditure of the project are taken into consideration and hence it would be appropriate if only one Commission be it State Commission or the Central Commission exercise the jurisdiction to determine the cost incurred under such component and determine the tariff for any power project. The learned counsel for the State Commission accordingly reiterated that being the case of inter-State generation and supply, the Central Commission alone would have jurisdiction in determining the tariff of the generating stations.

OUR FINDINGS:

12.12We have carefully considered the submissions of the Appellants as well as the State Commission and also taken note of various judgments relied upon by the parties. The primary dispute brought out in the Appeals is relating to the refusal of the State Commission to determine the tariff for the supply of power to the State Discoms of Madhya Pradesh. It is the contentions of the Appellants that all parties involved in the litigation namely generator, the trader and the Discoms unanimously intend to get tariff determined by the State Commission under Section 64(5) of the Electricity Act. On the other hand, the State Commission has taken a stand that as the generation and supply of power relates to more than one state, the State Commission cannot have jurisdiction to determine the tariff at which power would be procured by the State Discoms and instead, the Central Commission alone would have jurisdiction in this regard.

12.13The other contention of the Appellants is that the State Commission in its earlier order dtd. 01.12.2012 had approved the power procurement process along with the agreements for procurement of power from the LANCO's 300 MW power unit to PTC for onward supply to MPPMCL for a period of 25 years from the date of commencement of power supply and had fixed the power procurement price of FY 2012-13 after prudence check of the capital cost etc. However, on the other hand, the State Commission submitted that it exercises its jurisdiction only under Section 86 1(b) and not under Section 62. Learned counsel for the State Commission also submitted that the Commission had determined the annual fixed cost and the energy charges for the FY 2012-13 and these determinations were only indicative in nature. It is relevant to note that the State Commission while refusing the determination of tariff for procurement of power by the State DISCOMS, has brought out a number of judgments of the apex court, this Tribunal and some orders of the Central Commission relating to the jurisdiction. In this regard, it is pertinent to mention that after the test relating to jurisdiction being ruled by the Hon'ble Supreme Court in Energy Watchdog case, not much remains to be interpreted. The Section 64(5) of the Act is reproduced for ready reference as under:-

“64 (5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor”.

12.14As per the judicial ruling laid down by the Hon'ble Supreme Court, while the tariff for inter-State supply in more than one state is to be regulated by the Central Commission under Section 79 of the Act, their lordships have also elucidated the provisions under section 64(5) of the Act which

begins with a non-obstante clause and overrides specifically Part X of the Act which contains Section 79 (1)(b) etc.. The relevant extract of the aforesaid judgment of the Hon'ble Supreme Court is reproduced below:-

“27. That this definition is an important aid to the construction of Section 79(1) (b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante Clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

12.15It would thus appear that the Section 64 (5) is a special provision in the nature of exception and deserves jurisdiction of the State Commission over the distribution licensee of the state who are purchasing power from the generators who otherwise have composite scheme of which jurisdiction otherwise is vested with CERC under Section 79(1)(b). In other words Section 64(5) is a special provision whereas Section 79(1)(b) is a general provision. A special provision prevails over a general one even within the same statute. We accordingly find that Section 64(5) is squarely attracted in the present case in as much as all three parties want the State Commission to determine the tariff for supply of power from LANCO to MPPMCL through PTC. It is also relevant to note that for the home state share from LANCO's project, the Chhattisgarh State Regulatory Commission is exercising its jurisdiction for fixation of tariff since the inception of the generation project. We

notice from the records placed before us that in the present case, LANCO is supplying power to Haryana from its other 300 MW unit on ad-hoc interim basis based on the Hon'ble Supreme Court interim order dtd. 16.12.2011 and not under a long term PPA. For this supply too, Haryana Electricity Regulatory Commission is determining the tariff as per the order of the Hon'ble Supreme Court. These facts further supports the case of Appellants .

12.16 We do not agree with the contentions of the State Commission that the capital cost and tariff as determined by order dated 01.12.2012 passed in Petition No.78 of 2012 were only indicative in nature. In fact, the capital cost of Rs. 1236.40 crores which was quantified and agreed to between the parties in the Settlement Agreement was duly examined by the State Commission in light of the documents placed before it. On the basis of the requisite details and documents, the state commission conducted prudence check and found the capital cost to be in order and based on the same, the fixed cost and energy charge was determined by the Commission. Keeping in view the aforesaid submissions of all the parties and having regard to interpretation of various sections in various judgments of this Tribunal and the apex court, we are of the opinion that the State Commission was not justified in refusing the determination of tariff at which StateDiscom was to procure power for supply to its consumers. Needless to mention that the power supply from the reference unit of LANCO power station to MP Discoms is at one of the cheapest rates and is likely to gradually reduce in future. It would accordingly be in the interest of the consumers that the State Commission determines the tariff for the power supply to be procured by the StateDiscoms from the LANCO's unit.

12.17In view of the above , we are of the considered opinion that the State Commission was not justified in refusing the determination of tariff for supply of power to State Discoms from the Lanco's unit. Hence, the impugned order is liable for setting aside.

ORDER

For the foregoing reasons stated supra, we are of the considered view that the issues raised in the instant Appeals Nos. 327 of 2018, 337 of 2018 and 51 of 2019 have merits and hence the Appeals are allowed. The impugned orders dated 23.08.2017 passed by Madhya Pradesh Electricity Regulatory Commission in Petition No. 35 of 2016 and order dated 25.4.2018 in Review Petition No. 66 of 2017 are hereby set aside to the extent challenged in the Appeals and our findings indicated above.

The State Commission is directed to determine the tariff and pass the consequential orders as expeditiously as possible in a period of three months from the date of pronouncement of this judgment /order.

In view of the disposal of the Batch of Appeals, the reliefs sought in the pending IAs do not survive for consideration and accordingly stand disposed of.

No order as to costs.

Pronounced in the Virtual Court on this **19th day of August, 2020.**

(S.D. Dubey)
Technical Member

(Justice ManjulaChellur)
Chairperson

REPORTABLE / NON-REPORTABLE

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