IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO.97 OF 2020 &
IA NO.416 OF 2020

Dated: 05th OCTOBER, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

Karnataka Power Transmission Corporation Limited
Regd Office: Kaveri Bhavan
K. G. Road
Bengaluru-560009, Karnataka
Represented herein by its Financial Advisor
(Regulatory Affairs) … Appellant

Versus

Karnataka Electricity Regulatory Commission
16, C-1, Millers Tank Bed Area,
Vasanth Nagar,
Bengaluru 560 052, Karnataka
Through herein by its Secretary … Respondent

Counsel for the Appellant(s): Mr. Ramji Srinivasan, Sr. Adv.
Mr. Sriranga Subbanna
Ms. Sumana Naganand
Ms. Medha M. Puranik
Mr. Shikhar Singh
Ms. Deepthi C R

Counsel for the Respondent(s):Mr. Basava Prabhu S. Patil, Sr. Adv.
Mr. Anand Sanjay M. Nuli
Mr. Suraj Kaushik
Mr. Geet Ahuja for R-1/KERC

Mr. Arunav Patnaik
Mr. Shikhar Saha
Ms. Mahima Sinha
for Distribution Company/Impleader
(BESCOM, GESCOM, HESCOM &
MESCOM)

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. A claim of the procurer, staked in 2002, for the "*carrying cost*" in relation to additional power purchase expenditure incurred in terms of arbitral decision and directed to be allowed as "*pass through*" has not been permitted to attain closure till date notwithstanding several rounds of proceedings before the electricity regulatory commission and at least three rounds of appellate scrutiny endorsing the said claim. More than the extraordinary delay that has occurred in the fruits of the judicial process reaching the hands of the party whose claim was upheld, the cause of concern arising from the present appeal is the recalcitrant attitude of the regulatory authority in abiding by hierarchical judicial discipline.

2. Karnataka Power Transmission Corporation Limited (hereinafter referred to variously as "the appellant" or "KPTCL" or "the procurer") has preferred the appeal at hand being

aggrieved by order dated 16.01.2020 passed (in case no. N/07/08) by the Karnataka Electricity Regulatory Commission (hereinafter referred to variously as “the Commission” or “the State Commission” or “KERC” or “the respondent”), the grievance raised being that the KERC has erroneously held that the appellant is having a net surplus of Rs 314.47 crores based on the revised Annual Revenue Requirement (ARR) for the period Financial Year (FY) 2001 to FY 2007 in terms of the order dated 9.05.2008 of this tribunal passed in Appeal No 9/2008, the Commission statedly having conducted third true-up of ARR for the period FY 01 to FY 06 which had been specifically forbidden by this tribunal, and in the process also having disallowed “carrying cost” on the *Tanir Bhavi* (power project) power purchase expenditure which had been specifically allowed in previous decision of this tribunal.

3. Though the appeal was filed impleading only the State Commission as the sole respondent, upon requests being made, the Distribution licencees operating in State of Karnataka – Bangalore Electricity Supply Company Limited (BESCOM), Mangalore Electricity Supply Company Limited (MESCOM), Gulbarga Electricity Supply Company Limited (GESCOM) & Hubli Electricity Supply Company Limited (HESCOM),

hereinafter collectively referred to as “the Discoms” – were allowed to participate at the hearing in support of the impugned decision, they feeling concerned because of the possible ripple effect on tariff should the claim of the appellant be allowed.

4. Having regard to the averments, material presented and the submissions made at the final hearing on this appeal, it has emerged that most of the background facts leading to the dispute that has plagued the relationship between the parties over almost two decades now are undisputed, the resolution to the controversy being primarily dependent on legal principles. It would be profitable to set out the common territory at this stage.

UNDISPUTED BACKGROUND FACTS

5. The appellant is a company established in furtherance of Section 13 of the Karnataka Electricity Reforms law with the principal objects of engaging in the business of purchase, transmission, sale and supply of electrical energy in the State of Karnataka after the erstwhile Karnataka Electricity Board (KEB) was disbanded in keeping with the Karnataka Electricity Reform (Transfer Scheme) Rules, 1999. It is stated that at that point of time it undertook the activities of both transmission, distribution and supply of electricity in the State. With the unbundling of the

electricity sector, there was a bifurcation of the activities of transmission and distribution of electricity in the State. The appellant has continued to function as a deemed transmission licensee in terms of Section 14 of the Electricity Act, 2003.

6. The Karnataka Electricity Board, or the KEB, (the predecessor-in-interest of the appellant) and a generating company named Tanir Bhavi Corporation Ltd., (hereinafter referred to variously as "*Tanir Bhavi*" or "the Genco"), had entered into a Power Purchase Agreement (hereinafter referred to as "the PPA") on 15.12.1997 for sale and purchase of energy. Tanir Bhavi had agreed to establish and operate a generating station and sell electricity to the appellant at the agreed tariff and on the terms and conditions of PPA. Article 7 of the said PPA dealt with payment of fixed charges and variable charges payable to Tanir Bhavi.

7. With the enactment of the Electricity Act 2003, the task of distributing electricity in designated areas was assigned to different electricity supply companies (Discoms). By virtue of Section 131 of the Electricity Act, 2003 all the assets and liabilities of the KPTCL insofar as they pertained to distribution and supply of electricity, were passed on to the respective

Discoms, vesting in them all activities pertaining to distribution of electricity under the Statutory Transfer Scheme.

8. Disputes arose, in 2001, between the appellant and Tanir Bhavi on the issue as to whether fixed charge payable by the appellant to Tanir Bhavi in terms of Clause 7.3 of PPA is at the fixed rate of US$ 0.04 per kWh as claimed by Tanir Bhavi or it is based on actuals subject to maximum of US$ 0.04 as contended by the appellant. The Government of Karnataka ("State Government" or "GoK"), by its order dated 01.12.2001, decided that the appellant should pay fixed charges to Tanir Bhavi at US$0.04 per kWh.

9. The appellant had approached the KERC for approval of ARR for the financial year 2001-02 and 2002-03 on 15.2.2002. On 08.05.2002, the KERC while approving the ARR and determining the tariff for the year 2002-03 inhibited the appellant from taking any further action on the claims of Tanir Bhavi without following the dispute resolution mechanism (arbitration) stipulated in the PPA directing that such course of judicial determination be pursued. The appellant filed petition (O.P. no. 18 of 2002) before KERC seeking clarifications as to whether appellant is liable to pay to Tanir Bhavi the amount disputed by it before the dispute is resolved by the arbitral tribunal. It also

requested the KERC to take note of and include the additional payment of Rs. 271.60 crores for the power supply recovered for the year 2002-03 and projected additional expenditure of Rs. 147.34 crores for FY 2004 with interest burden of Rs. 34.10 crores, in all aggregating to Rs. 453.04 crores and to enhance the Bulk Supply Tariff (BST) and consequential retail tariff increase for FY 2004 suitably. The KERC held that the PPA terms must be given effect and hence the arbitral tribunal was the proper forum to decide the issues.

10. The dispute between the KPTCL (appellant) and Tanir Bhavi was eventually referred to the arbitration by three former judges of the Hon'ble Supreme Court on 17.9.2002, the prime issue to be addressed being as to the extent of the fixed charge payable by former (KPTCL) to the latter (Tanir Bhavi) in terms of Clauses 7.3 and 7.4 of the PPA. On 19.05.2003, the arbitral tribunal passed an award holding that Tanir Bhavi was entitled for payment of fixed charges at US$ 0.04 per kWh in terms of the interpretation placed on Clause 7.3 and 7.4 of the PPA, the principal amount payable having been computed as Rs. 191.31 crores along with interest @ 24% per annum from the date of default to the date of payment.

11. The principles governing "Carrying Cost" are well settled. Some of the decisions of this tribunal on this subject are enlightening. The same may be noted at this very stage.

12. In *Tata Power Co. v MERC*, Appeal 173/09 decided by this tribunal, by judgment dated 15.02.2011, it was explained (in Para 43) thus:

> "*Carrying cost is a legitimate expense. Therefore, recovery of such carrying cost is legitimate expenditure of the distribution companies. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the Distribution Company from lenders/promoters/accruals is to be paid by way of carrying cost. In this case, the Appellant, in fact, had prayed for allowing the legitimate expenditure including carrying cost. Therefore, the Appellant is entitled to carrying cost*"
>
> (emphasis supplied)

13. In *SLS Power Limited v. APERC*, 2012 SCC OnLine APTEL 209, by judgment dated 20.12.2012, this tribunal held (at page 63 of the report):

> *"The principle of carrying cost has been well established in the various judgments of the Tribunal. The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time. Therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in this judgment. We do not accept*

> *the contention of the licensees that they should not be penalized with interest. The carrying cost is not a penal charge if the interest rate is fixed according to commercial principles. It is only a compensation for the money denied at the appropriate time.”*
>
> (emphasis supplied)

14. In the matter of *Torrent Power Limited vs GERC*, Appeal Nos. 190/2011 and 162-63/2012, decided by this tribunal on 28.11.2013, it was ruled that:

> “*83. The relevant principles which have been laid down in these decisions are extracted below:*
>
> > *(a) We do appreciate that the State Commission intents (sic) to keep the burden on the consumer as low as possible. At the same time, one has to remember that the burden of the consumer is not ultimately reduced by under estimating the cost today and truing it up in future as such method also burdens the consumer with carrying cost.*
> >
> > *The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accruals, has to be paid for by way of carrying cost.*
> >
> > *(b) The carrying cost is a legitimate expense and therefore recovery of such carrying cost is legitimate expenditure of the distribution company.*
> >
> > *(c) … The utility is entitled to carrying cost on its claim of legitimate expenditure if the expenditure is:*

> *i)* *accepted but recovery is deferred* *e.g. interest on regulatory assets,*
> *ii)* *claim not approved within a reasonable time, and*
> *iii)* *Disallowed by the State Commission but subsequently allowed by the Superior authority.*
> *iv)* *Revenue gap as a result of allowance of legitimate expenditure in the true up.*
>
> *…."*

(emphasis supplied)

15. Again, in *Torrent Power Limited vs GERC & Ors*, Appeal No 246-47/2017 by decision dated 4.10.2019, it was held:

> "*9.4 … Thus, the value of money is settled financial principle and the same has also been recognized by this Tribunal. The utility gets compensated by way of carrying cost on this very principle i.e. when amount is due and recovery is deferred, the utility gets compensated by way of carrying cost. Thus, when the Commission has arrived at the revenue gap after following due process of truing up exercise, the utility should be compensated for the delay in recovery of its revenue.*
>
> *9.13 Upon perusal of the judgment of this Tribunal in Appeal Nos.190 of 2011 and 162 & 163 of 2012, it is observed that after deliberating the applicable judgments of this Tribunal and principles laid down in those judgments, this Tribunal has come to the conclusion that carrying cost is to be allowed to the Appellant on the revenue gap as a result of legitimate expenditure in true up. It is to be noted that the Commission has verified all the expenses during true up exercise and approved the same.*

The resultant gap is arrived at after this truing up exercise. Thus, it is admitted fact that the recovery of the Appellant is delayed till the Commission allows recovery of this revenue gap. As per well settled financial principle in catena of judgments, carrying cost is to be allowed to compensate the utility for such delayed recovery. From perusal of referred judgment, we agree that rather this Tribunal has categorized the carrying cost on the revenue gap arrived after true up exercise under 83(d)(iv) and allowed the recovery of same. Therefore, we are unable to agree with the Commission that this Tribunal has required the Commission to further verify the carrying cost in the referred judgment of this Tribunal.

9.14 In the impugned order, the Commission has also referred to the judgment of this Tribunal dated 28.05.2009 in Appeal No. 111 of 2008 and stated that this Tribunal has held the carrying cost as legitimate expenditure and same can be allowed only on financial principles once such expenditure is proven by the licensee and extracted para 7 of the judgment. However, as pointed out by the Learned Counsel for the Appellant, the perusal of judgment reveals that the referred para relied upon is with reference to the issue of computation of gains/ (losses) for Interest on Working Capital as provided for in the MERC (MYT) Regulations and not with reference to the carrying cost as stated by the State Commission. Therefore, the Commission has erred in relying on para 7 of this judgment with reference to the issue of carrying cost as it is on unrelated issue and Regulations. The Learned Counsel of the Commission has also argued that judgment in Appeal No. 111 of 2008 and judgment in Appeal No. 190 of 2011 & Appeal No. 162 & 163 of 2012 are of coordinate benches and are biding upon the parties. However, we are of the view when the decision relied upon is on unrelated issue, the question of its applicability does not arise in the present case.

9.15 The Learned Counsel for the Commission also referred to the judgment of this Tribunal in Kerala State Electricity Board Vs. Kerala State Electricity Regulatory Commission – 2012 SCC Online APTEL 151 and submitted that the issue of carrying cost is subject to prudence check is no longer res integra. The perusal of this order reveals that the issue in that case was with reference to denial of power purchase cost by the State Commission and in turn, this Tribunal directed the State Commission to allow the power purchase cost, which was denied earlier, along with carrying cost. This judgment does not deal with the present issue i.e. whether carrying cost claimed on the approved revenue gap, arrived at after true up exercise, as per the methodology adopted by the Commission for implementing the judgment of this Tribunal allowing carrying cost is further required to be substantiated by the utility. Accordingly, we find that the Commission has not only deviated from its own methodology but also not followed the order and judgment of this Tribunal in true spirit."

(emphasis supplied)

16. It appears that the additional fixed cost was paid by the appellant to Tanir Bhavi, along with interest accrued thereupon (in favour of said entity) in annual instalments, the payments made being Rs. 114.96 Crores in FY 2001-02, Rs. 131.84 Crores in FY 2002-03, Rs. 134.44 Crores in FY 2003-04, Rs. 130.23 Crores in FY 2004-05, Rs. 22.23 Crores in FY 2005-06, besides Interest in sum of Rs. 12.18 Crores, all such payments totaling to Rs. 545.87 Crores the said amount representing the

additional Tanir Bhavi cost arising out of arbitral award, the claim of *carrying cost* (on account of interest liability due to delay in "*pass through*") being over and above the said amount.

17. In the wake of the above-mentioned arbitral award, the appellant filed an application before the KERC to allow the amount paid and payable by it to Tanir Bhavi as a "*pass through*" in the applicable tariff. The KERC, by its order dated 15.12.2003, rejected the said request of *pass through* on the ground that the appellant had not chosen to further challenge the arbitral award. Being aggrieved by the said order of the KERC, the appellant preferred appeal in MFA No. 481 of 2004 before the Hon'ble Karnataka High Court. The Division Bench of the High Court of Karnataka remanded the entire matter by its judgment dated 02.12.2005 to the KERC for fresh consideration as the consumers were not afforded an opportunity.

18. Meanwhile, the KERC had undertaken the exercise of truing up of financials of KPTCL for the FYs 2000-01 to 2003-04 based on its audited accounts, finding that it (KPTCL) was in deficit of Rs 479.9 crores for the said period (2000-01 to 2003-2004).

19. The proceedings held pursuant to remand order culminated in order dated 20.04.2006 of KERC whereby the

request of the appellant to include in the ARR the additional cost (consequent to the arbitral award) paid to Tanir Bhavi was rejected on two new grounds viz. (i) KPTCL had not challenged the arbitral award by an appeal and (ii) the first supplemental agreement was entered after the constitution of the KERC and, therefore, the PPA dated 14.12.1997 as well as supplemental agreement could not be treated as a validly concluded contract, the same not saved by proviso to Section 27 (2) of the Karnataka Electricity Reforms Act, 1999.

20. Being aggrieved by the order dated 20.04.2006, the appellant challenged it before this tribunal by Appeal no. 107 of 2006 which was decided by judgment dated 19.10.2006. It is clear from reading of the said judgment in appeal that conclusions reached included that the conclusive nature of the agreement entered between the appellant and Tanir Bhavi was not challenged in any manner in the arbitration proceedings; Articles 7.3 and 7.4 of the PPA being part of the concluded contract, are deemed by the statutory fiction to have been approved and the award of the Arbitral Tribunal had resolved the dispute in respect of fixed charges; the effect of section 27 (2) of the Karnataka Electricity Reforms Act, 1999 meant that the consequences of the award were binding not only on Tanir Bhavi

but also on the utilities of the State and its liability had to be necessarily passed on to the consumers; it is not open to the consumers to pick holes or point out that the award is not to their convenience or disadvantage and desist the legal consequences; in the absence of any allegations or averments of collusion or fraud or such other vitiating factor, it is futile on the part of the consumers to contend that the appellant is not liable to pay the fixed charges, which are to be paid in terms of the award; such liability cannot in law be ignored or brushed aside but had to be allowed as a cost directly incurred in the acquisition of power; and such an expenditure has to be justifiably passed on to the consumers through tariff.

21. The relevant observations and directions in the said decision, as referred to by the parties, read thus:

> *41…. we hold that the disallowance of full fixed charges payable/paid by the appellant in terms of the arbitral award, by the State Commission is liable to be reversed and charges claimed deserve to be allowed. … the appellants are entitled to include the difference in fixed charges in the ARR, which, it is liable to pay as per the award and included and the same has to be passed on to the consumers through tariff. … the view of Regulatory Commission in disallowing the claims of the appellants is not only a misdirection, but also an illegality. Hence the entire claim of the appellants deserved to be sustained. … the acceptance of the arbitral award without any further challenge by the appellants, in no manner*

reflects on the managerial and commercial decision taken by the appellant and we do not find any want of bonafides in this behalf.

43. In the result, the appeal deserves to be allowed and we direct the first respondent Commission to allow the claim of the appellant as prayed for, with a consequential direction that the said liability can be passed on to the consumers through tariff. However, as such a direction to include the past arrears, may result in steep increase in tariff, it would be eminently fit and proper to direct KPTCL to create regulatory asset to the value of the differential amount payable by it for five years, which the appellants are liable to pay to M/s. Tanir Bhavi and amortize the same by gradual increase of tariff in the course of next five years or so sooner thereof as the financial position may warrant.

(emphasis supplied)

22. Thus, the KERC was held obliged to take appropriate measures to reverse the disallowance of full fixed charges payable/paid by the appellant in terms of the arbitral award the appellant having been held entitled to include the difference in fixed charges in the ARR so that the said money paid was passed on to the consumers through tariff.

23. Pursuant to the aforesaid order dated 19.10.2006 in Appeal 107 of 2006, the appellant filed before the KERC the petition for ARR for FYs 2007-08 to 2009-10 claiming the additional cost to be paid/payable to Tanir Bhavi to be adjusted. The KERC passed order dated 06.07.2007 deciding on various

revenue requirement proposed by the KPTCL for the above-said period also undertaking a fresh truing up of KPTCL's financials for the tariff period 2000-01 till 2005-06 and concluded that the appellant had a surplus of Rs. 738.23 crores in the sales revenues and adjusted the various costs claimed by the appellant including the additional power purchase cost of Rs. 545.87 crores paid/payable to Tanir Bhavi as per the judgment of this Tribunal dated 19.10.2006.

24. The appellant was again aggrieved and filed Appeal 100 of 2007 challenging the order dated 06.07.2007 passed by KERC, *inter alia*, on the issue of fresh truing up undertaken to adjust the additional power purchase cost from Tanir Bhavi. The appeal was allowed by this tribunal by judgment dated 04.12.2007 holding that the KERC was carrying out the truing up exercise on year to year basis but had not given effect to the results of such exercise all these years and same was impermissible. It was observed that once truing up is carried out, the KERC is not permitted to again take up the truing up exercise based on new assumptions regarding Transmission & Distribution (T&D) losses. The order dated 06.07.2007 was set aside and the KERC was directed to re-determine the tariff based on the said decision.

25. The relevant portion of the said decision dated 04.12.2007 of this tribunal may be extracted as under:

> "*28. … Invariably, the projections at the beginning of the year and actual expenditure and revenue received differ due to one reason or the other. Therefore, truing up is necessary. Truing up can be taken up in two stages: Once when the provisional financial results for the year are compiled and subsequently after the audited accounts are available. The impact of truing up exercise must be reflected in the tariff calculations for the following year…. If any surplus revenue has been realized during the year 2006-07, it must be adjusted as available amount in the Annual Revenue Requirement for the year 2007-08 or / and 2008-09. It is not desirable to delay the truing up exercise for several years and then spring a surprise for the licensee and the consumers by giving effect to the truing up for the past several years. Having said that, truing up, per se, cannot be faulted, and, therefore, we do not want to interfere with the decision of the Commission in this regard to cleans up accounts, though belatedly, of the past.*
>
> *29. It is noted that the Commission had been carrying out the truing up exercises on year to year basis but had not given effect to the results of such exercises during all these years. Once the truing up exercise has been carried out, the Commission is not permitted to again take up the truing up exercise based on new assumptions.*
>
> *30. It has been brought to our notice that whereas the Commission, in the first truing up exercise, had found a deficit of Rs. 479.9 crores, second truing up exercise by the Commission has resulted in sufficient surplus in the revenues of KPTCL to not only wipe out the deficit of Rs. crores but also adjust an amount 545.87 crores which this Tribunal had directed to allow on account of difference in power purchase cost paid to Tanir*

Bhavi. The main reason for this disparity, it has been contended by the appellant, is <u>on account of treatment of Transmission and Distribution losses</u>.

31. We now advert to the T&D losses. The <u>Commission is expected to fix the T&D loss targets in consultation with the licensee</u>. Once the target for loss level is fixed, the licensee is expected to make all efforts to achieve the loss level. The consumers should not be made to bear the brunt of losses over and above the fixed target. In the case in hand, during one year, <u>a loss level of 31% is fixed by the Commission</u>. The cost of 100 units purchased and 69 units (100-31) sold should be considered in the ARR. However, KPTCL could achieve only 35.5% loss level which means that units required to be purchased will be about 107 so that 69 units are available for sale to the consumers. Whereas the Commission has allowed the cost of procurement of power of about 107 units, simultaneously by applying a loss level of 31% to 107 units, it has also <u>assumed that there will be sale of about 5 units over and above the 69 units</u>. This results in recovering from the licensee for the electricity which has not actually been sold because of losses being 35% (actuals) against the set target of 31%. The <u>additional imaginary sale of power assumed by the Commission is irrational, unreasonable as this electricity has not even reached the consumer end</u>.

32. We need to balance the interest of the consumer and the licensee by ensuring that the licensee tries his best to achieve the said targets and is deterred to under achieve loss reduction. In the present case to sell 69 units KPTCL will be allowed purchase cost of 100 unit only as per the target of 31% set by the Commission and the licensee will have to pay for the power required over and above 100 units so that 69 consumers. We decide that <u>this deterrent of disallowing cost of electricity required over and above 100 units is sufficient and it will not be correct to assume an imaginary sale of electricity when the actual loss</u>

level is 35.5% and when the licensee has already been penalized by not allowing it the cost of power procurement over and above 100 units. This will ensure that the licensee functions efficiently. Interest of consumers is not prejudiced because licensee is being allowed only purchase cost of power as per the loss level target set by the Commission.

The question before us is how much of power can be deemed to have been sold and what amount should be taken as the revenue from the sale of power. The Commission cannot be allowed to assess the revenue of the licensee on the imaginary sale of power indicated above. The licensee has borne the burden of extra purchase of power for meeting the T&D loss over and above the target. The revenue of the licensee can be assessed only on the basis of actual sale. We, accordingly, uphold the objection of the appellant on this aspect and allow the appeal in respect of issues A&B.

Concedingly, the Commission has taken into account the additional power purchase cost payable to Tanir Bhavi as allowed by this Tribunal in appeal No. 107 of 2006. We direct that this element of additional cost may be succinctly reflected by the Commission while implementing this order.

49. We note that the Commission has not allowed an expenditure of Rs, 220.23 crores, being interest on belated power purchase payment on the premise that KPTCL is responsible for the delayed payment. However, it has been contended by the appellant that the claims related to the arrears for the period during which KPTCL was undertaking functions of bulk purchase and bulk sale of power and that KPTCL was deprived of its revenues and, therefore, had to face financial difficulties resulting in delay in the payment of power procurements cost. We do not find any justification for not allowing the interest charges to

KPTCL; KPTCL was merely a bulk power buyer and seller arid not repository of revenue stream. In view of this ground reality we direct the Commission to allow the interest on delayed payment and give effect to the-adjustments in the distribution tariff for the periods 2007-08 to 2009-10 along with the carrying cost as per the principles laid down by the Commission."

(emphasis supplied)

26. The appeal was, thus, allowed and the Commission directed to implement the orders within six weeks. The conclusions reached and the end-result requiring to be flagged include that once truing up exercise is carried out, the Commission is not entitled to again take truing up based on new assumptions; the Commission could not assess revenue on an imaginary sale of power; and that the Commission was under direction to allow interest on delayed payment and give effect to adjustments in the distribution tariff for the periods 2007-08 to 2009-10 along with carrying cost.

27. The exercise of truing up of the revenue requirements of KPTCL for the FY 2000-01 to 2005-06 came up before KERC resulting in its order dated 31.12.2007 whereby, ignoring the previous decision, it applied a new methodology and found Rs.545.87 crores to be surplus and adjusted it against additional power purchase cost from Tanir Bhavi. The said order was also

challenged by Appeal no. 09 of 2008 which was decided by this tribunal by judgment dated 09.05.2008. The appellant had again raised issues relating to disallowance of cost of power purchases made it from Tanir Bhavi in the spirit of previous decisions on the subject.

28. It is necessary to quote certain portions of the judgment dated 09.05.2008 of this tribunal:

> "*30. … the issues which arise for our consideration in the present appeal are:-*
>
> > *(a) Whether the Commission was right in undertaking the truing up of the revenue requirements of KPTCL for the financial years 2000-01 – 2005-06 under the impugned Order dated 31.12.2007 so as to find a surplus revenue and thereby adjust an amount of Rs 545.87 crores on additional cost of power purchase from Tanir Bhavi, admittedly, payable asper the Award and as per the earlier decision of this Tribunal?*
> >
> > *(b) Whether the Commission has undertaken the determination of the revenue requirements under the truing up exercise based on new methodology or otherwise there is any merit in the adjustments made by the Commission to arrive at a surplus of Rs 583.30 crores?*
> >
> > *(c) Whether the Order of the Commission on the issues relating to depreciation, O & M charges and interest on finance charges is correct?*
>
> *34. In the present case admittedly there has not been any substantial change between the provisional accounts and the audited accounts on*

<u>all the three scores the Commission has done the second truing up on the basis of revised policy which is not permissible</u> as per above judgement.

35. For the financial years 2000-01 to 2003-2004 the aggregate deficit found by the Commission was of Rs 479.09 crores. Now <u>adopting a new approach the Commission has discovered a surplus of Rs 738.23 crores as against the deficit earlier found</u> and thereby providing for an adjustment on account of additional Power Purchase Cost of Tanir Bhavi of Rs 545.87 crores. Commission's <u>order clearly shows that it has found a new methodology and process to undertake truing up</u>. <u>Truing up exercise has to be done with reference to the amounts approved and actual figures. The Commission has changed the approved figures of Rs 183.29 crores for the revenue requirements for the year 2003-03 for the purpose of truing up and that too on a second attempt</u>. This was <u>not permitted by the Tribunal in its order dated 4.12.2007</u>. <u>Such an approach is against the essence of true up exercise</u>: <u>True up exercise is meant to fill the gap between the actual expenses and revenues estimated at the end of the year and anticipated expenditure and revenue at the beginning of the year</u>.

36. The Commission has erred in its assessment of power purchase quantum to be considered for the purpose of revenue requirement for the relevant year FY 2000-01 to FY 2005-06. <u>While arriving at the quantum of power purchase to be allowed for revenue requirement, KERC should first reduce the disallowed T&D losses from the quantum of power purchase entered in the audited accounts of KPTCL. From the figure so arrived, the Commission has to reduce the allowed T&D losses which will give the quantum of power available for sale yielding revenue</u>. Moreover, KERC has to realize that the audited sale quantum includes metered sale and unmetered sale which also includes agricultural pumping sets and, therefore, there is an overlapping between the

unmetered sale and loss. In this view of the matter, we are the opinion that <u>calculation should be carried out on directed the KERC to carry out the calculations on the basis of the methodology given by KPTCL</u> in its Memo of Appeal at para "W". We order accordingly.

37. The appellant has rightly claimed the depreciation and O & M Charges during the MYT period 2007-08 to 2009-10 as and when the assets created are put into use. There is <u>no reason why such newly created assets during the MYT period are not included for the purpose of determination of depreciation and 0&M expenses</u>. We, therefore, order that all the assets including those new assets which will be established during the control period of 2007-08 to 2009-10 must be treated as eligible for the purpose of determination of depreciation and 0&M charges.

38. It is <u>not understood how the Commission has considered an interest rate of 8.5% when figures for the actual loans advanced/sanctioned to KPTCL were available</u> with it. In the cost plus regulatory regime <u>all reasonable costs including the actual rate of interest on loan have to be allowed to KPTCL</u>. We order accordingly.

39. KERC is also directed to immediately undertake the <u>truing up exercise for the year FY 2006-07</u>.

41. The <u>finding of the Commission that there is a surplus of Rs. 738.23 crores is set aside</u> and, therefore, <u>the amount of Rs. 545.87 crores with carrying cost of 12% being the additional Power Purchase Costs to be allowed for Tanir Bhavi, as per the earlier order, cannot be said to be adjusted in surplus</u> and, <u>therefore, KPTCL (sic – this needs to be read as KERC) should allow the same in the tariff immediately without providing for any adjustment for the FY 2001-02 to 2005-06</u>. …

42. Before parting, we have to regretfully say that we have been observing that <u>the Commission has</u>

been articulative in avoiding implementation of the Tribunal orders in one way or the other and the rightful claims of the appellant have been denied to him for long time by giving different meanings to our orders. We have been leaving it to the Commission to implement our orders and revise the tariff in the light of the directions given therein having full trust in the Commission that our orders will be meticulously implemented without demure (sic). This kind of approach adopted by the Commission deters investments in the power sector. The objective behind the reforms in the electricity sector was to enhance generation, transmission and distribution capacities by attracting capital from all sources while protecting the consumers against exploitation by creating the mechanism of Regulators. They are quasi judicial bodies and have to adhere to judicial discipline. The attitude betrayed by their repeated attempts to bypass the dictum of this Tribunal is not conducive to the growth of the sector since an overjealous (sic) efforts to keep tariff low at the cost of capital might threaten capital and cause a capital flight from the power sector. Such attitude leads to litigation and consequent waste of public money and public time. We hope that the Commission would keep the aforementioned in mind in its future operations."

(emphasis supplied)

29. From the above, it is clear that it was judicially noticed that the KERC had been avoiding implementation of this tribunal's orders denying the rightful claims of KPTCL. This tribunal reminded the Commission about its duty to remain within discipline of judicial hierarchy. A caution was administered as to impermissibility of the repeated attempts

made to bypass binding decisions and impropriety of the approach adopted to such issues with inherent possible adverse impact on the growth of power sector. It was ruled that (i) KERC was not entitled to truing up afresh based on new assumptions or new process or new methodology; (ii) KERC had erred in assessment of power purchase quantum for the purpose of revenue requirement for FY 2000-01 to 2005-06, it having been directed to make the calculations as per methodology given by the KPTCL; and (iii) that the finding of the KERC that there is a surplus of Rs. 738.23 crores stood set aside and that the amount of Rs. 548.7 crores with carrying cost of 12% being the additional Power Purchase costs to be allowed to Tanir Bhavi could not be adjusted in surplus for the FY 2001-02 to 2005-06. The appeal was allowed with appropriate directions to KERC in above regard.

30. The judgment dated 9.5.2008 passed by this tribunal in Appeal no. 09 of 2008 was challenged before Hon'ble Supreme Court of India in Civil Appeal nos. 697-8/2008, 4726/2008, 5342/2008 and 1432-27/2010. The said appeals were dismissed by order dated 11.4.2018 with observation that the Supreme Court did not find any merit therein.

31. The appellant, by its letter dated 28.05.2018, pointing out the disposal of the appeals before Supreme Court, requested the KERC to implement the judgment dated 09.05.2008 of this tribunal. The Commission opted to issue notices to the stakeholders calling for objections from the public by notification dated 09.08.2018. The appellant had filed memo regarding details on truing up for FY 2006-2007 and for giving effect to the order passed by this tribunal respecting Tanir Bhavi additional power purchase cost along with carrying cost. The Commission heard the parties over ten months, collected accounts data for FY01 to FY07 and passed order on 16.01.2020 which is impugned herein.

THE IMPUGNED ORDER

32. KERC Order while allowing power purchase cost as per audited accounts by calculating losses in terms of order dt 09.05.18, has disallowed carrying cost on the Tanir Bhavi power purchase cost by holding that the question of carrying cost would arise only when there is net revenue deficit which necessitates borrowing of funds and payment of interest thereon. For arriving at the said conclusion it undertook the exercise of revision of ARR beginning with FY 2000-01, taking into consideration

various elements including the actual power cost; transmission and distribution losses; employees cost; repair and maintenance expenses; administration and general expenses; depreciation, interest and finance charges; other debits/expenses; net prior income/expenses; income tax; rate of return (RoR); other income; and, revenue & RE subsidy.

33. The Commission stated in the impugned order (beginning at internal page 8) that for revision of ARR for FY 2001-02, it had "*considered the actual power purchase cost of Rs. 3760.92 Crores as per audited accounts*", during FY 01 there being "*no Tanir Bhavi claim towards power purchases*" and that it had "*considered the penalty of Rs. 5 Crores originally levied for non-furnishing of power purchase details by KPTCL, while improving the ARR*" and, thus, having "*allowed Rs. 3755.92 Crores.*" It concluded that the revision of the ARR of the appellant showed a surplus of Rs. 257.23 Crores at the end of FY 2000-01.

34. The revised ARR for FY 2001-02 was computed in the impugned order by the Commission showing a net surplus of Rs. 365.04 Crores, as against previous finding of surplus of Rs. 22.31 Crores and audited accounts reflecting surplus of Rs. 79.41 Crores only, the huge differences being under various

heads of revenue (e.g. energy sales, energy loss, T&D loss, sale of power, subsidies) and expenditure (e.g. Employees cost, R&M expenses, A&G expenses, depreciation, Interest and Finance charges, capitalization of Interest, other expenses etc.).

35. Upon revision of ARR for FY 2001-02, the Commission concluded thus:

> *"the Hon'ble ATE has allowed the carrying cost on the amounts payable to Tanir Bhavi on the ground that the same had not allowed in tariff and that the amounts due to the recovered through tariff attract carrying costs. KPTCL, in its Memo dated 30.09.2019, has claimed an amount of Rs. 262.11 Crores towards carrying cost on the Tanir Bhavi claims. As per audited accounts for FY 02, the total power purchase cost of Rs. 4786.67 Crores is inclusive of full fixed cost of 4 cents per kwhr paid to Tanir Bhavi. The Commission notes that Government of Karnataka was meeting the statutory requirement of earning 3% RoR on the net fixed assets at the beginning of the year, and meeting the deficit through allocation of adequate subsidy. The Government of Karnataka as allocated subsidy of Rs. 2210.65 Crores for FY 02, so as to enable KPTCL to earn the said 3% RoR. With this arrangement KPTCL was able to pay the full fixed cost to Tanir Bhavi, though the same was not allowed by the commission in Tariff. Since the Commission had not allowed the difference of fixed cost of 2 cents per kwhr in the tariff the same is met through the RE subsidy and KPTCL has not borrowed any amount for making payment to Tanir Bhavi. The Commission also notes that Tanir Bhavi claims of Rs. 433.31 Crores were fully paid by KPTCL through ESCROW arrangements with reference to the base preferred by the said Company. The details of amounts incurred towards power*

purchase cost paid to Tanir Bhavi, at 4cents per kwhr, is indicated under Schedule-19 of the audited accounts for FY 02.

While Complying with the orders of the Hon'ble ATE to allow full power purchase cost of Tanir Bhavi with full fixed cost at four cents per kwhr, it is found that the revised ARR has resulted in a net revenue surplus of Rs. 365.04 Crores for FY 02 as shown in Table-4 above. Considering the surplus revenue of Rs. 365.04 Crores, the cumulative surplus for FY 01 and FY 02 works out to Rs. 622.27 Crores. The Commission notes that the question of carrying cost would arise only when there is net revenue deficit which necessitates borrowing of funds and payment of interest thereon. Since, there is overall revenue surplus of Rs. 622.27 Crores, as at the end of FY 02, even after allowing full payment of Tanir Bhavi claims as per the Orders of the Hon'ble ATE, the Commission is unable to allow any carrying cost to KPTCL, to safeguard the interest of the consumers.

36. The reasoning for the revision of ARR for each of the subsequent financial years up to FY2006-07 is set out in the impugned order in almost identical phraseology as above. The conclusions reached by the KERC show overall revenue surplus being found in each of the relevant financial years for which reason it expressed inability to "*allow carrying cost, to safeguard the interest of consumers*", the computation of such "*overall revenue surplus*" being Rs. 257.23 Crores for FY 01; Rs. 622.27 Crores for FY02; Rs.725.44 Crores inclusive of current Rs. 103.17 for FY03; Rs. 697.05 Crores inclusive of current Rs.

28.39 cumulatively for FY03 and FY04; Rs. 816.68 Crores inclusive of current Rs. 119.64 for FY05 though the net surplus was Rs. 196.11 Crores since State Government (GoK) had adjusted surplus amount of Rs 620.58 Crores against subsidy payable to Discoms; Rs. 387.37 Crores inclusive of current Rs. 191.26 Crores for FY06; and Rs. 314.47 Crores after adjusting revenue deficit of Rs 72.90 Crores for FY07.

37. The above is summarized by the KERC in the form of following table (no. 15 at internal page no. 39 of impugned order):

ABSTRACT OF DEFICIT/ SURPLUS FOR THE PETIOD FY01 to FY07

Period	Revised Surplus (+)/ Deficit (-) in revenue (Gap) Rs.Crores	Overall cumulative surplus Rs. Crores
(1)	(2)	(3)
FY01	257.23	257.23
FY02	365.04	622.27
FY03	103.17	725.44
FY04	-28.39	697.05
FY05	119.64	816.69
Less… Subsidy Adjusted by GoK		-620.58
Surplus up to the end of FY05		196.11
FY06	191.26	387.37
FY07	-72.90	314.47

38. Based on the revised ARR for the period FY 2000-01 to FY 2006-07, the Commission having arrived at net surplus Rs. 314.47 Crores directed that it be given effect as per APR for FY 2018-19 and revision of transmission tariff for FY 2020-21.

THE CHALLENGE AND CONTENTIONS

39. In the submission of the appellant, by the impugned order dated 16.01.2020, captioned as one passed for "*Implementation of the Order … dated 09.05.2008 in Appeal No. 9/2008*" of this tribunal (which, it is noted in the caption itself, had been unsuccessfully challenged before Supreme Court), the KERC has conducted a fresh truing up for the entire period. Concededly, it has allowed the power purchase cost as per audited accounts by duly calculating the losses in terms of para 36 of this tribunal's order in Appeal No.9 of 2008. The grievance of the appellant is that the Commission has yet again not allowed the Carrying Cost of 12% in spite of directions of this tribunal in para 41 of order dated 09.5.2008, such conclusion having been reached by fresh true up of each item of expenditure during the period FY 2000-2007, improperly based on MYT Regulation notified in the year 2006 (applicable from

2007-08 onwards), it having been conducted against the letter and spirit of the aforesaid Order dated 09.5.2008.

40. It is the contention of the appellant that it is entitled to a sum of Rs 545.87 crores, being the additional power purchase cost incurred by it, plus carrying cost of 12%. By way of the impugned order, the KERC has allowed the actual power purchase cost as per the audited accounts of appellant without any carrying cost. It is submitted that by adopting a different methodology than what it was directed to do, the KERC has come to a conclusion that the appellant is having a surplus of Rs 314.47 Crore, which needs to be set aside. It is pleaded that when the issue has been determined thrice by this tribunal, the claim of the appellant on the very same basis having been accepted, the Supreme Court having affirmed such decision of this tribunal, it is now not open to the KERC to have a relook at the same issue and come to a contrary finding, it being opposed to the settled principle of finality of proceedings. The appellant while praying for setting aside of the order dated 16.01.2020 passed by Karnataka Electricity Regulatory Commission in case no. N/07/08 urges a direction for order dated 9.5.2008 in Appeal No. 9/2008 to be given effect to by allowing carrying cost of 12% on the additional power purchase cost of Rs 545.87 crores and

for inhibition against direct conduct of fresh true up for the period from FY01 to FY 06.

41. *Per contra*, the Commission seeks to explain that this tribunal has allowed the carrying cost on the amounts payable to Tanir Bhavi on the ground that the same had not been allowed in tariff and that the amounts due to be recovered through tariff attract carrying costs. The Commission states that it has instead noted that the actual power purchase cost, for the period from FY01 to FY06, as per the audited accounts, is inclusive of the power purchase cost (with fixed cost at 4 cents per kwhr) to Tanir Bhavi which is fully paid through ESCROW arrangements with reference to the bills preferred by it. While complying with the orders of this tribunal, the Commission has arrived at an overall cumulative net surplus in each year up to FY07 and arrived at a net surplus of Rs.314.47 Crores, as at the end of FY07. Hence, the Commission expresses it not having allowed any carrying cost to the appellant for the relevant years.

42. In resisting the appeal at hand, the respondent Commission places reliance on the justification of denial of carrying cost as set out in (para 20 of) impugned order thus:

> *"The Commission notes that, the power purchase costs allowed in respect of Tanir Bhavi as per the audited accounts, includes the fixed cost at four*

cents per kwhr, but the difference of two cents per kwhr in the fixed cost were not passed on to the consumers in the tariff, in the relevant years. Now, the Commission, as per the Orders of the Hon'ble ATE, has considered the full fixed cost at four cents per kwhr and has allowed the difference of two cents per kwhr of fixed cost towards year on year claims of Tanir Bhavi power purchase cost of Rs.545.88 Crores for being passed on to the consumers in tariff as claimed by KPTCL in terms of Hon'ble ATE Order dated 09.05.2008. In order to arrive at the overall power purchase costs to be allowed and to pass on the same to the consumers, the actual power purchase cost of Tanir Bhavi cannot be considered in isolation. Hence, the power purchase cost of all generators including the Tanir Bhavi have been considered and included in the year on year ARR for the period from FY01 to FY07, with reference to the audited accounts."

43. The Discoms, which have intervened, seek to defend the view taken in the matter by KERC. Arguing that the concept of "carrying cost" arises only when the party claiming it has suffered a deficit on account of the due that ought to have been paid in the first instance or if it had originally borrowed money to source such dues or if it has paid interest to the final recipient of money on account of delayed payment, the Discoms contend that the Commission has followed the appropriate methodology, the appellant being entitled to carrying cost only in case a revenue gap had resulted due to allowance of the legitimate expenditure which is not the case here. It is also submitted by

Discoms that at the time of passing the order dated 09.05.2008 in Appeal no. 9/2008 directing payment of carrying cost, this tribunal did not have the benefit of actual audited numbers, or data on the interest paid by the Appellant towards Tanir Bhavi power purchase cost and data on the surplus of the Appellant, if any. It is argued that in the said decision, this tribunal had directed, *inter alia*, re-determination of tariff factoring in the losses for the period 2000-01 to 2005-06 as also Tanir Bhavi Power Purchase Cost of Rs. 545.87 crores along with carrying cost of 12% p.a. without providing any adjustment for FY 2001-02 to 2005-06 in addition to truing up exercise for FY 2006-07 to be undertaken. This, according to Discoms, required, amongst others, the calculations of ARR for the period from FY 2000-01 to FY 2005-06 to be revised. It is thus argued that what has been done is revision of ARRs and not fresh truing up for the relevant period. The Discoms submit that if the claim of the appellant were to be allowed, a staggering amount of Rs. 1,657 Crores would be added to their power purchase cost that, in turn, would have to be passed on to the consumers at large resulting in sharp increase in retail tariff. The lament of the Discoms is that even after payment of additional fixed cost, there is surplus of Rs 314.47 crores which has not been passed on to the

consumers, the appellant not having borrowed any sums for payment of additional fixed cost or for other power purchase cost, the State Government instead having compensated the power purchase cost by releasing subsidies. It is submitted that there has been no liability on the appellant it having been discharged, the claim of carrying cost is not maintainable.

44. The appellant raises following questions for consideration:

(i.) Whether the KERC was justified in conducting a truing up exercise in the light of the specific direction of this Hon'ble Tribunal to the contrary?

(ii.) Whether the disallowance of carrying cost by the KERC is permissible in the light of the specific direction of this Hon'ble Tribunal to allow carrying cost?

(iii.) Whether the KERC erred in taking into consideration the surplus revenue available with the Appellant in order to deny the carrying cost?

(iv.) Whether the KERC has given effect to the directions of this Hon'ble Tribunal in the order dated 9.5.2008 in Appeal No. 9/2008 in letter and spirit?

SUPPRESSION OF FACTS BY APPELLANT?

45. The appellant is accused of having withheld or suppressed relevant information or material. This criticism, in our opinion, is not fair or correct.

46. As is discussed at length in later part of this judgment, the KERC was required to consider the specific issues as dealt in and decided by this tribunal by order dated 09.05.2008 passed in Appeal no. 09 of 2008. The operative part of the said order is clear and unambiguous. The task in terms of said decision to be performed by the Commission was simple - to allow the power purchase cost of Tanir Bhavi duly quantified in the order dated 09.05.2008 at Rs. 545.78 Crores (which was undisputed amount as per the records and has been accepted so by the KERC even in the impugned order) and carrying cost where the rate of interest has been specified in the said order at 12% per annum. The interest calculation had been given by KPTCL in the proceedings before the KERC which was not disputed. The KERC without any justification expanded the scope of the proceedings into areas which are outside the remand directions, selectively calling for information on extraneous matters. The appellant (KPTCL) had given all the relevant details and support documents concerning the said issue before the KERC. There has been no suppression of any material fact by KPTCL. In the proceedings held by it, for "*implementation*" of the appellate order of this tribunal, towards carrying cost that had been allowed, with rate of levy also duly

determined, the entire approach of the Commission being improper and uncalled for, no credence can be given to accusations levelled against KPTCL.

LIMITED REMIT?

47. We agree with the submission of the appellant that the scope of remit to KERC by Order dated 09.05.2008 was limited. The dispute which required determination had been adjudicated upon by the said order in appeal rendered by this tribunal. Upon the dismissal of the Civil Appeals and upholding of the order dated 09.05.2008 of this tribunal, it having merged with decision of the Supreme Court, the KERC was required – rather duty-bound – to implement the directions contained in the order dated 09.05.2008 which had attained finality and become binding, on its terms, it being beyond its domain to raise any fresh or other issues. The directions in para 41 of the order dated 09.05.2008, as quoted earlier, are unequivocal - without any ambiguity. The amount of Rs. 545.87 Crores with carrying cost of 12% being the additional power purchase cost relating to payment made by KPTCL to Tanir Bhavi had been directed to be allowed in the tariff forthwith without factoring in of any adjustment for FY 2001-02 to 2005-06. The adjustments made and the finding of surplus

of Rs. 738.23 Crores in the KERC's order dated 31.12.2007 had been specifically considered and set-aside.

48. The proceedings initiated before the KERC in the wake of dismissal of appeals by the Hon'ble Supreme Court by order dated 11.04.2018 were only to implement the decision of this Tribunal whereby directions were passed to allow Rs. 545.87 Crores with carrying cost of 12% related to the period FY 2001-02 to 2005-06 in the truing up of financials for FY 2006-07 and, therefore, not a fresh round of adjudicatory process but more in the nature of execution of a "*decree*" (using the said expression in absence of a more precise one in the present context) that had become final and binding. From this perspective, the status of the State Commission while dealing with the matter of "implementation" was not that of an adjudicatory body but of an executing forum being obliged in law to carry out the dicta of the appellate authority in due compliance with the directions given.

49. The specific aspect of the truing up of the financials for the period from 2001-02 to 2005-06 had been analyzed by this tribunal in the order dated 09.05.2008. The attempts to not follow the earlier decisions of the appellate authority was also noted. The view earlier taken by KERC finding surplus and making an adjustment against such claim of the appellant had been

squarely rejected and set aside. In the wake of said binding decision concerning power purchase cost of Tanir Bhavi, the KERC was required to allow not only the principal amount of Rs. 545.87 Crores but also the carrying cost at the rate of 12%.

50. It is trite that the forum of first instance discharging the duty to implement the specific decision of the appellate forum is required to confine to the issues, if any, directed to be decided it being not permissible for it to get into analyzing any new or other issues. The fact that the State Commission has chosen to do this, this not being an act indulged for the first time in this very dispute, is reflective of serious infraction of duty to maintain judicial discipline on its part.

RES JUDICATA?

51. Even otherwise, fresh consideration by KERC of issues that had been decided earlier by its previous decision(s) which had been adversely commented upon and set-aside by this tribunal in appeal(s), the last such decision in appeal having been affirmed by the Supreme Court, and raking up of new issues, is inhibited by the rule of *res judicata*. It was not open to the State Commission to raise new issues to deny the claims of

KPTCL considered in the order dated 9.5.2008 (as indeed the earlier order) of this tribunal.

52. In *Shiv Chander More v. Lt. Governor*, (2014) 11 SCC 744, the law was explained by the Supreme Court thus:

> ***"21.*** *… we need to say what is trite, namely, the doctrine of res judicata being one of the most fundamental and well-settled rules of jurisprudence. The doctrine is found in all legal systems of civilised society in the world. It is founded on a twofold logic, namely, (1) that there must be finality to adjudication by the competent court; and (2) no man should be vexed twice for the same cause. These two principles attract the doctrine of res judicata even to inter partes decisions that may be erroneous on a question of law. That the doctrine is applicable even to writ jurisdiction exercised by the superior courts in this country is settled by a Constitution Bench decision of this Court in Amalgamated Coalfields Ltd. v. Janapada Sabha Chhindwara [AIR 1964 SC 1013] wherein this Court observed: (AIR p. 1018, para 17)*
>
> > *"17. … Therefore, there can be no doubt that the general principle of res judicata applies to writ petitions filed under Article 32 or Article 226. It is necessary to emphasise that the application of the doctrine of res judicata to the petitions filed under Article 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It only seeks to regulate the manner in which the said rights could be successfully asserted and vindicated in courts of law."*
>
> ***22.*** *The principles of constructive res judicata which are also a part of the very same doctrine have been held to be applicable to writ proceedings, by another Constitution Bench decision of this Court in Devilal Modi v. STO [AIR*

1965 SC 1150] wherein this Court observed: (AIR p. 1152, para 8)

> *"8. It may be conceded in favour of Mr Trivedi that the rule of constructive res judicata which is pleaded against him in the present appeal is in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred."*

23. Reference may also be made to the Constitution Bench decision in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] wherein this Court once again reiterated that the principles of constructive res judicata apply not only to what is actually adjudicated or determined in a case but every other matter which the parties might and ought to have litigated or which was incidental to or essentially connected with the subject-matter of the litigation. This Court observed: (SCC p. 741, para 35)

> *"35. … an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with the subject-matter of the*

litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Civil Procedure Code was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata."

It is in the light of the above authoritative decisions of this Court no longer open to the appellants to contend that the principles of constructive res judicata would not debar them from raising the question which, as observed earlier, could and indeed ought to have been raised by them in the previous round of litigation. The High Court was, in that view of the matter, perfectly justified in holding that the plea sought to be raised by the appellants in the purported exercise of liberty given to them by the orders of this Court dated 9-4-2008 in Lt. Governor v. Shiv Chander More [Lt. Governor v. Shiv Chander More, (2008) 4 SCC 690] was not legally open and should not be allowed to be urged."

(emphasis supplied)

53. In *Asgar & ors v Mohan Varma, 2019,* SCC Online SC 131, the Supreme Court observed thus:

"40. We are not inclined to decide this question on a priori consideration, for the simple reason that under the CPC, both res judicata (in the substantive part of Section 11) and constructive res judicata (in Explanation IV) are embodied as statutory principles of the law governing civil procedure. The fundamental policy of the law is that there must be finality to litigation. Multiplicity of litigation enures to the benefit, unfortunately for the decree holder, of those who seek to delay the fruits of a decree reaching those to whom the decree is meant. Constructive res judicata, in the same manner as the principles underlying res

judicata, is intended to ensure that grounds of attack or defence in litigation must be taken in one of the same proceeding. A party which avoids doing so does it at its own peril. In deciding as to whether a matter might have been urged in the earlier proceedings, the court must ask itself as to whether it could have been urged. In deciding whether the matter ought to have been urged in the earlier proceedings, the court will have due regard to the ambit of the earlier proceedings and the nexus which the matter bears to the nature of the controversy. In holding that a matter ought to have been taken as a ground of attack or defence in the earlier proceedings, the court is indicating that the matter is of such a nature and character and bears such a connection with the controversy in the earlier case that the failure to raise it in that proceeding would debar the party from agitating it in the future."

(emphasis supplied)

54. The above principles based on the doctrine of *Res Judicata* have been held applicable to adjudicatory process before Regulatory Commissions under Electricity Act. For illustration, we may refer in this context to decisions of this tribunal in *Bihar Steel Manufacturers Association v. BERC*, Appeal 172/2010 decided on 18.05.2011; *IOCL v. GERC*, Appeal 124/2012 decided on 04.01.2013; and *Reliance Industries v. MERC*, Appeal 267/2013 decided on 28.11.2014.

55. The doctrine of *res judicata* impels us to conclude that the impugned order is impermissible since it treats the decision

on the issues rendered by this tribunal earlier, and upheld by Supreme Court in final appeal, open to fresh scrutiny. The order denying carrying cost challenged in appeal is, therefore, liable to be quashed.

FINDING OF SURPLUS

56. The decision of this tribunal by judgment dated 09.05.2008, as upheld by Supreme Court, is clear and unambiguous, admitting no demur, that carrying cost on the principal amount of power purchase cost of Tanir Bhavi is to be allowed at the rate of 12% per annum. Such dispensation was not contingent or conditional upon want of support from different heads such as subsidy etc. from the Government of Karnataka. Further, the consideration of carrying cost earlier not considered in FY 2001-02 to FY 2005-06 was not conditional upon whether KPTCL otherwise had any surplus. The existence of surplus or otherwise in the revenue requirement is an independent issue as to the computation of the amount with carrying cost as per the directions in appeal. The KERC had no authority to deny the computation of the amount due with carrying cost itself by holding that there was a surplus. By taking a contrary approach to the matter, KERC

has acted in a manner that perpetuates the same illegality as was noticed and struck down in previous appeal decided by order dated 09.05.2008.

57. There is no doubt that "*consumers' interest*" has to be safeguarded. But it appears that the Commission has partially applied Section 61(d) of Electricity Act ignoring its corresponding duty towards the generator to ensure "*recovery of the cost of electricity in a reasonable manner*". The statutory scheme requires balance between two competing interests to be struck. Catering to former so as to deprive the latter of its legitimate claims is lopsided and, therefore, violative of law. Unfortunately, the Commission has forgotten that denial of "*pass through*" of additional power purchase cost along with carrying cost all these years eventually works to the detriment of "*consumers' interest*" it professes to protect in as much as its effect on the tariff would creep in belatedly but at much higher rate. Such myopic handling at the hands of a regulatory authority is not very reassuring.

58. The claim of KPTCL, both in regard to principal amount and entitlement to carrying cost stands adjudicated by the order dated 09.05.2008 passed by this tribunal as upheld by the Supreme Court by order dated 11.04.2018. Such an

adjudicated claim cannot be denied in any part by KERC by a general reference to Section 61(d) of the Electricity Act, 2003.

59. The rejection of carrying cost, by KERC, on the ground that the audited accounts of KPTCL for the relevant financial years do not provide for the carrying cost, is misplaced and without any basis. The carrying cost was to be allowed by the commission in the truing-up of the financials decided on 31.12.2007 where after it would have to be incorporated in the audited accounts. The KERC did not allow the claim. The claim was allowed by this tribunal in the order dated 09.05.2008. In these circumstances, disallowing the claim for carrying cost on grounds of audited accounts for relevant years FY 2001-02 to FY 2005-06 not disclosing the carrying cost is patently erroneous and perverse. Even otherwise, after the decision dated 09.05.2008, KERC having been directed to consider carrying cost at 12%, it is not open to it to reject the same on the purported ground of audited accounts not disclosing the same.

60. It is sought to be argued that by factoring in 3% return in its terms along with subsidy granted by the GoK, KPTCL had sufficient surplus to offset the Tanir Bhavi power purchase cost and corresponding carrying cost which have been allowed in

the order dated 09.05.2008. The adjustment of the claim premised on Section 59 of the Electricity (Supply) Act, 1948 is misplaced and untenable. Section 59 of the Electricity (Supply) Act, 1948, *inter alia*, reads as under:

> *"59. GENERAL PRINCIPLES FOR BOARD'S FINANCE. –*
>
> *(1) The Board shall, after taking credit for any subvention from the State Government under Sec. 63, carry on its operations under this Act and adjust its tariffs so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans leave such surplus as is not less than three per cent., or such higher percentage, as the State Government may, by notification in the Official Gazette, specify in this behalf, of the value of the fixed assets of the Board in service at the beginning of such year.*
>
> *EXPLANATION - For the purposes of this sub-section, value of the fixed assets of the Board in service at the beginning of the year means the original cost of such fixed assets as reduced by the aggregate of the cumulative depreciation in respect of such assets calculated in accordance with the provisions of this Act and consumers contributions for service lines."*
>
> (emphasis supplied)

61. The above provision provides for a direction to the authority having the requisite competence to organise the tariff in a manner so as to allow at least 3% return on capital

employed or such higher percentage to provide cash availability to the entity responsible for distribution.

62. The KERC, in the orders passed relating to the FY 2000-01 to FY 2006-07, had specifically taken note of the subsidy granted by the Government of Karnataka, the aspect of 3% dealt in Section 59 of the Electricity (Supply) Act, 1948 and the surplus arising in FY 2004-05 on account of favorable hydro-generation towards outstanding subsidy to be granted, with full knowledge of the existence of the claim of KPTCL towards the power purchase cost of Tanir Bhavi. In these orders, the claim was rejected by the KERC on different grounds and not for the reason of subsidy from Government of Karnataka and related adjustment thereto etc. To put it simply, it was then not the decision that the above aspect should be the basis for rejecting the claim of KPTCL or that the true-up exercise relating to Tanir Bhavi power purchase cost should be considered as being offset and to be adjusted in regard to any of the above aspects. Adopting a contrary approach to deny the claim of KPTCL in the aftermath of the Order dated 09.05.2008 on preceding round of appeal reflects inconsistency and, therefore, grossly inappropriate.

63. The appellant has referred in above context, and aptly so, to the following provision contained in Section 27 of the Karnataka Electricity Reforms Act, 1999:

> *"PART VIII TARIFFS AND FINANCING THE LICENSEES*
>
> *27. Tariffs.- (1) The holder of each licence granted under this Act shall observe the methodologies and procedures specified by the Commission from time to time, in calculating the expected revenue from charges which it is permitted to recover pursuant to the terms of its licence and in designing tariffs to collect such revenues.*
>
> *(2) The Commission shall, subject to sub-section (3), have the power to lay down methodology and the terms and conditions for determination of revenue of the licensee under sub section (1) of this section and the determination of tariff, in such other manner as the Commission considers appropriate and for doing so, the Commission shall be guided by the following factors, namely:-*
> *(a) the financial principles and their applications provided in sections 46, 57 and 57-A of the Electricity (Supply) Act, 1948 (54 of 1948) and in the sixth schedule thereto;*
> *(b) in the case of the Board or its successor entities, the principles under section 59 of the Electricity (Supply) Act, 1948;"*
>
> (emphasis supplied)

64. From the above, it emerges that the guidelines provide that KPTCL should have a minimum return and not that the legitimate claim of KPTCL on power purchase costs etc. should not be considered separately on the ground that in any event

the Government of Karnataka will provide subsidy which could be taken towards meeting the minimum return. Clearly, there is a fallacy in the approach adopted by the Commission for the first time in the impugned order by mixing up the issues of allowing the legitimate costs with the issues of Section 59 of the Electricity (Supply) Act, 1948 and subsidy (to be) provided by the State Government. At any rate, the remit by Order dated 09.05.2008 was for allowing the legitimate costs which has to be granted without new considerations being brought in.

DUE COMPLIANCE?

65. It is a ruse, and a fallacious plea, when the Commission argues that it has only implemented the Order dated 09.05.2008 in Appeal no. 09 of 2008. The judicial precedents on the scope of proceedings pursuant to limited remand need to be noticed here.

66. In *K.P. Dwivedi v. State of U.P.*, (2003) 12 SCC 572, the Supreme Court (in the factual matrix indicated in the extract hereinbelow) held:

> ***"11.*** *In our considered opinion, there is a glaring mistake in the impugned order dated 29-3-1996 of the Prescribed Authority passed after remand in treating the earlier order dated 5-8-1977 passed in appeal by the District Judge to have been totally*

set aside by the earlier order of the High Court dated 19-1-1979 passed in writ petition against the order of the District Judge dated 5-8-1977. From the order of the High Court extracted, it is clear that the whole order of the District Judge was not set aside. It was set aside only with respect to categorisation of lands in the two villages and the remand was restricted to fresh determination of the same. The observations that "no other controversy shall be allowed to be raised hereafter before the Prescribed Authority or before the Appellate Authority" only meant that the remand would be restricted to redetermination of the nature of the land and all other issues decided which have not been disturbed by the order of the District Judge in appeal shall not be allowed to be reagitated.

***12.** From the contents of the order of the High Court, we have no manner of doubt that the writ petition of the holder of the land against the judgment of the District Judge had only succeeded with an order of the remand limited to re-examination of the nature of the lands. In all other respects, the order of the District Judge was confirmed prohibiting reopening of the same. We have already mentioned above that the order of the District Judge passed in appeal dated 5-8-1977 was not challenged by the State of U.P. and therefore, that order to the extent it was in favour of the appellant, had attained finality and could not have been disturbed. The Prescribed Authority and the appellate court in their orders passed on 29-3-1996 and 18-3-1997 respectively, overlooked this aspect of the case of the finality of the order of the District Judge dated 5-8-1977. They misdirected themselves by assuming that the whole case was open before them for reconsideration and redetermination of the ceiling area. In the second writ petition filed by the appellant to the High Court against the orders passed by the authorities under the Act after remand, the learned Single Judge took no care to*

re-examine the contents of the orders previously passed and which had attained finality to the extent indicated in those orders. The High Court by the impugned order dated 9-5- 1997 cursorily examined the case and wrongly dismissed it as being without merit."

(emphasis supplied)

67. In *Mohan Lal v. Anandibai (1971) 1 SCC 813 (as quoted in Paper Products Ltd. v. CCE*, (2007) 7 SCC 352), the Supreme Court ruled thus:

> *"9. … counsel <u>urged that now that the suit has been remanded to the trial court for reconsidering the plea of res judicata</u>, the appellant should have been given an opportunity to amend the written statement so as to include pleadings in respect of the fraudulent nature and antedating of the gift deed Exhibit P-3. <u>These questions having been decided by the High Court could not appropriately be made the subject-matter of a fresh trial</u>. Further, as pointed out by the High Court, any suit on such pleas is already time-barred and it would be unfair to the plaintiff-respondents to allow these pleas to be raised by amendment of the written statement at this late stage. In the order, the High Court has stated that the judgments and decrees and findings of both the lower courts were being set aside and the case was being remanded to the trial court for a fresh decision on merits with advertence to the remarks in the judgment of the High Court. It was argued by learned counsel that, in making this order, the High Court has set aside all findings recorded on all issues by the trial court and the first appellate court. This is not a correct interpretation of the order. Obviously, <u>in directing that findings of both courts are set</u>*

aside, the High Court was referring to the points which the High Court considered and on which the High Court differed from the lower courts. Findings on other issues, which the High Court was not called upon to consider, cannot be deemed to be set aside by this order. Similarly, in permitting amendments, the High Court has given liberty to the present appellant to amend his written statement by setting out all the requisite particulars and details of his plea of res judicata, and has added that the trial court may also consider his prayer for allowing any other amendments. On the face of it, those other amendments, which could be allowed, must relate to this very plea of res judicata. It cannot be interpreted as giving liberty to the appellant to raise new pleas altogether which were not raised at the initial stage. The other amendments have to be those which are consequential to the amendment in respect of the plea of res judicata."

(emphasis supplied)

68. The judgment in *Damodar Valley Corporation v CERC* (Appeal no. 146/09) was rendered by this tribunal on 10.05.2010 and the law on the subject was summarized as under:

"*40. In the cases referred to above, the following principles have been laid down:*

(i) When a matter is remanded by the superior court to subordinate court for rehearing in the light of observations contained in the judgement, then the same matter is to be heard again on the materials already available on record. Its scope cannot be enlarged by the introduction of further

evidence, regarding the subsequent events simply because the matter has been remanded for a rehearing or de novo hearing.

(ii) The court below to which the matter is remanded by the superior court is bound to act within the scope of remand. It is not open to the court below to do anything but to carry out the terms of the remand in letter and spirit.

(iii) When the matter comes back to the superior court again – on appeal after the final order upon remand is passed by the court below, the matter/issues finally disposed of by order of remand, cannot be reopened.

(iv) Remand order is confined only to the extent it was remanded. Ordinarily, the superior court and set aside the entire judgement of the court below or it can remand the matter on specific issues through a "Limited Remand Order". In case of Limited Remand Order, the jurisdiction of the court below is limited to the issue remanded. It cannot sit on appeal over the Remand Order.

(v) If no appeal is preferred against the order of Remand, the issues finally decided in the order of remand by the superior court attains finality and the same can neither be subsequently re-agitated before the court below to which remanded not before the superior court where the order passed upon remand is challenged in the Appeal.

(vi) In the following cases, the finality is reached:

a) The issue being not challenged before the superior court, or

b) The issue challenged but not interfered by the superior court, or

c) The issue decided by the superior court from which no further appeal is preferred.

These issues cannot be re-agitated either before the court below or the superior court."

(emphasis supplied)

69. As said before, the remit (besides direction for true up for FY 2006-07) was limited viz. the amount of Rs. 545.87 crores with carrying cost of 12% being the additional Power Purchase Costs for Tanir Bhavi to be allowed in the tariff; the same be not adjusted in surplus for the FY 2001-02 to 2005-06; and, compliance be made by the Commission immediately. The operative part of the order dated 09.05.2008 (para 41) is clear, unambiguous and leaves no scope for KERC to re-determine afresh various aspects pertaining to the truing-up of the financials of KPTCL for FY 2001-02 to FY 2006-07. The Commission had concluded true-up for the period 2001-2007 by its earlier orders dated 06.07.2007 and 31.12.2007. It was now required to only comply with directions on the three issues specifically dealt and decided by this tribunal.

70. The above directions could not have been treated as a *carte blanche* for undertaking *de novo* proceedings for such truing-up as done so as to consider all the issues, particularly

in the face of the fact that they were not the subject matter of challenge before this tribunal.

71. The impugned order cannot be defended on the logic articulated by Discoms. It is forgotten by them that the earlier decision of KERC was based on audited accounts of the appellant. There is nothing in Order dated 09.05.2008 from which it could be inferred that for implementation of directions thereby given a revision (actually fresh true up) of ARRs of the kind done was required. Their main concern is sharp increase in tariff resultant from the pass through of carrying cost being permitted. They conveniently forget that "*recovery of the cost of electricity in a reasonable manner*" *is* as important as "*safeguarding of consumers' interest*"*.* Their endeavor to repress tariff by denying full recovery of cost smacks of populist approach which has no place in the environment of "*competition, efficiency, economical use of resources, good performance and optimum investments*" introduced by the reforms ushered in, *inter alia*, by the Electricity Act, 2003, unless the intent is to scuttle the growth of the power sector by starving it of legitimate returns for the investments. Such regressive arguments represent shortsighted agenda and must be rejected.

72. As a result of the above, KPTCL's claims for the period from FY 2001-02 to FY 2005-06 which were to be allowed in the truing up of the financials of FY 2006-07 are still not being allowed causing serious and substantial prejudice to it. Instead, directions have been given for recovery of amount from KPTCL by way of adjustment of Rs. 314.87 Crores in the revenue requirements of KPTCL related to the transmission tariff of FY 2020-21. We find that KERC was not justified in conducting a truing up exercise in the light of the specific direction to the contrary given by this tribunal in judgment dated 09.05.2008 in Appeal No. 9/2008. The directions in said judgment in so far as it pertained to claim of carrying cost have been flouted in letter and spirit.

73. The appellant has demonstrated before us that there has been no surplus of the kind determined by the Commission. The subsidy amount from Government of Karnataka stood duly adjusted otherwise and was not available for meeting the power purchase cost of Tanir Bhavi at the time when the KERC undertook the truing up in two rounds. It remains unexplained as to how finding of surplus could have been reached when in each of the earlier orders passed by it, the Commission had

not taken the subsidy leading to surplus available in the hands of KPTCL.

74. Contrary to the conclusions reached by the Commission, the appellant has shown that the carrying cost calculated @12% as was allowed by earlier decision works out to Rs. 1111.20 Crores till 2019 – Rs. 262.11 Crores on additional cost of Rs. 114.96 paid in FY 2001-02; Rs. 284.77 Crores on additional cost of Rs. 131.84 paid in FY 2002-03; Rs. 274.26 Crores on additional cost of Rs. 134.44 paid in FY 2003-04; Rs. 250.04 Crores on additional cost of Rs. 130.23 paid in FY 2004-05; and Rs. 40.02 Crores on additional cost of Rs. 22.23 paid in FY 2005-06. If the carrying cost were to be so computed, rather than being in surplus, the appellant would have a deficit of Rs. 723.83 Crores by the end of FY 2005-06. Upon the deficit of Rs. 72.90 Crores found by KERC for FY 2006-07 being added, the total deficit to be considered for FY 2020-21 is computed at Rs. 796.73 Crores. And we have not yet factored in the consequence of judgment dated 04.12.2007 in terms of which the appellant claims interest on delayed power purchase payments of the total effect of Rs. 492.61 Crores (Rs. 96.85 Crores for FY03; Rs. 45.72 Crores for FY04; Rs. 107.57 Crores for FY05; and Rs. 242.47 Crores for FY06).

75. Thus, we conclude that the impugned order denying carrying cost is not due “implementation” of the Order dated 09.05.2008. On the contrary, the approach must attract strong disapproval since it is designed to bypass or skirt around the said decision on considerations and methodology which had been specifically prohibited.

IMPUGNED ORDER – AN ACT OF HIERARCHICAL INDISCIPLINE?

76. We are constrained to conclude that the impugned order passed by KERC is designed to deprive KPTCL of its legitimate claim towards *carrying cost* despite binding decision of Supreme Court which had upheld the order of this tribunal. The perversity of the impugned decision is writ large on its face, in as much as KERC has adopted the above course in the teeth of critical observations in para 42 of the order dated 09.05.2008 (quoted earlier).

77. The Commission has proceeded by selective reading of some part of the judgment dated 09.05.2008 referring to truing-up without considering the scope of remand as contained in the operative part of the order dated 09.05.2008. Such course as adopted is impermissible in regulatory regime. If allowed, it would render redundant and meaningless the statutory

process of appellate scrutiny and adjudication on specific issues by this tribunal and, finally, by Supreme Court. This has the potency, as is demonstrated by the case at hand, of the regulatory authority at the bottom of the rung taking the liberty of ignoring the binding directives, re-opening and re-considering other aspects which were not challenged, acting contrary to the principles judicially settled to be followed and thereby setting at naught the legal remedies. This would lead to anarchy, endanger rule of law, and, therefore, is totally unacceptable.

78. We are appalled at the way the statutory Electricity Regulatory Commission has conducted itself vis-à-vis the legitimate claim of the appellant – the procurer which has been serving the cause of Discoms in the State of Karnataka.

79. The issue since beginning of the proceedings on the subject initiated in February 2002 before the State Commission has been as to whether the appellant (the procurer) was entitled to the additional power purchase cost paid to Tanir Bhavi on account of the award granted by the arbitral tribunal to be factored in the tariff so that the burden could be passed on to the consumer at the end of the supply chain. That this burden required "*pass through*" was settled by

this tribunal in appeal in the first round, the specious ground of default in filing appeal against the award taken by KERC for denial having been rejected. When the matter came back before KERC, upon remand in the wake of the said first round appellate order, new reasons were invented at least twice to deny the benefit, a fresh true up of the relevant years' accounts having been made to conclude that the appellant was sitting throughout on surplus and, therefore, there was no justification for "*pass through*" of the additional burden. The second round of appeal had to be followed by a third round which process concluded in 2018 when the Supreme Court dismissed the Civil Appeals. In the result, virtually two decades passed by before the appellant could secure from the State Commission the benefit of "*pass through*" of the additional burden of power purchase cost towards Tanir Bhavi. It does not call for much imagination to appreciate that the delay has added to the burden on account of accrual of interest on the funds availed for payments to Tanir Bhavi. This tribunal in preceding round had determined that the said burden of carrying cost also had to be allowed "*pass through*". But, in spite of the said binding directive, the carrying cost has again been denied on yet another revision of true up of previous FYs. This tribunal had

clearly ruled that against the given backdrop undertaking of fresh truing up of the financials of the previous years (i.e. the relevant period) was wholly impermissible. The State Commission, by the impugned order, has not only violated the said dictum but in the process has again indulged in same impropriety. Such approach must be condemned and its product quashed.

SOLUTIONS?

80. Given the arguments of the appellant that the impugned order of state Commission amounted to willful disobedience and, therefore, contempt, midway the hearing (spread over several days) we had called upon the Commission through its counsel to inform if it was inclined to conduct a revisit to the issues in light of the grievances that have been brought through the appeal at hand to this tribunal. The learned senior counsel representing the State Commission informed us on 10.08.2020 that the State Commission stands by the decision which has been rendered and which is subject matter of challenge by the present appeal there being, in his submissions, no error or infirmity therein.

81. The order of KERC denying carrying cost, in our judgment, is erroneous and illegal, not at all permissible in proceedings which were in the nature of execution ("for implementation") of the judgment dated 09.05.2008 of this tribunal, as merged in decision of Supreme Court repelling challenge thereto.

82. It is our duty to step in and bring about necessary correction. Since such indiscipline as noticed above has been indulged in more than once by the same Commission in the course of same dispute, forming almost a pattern, and such tendency has come to be noticed in other proceedings in the past as well, lest it becomes the order of the day leading to anarchy, it is also our duty to deal with it appropriately.

83. This tribunal has been established by section 110 of the Electricity Act, 2003 as the forum of first appeal, with the objective of not only affording remedy of appellate scrutiny to a person aggrieved, *inter alia*, by an order made by the Electricity Regulatory Commission to secure ends of justice , if need be, by "*confirming, modifying or setting aside*" the impugned order but also to perform the role of superintendence and control by exercising the jurisdiction conferred by Section 122 to "*issue such orders, instructions*

or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act". This tribunal, for purposes of adjudicatory process over disputes governed by Electricity Act stands in judicial hierarchy at a tier immediately below the Supreme Court of India. The decisions rendered or orders passed by us are subject to correction in appeal before Supreme Court in terms of Section 125 of Electricity Act, it being equated with second appeal "*on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908 (5 of 1908)*". Supreme Court is at the apex of judicial organ and, per Article 129 of the Constitution of India possesses "*all the powers of such a court including the power to punish for contempt of itself*".

84. Though this Appellate Tribunal is not "*bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908),*" and has the prerogative ("*subject to the other provisions of*" the statute) "*to regulate its own procedure*", in terms of Section 120 we are bound by law to always be "*guided by the principles of natural justice*". At the same time, the enactment specifically declares that the proceedings before us are "*judicial proceedings*" and confers, "*for the purposes of discharging its functions*", upon this tribunal "*the*

same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908)" on specified matters. Crucially, the tribunal is also vested with power to execute and enforce compliance, this being clearly laid out in sub-section (3) of Section 120 which reads thus:

> "*An order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court and, for this purpose, the Appellate Tribunal shall have all the powers of a civil court.*"
>
> (emphasis supplied)

85. The Code of Civil Procedure, 1908 ("CPC"), by Section 51, provides for the powers of the Court to enforce execution, *inter alia*, as under (quoted to the extent germane):

> "*51. Powers of Court to enforce execution.—Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—*
>
> *(a) xxx;*
>
> *(b) xxx;*
>
> *(c) by arrest and detention in prison for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section;*
>
> *(d) xxx; or*
>
> *(e) in such other manner as the nature of the relief granted may require:*
>
> *Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—*
>
> *Xxx*" (emphasis supplied)

86. Order XXI of CPC contains detailed provisions on the subject of execution. To the extent relevant, Rule 32 thereof may be quoted as under:

> "*32. Decree for specific performance for restitution of conjugal rights, or for an injunction.— (1) <u>Where the party against whom a decree</u> for the specific performance of a contract, or for restitution of conjugal rights, or <u>for an injunction</u>, <u>has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced</u> <u>in the case of a decree</u> for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or <u>for an injunction by his detention in the civil prison, or by the attachment of his property, or by both</u>.*
>
> *(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.*
>
> *(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.*
>
> *(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment no application to have the*

property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Explanation.—For the removal of doubts, it is hereby declared that the expression "the act required to be done" covers prohibitory as well as mandatory injunctions."

(emphasis supplied)

87. It is trite that directions passed by this tribunal in exercise of appellate jurisdiction are in the nature of mandate and, therefore, covered under the expression "*mandatory injunction*".

88. The impugned order denying "*pass through*" of the "*carrying cost*" cannot be sustained and, therefore, must be set-aside. At the same time, we cannot allow the judicial process to run into an unending vicious circle. The directions in the judgment dated 9.05.2008 must be enforced, in letter and spirit, by following the procedure which does not permit

any such liberties to be taken hereinafter. There has to be a closure for the appellant.

89. As observed earlier, the shortsighted approach of deferring the inevitable eventually works adversely to the interest of the consumers at large. If the "*carrying cost*" had been allowed immediately upon such claim being brought to the State Commission, its effect on the tariff would have been negligible. It is the delay of almost two decades which has led to escalation in terms of money of the burden of "*carrying cost*" for the appellant, the load of which would ultimately have to be borne by the consumer. In order that the "*pass through*" does not lead to extraordinary hike in the retail tariff, this tribunal while deciding the earlier appeal (no. 107 of 2006) by judgment dated 19.10.2006 had directed (by para 43 quoted earlier) that a "*regulatory asset*" be created by the appellant equivalent to "*value of the differential amount payable by it* (to Tanir Bhavi) *for five years*" and "*amortize the same by gradual increase of tariff in the course of next five years or so sooner thereof as the financial position may warrant*". Since the additional power purchase cost was not allowed by the State Commission, in spite of the said decision of this tribunal, the said direction could not be immediately put to compliance. In order to ensure

that there is no "*tariff shock*" to the consumers at large, the additional burden of "*carrying cost*" that would now have to be allowed "*pass through*" will also have to be similarly treated.

90. While the above procedure for execution of the order dated 09.05.2008 is available to us to compel and secure compliance, given the submissions advanced, it has also become necessary to examine the request for initiation of proceedings for contempt.

91. The Contempt of Courts Act, 1971 codifies the law on contempt of court. It clarifies that "contempt of court" includes civil contempt or criminal contempt.

92. The expression "civil contempt" is defined by section 2(b) to mean:

> "wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court". (emphasis supplied)

93. Likewise, the expression "criminal contempt" is defined by Section 2(c) to mean:

> "the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which— (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) interferes or tends to interfere with, or obstructs or tends to

obstruct, the administration of justice in any other manner" (emphasis supplied)

94. Wilful disobedience of a binding decision of a judicial authority is "civil contempt". An act which tends to obstruct the consequences flowing from a binding decision of the judicial authority is also interference with the administration of justice and, therefore, "criminal contempt". Penal consequences follow from a contumacious conduct.

95. The power to take cognizance of civil or criminal contempt is conferred by the Contempt of Courts Act, 1971 upon the Supreme Court or the High Courts (Sections 14-15).

96. In *Tirupati Balaji Developers (P) Ltd. v. State of Bihar*, (2004) 5 SCC 1, it was observed:

> ***"9.*** *In a unified hierarchical judicial system which India has accepted under its Constitution, vertically the Supreme Court is placed over the High Courts. The very fact that the Constitution confers an appellate power on the Supreme Court over the High Courts, certain consequences naturally flow and follow. Appeal implies in its natural and ordinary meaning the removal of a cause from any inferior court or tribunal to a superior one for the purpose of testing the soundness of decision and proceedings of the inferior court or tribunal. The superior forum shall have jurisdiction to reverse, confirm, annul or modify the decree or order of the forum appealed against and in the event of a remand*

the lower forum shall have to rehear the matter and comply with such directions as may accompany the order of remand. The appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below and failure on the part of the latter to carry out such directions or show disrespect to or to question the propriety of such directions would — it is obvious —be destructive of the hierarchical system in administration of justice. The seekers of justice and the society would lose faith in both."

(emphasis supplied)

97. This tribunal had to carry out the painful duty of dealing with similar situation of disobedience by another statutory Commission in the case leading to judgment reported as *BSES Rajdhani Power Limited v. DERC*, 2013 SCC OnLine APTEL 137 **:** [2013] APTEL 157. It was held that refusal to implement this tribunal's binding judgment by the Regulatory Commission amounted to judicial indiscipline and that this tribunal is empowered to take suitable action by imposing fine or cost on the commission. The following discourse in that decision enlightens us:

"*24.* *The refusal by the Delhi Commission to implement the judgment of this Tribunal would amount to judicial indiscipline and is contrary to the settled position of law.*

25. *As laid down by the Hon'ble Supreme Court that mere filing of the Appeal or proposal to file the Appeal would not amount to the effect of automatic stay.*

29. *<u>Any action or omission by a subordinate authority which violates or refuses to give effect to a direction given by a superior authority, has been repeatedly held to be a denial of justice which is destructive of basic principles in the administration of justice</u>. It is well settled law that the <u>findings and directions of Appellate Authority are binding on subordinate authorities</u>, which should be implemented effectively and scrupulously unless the same has been stayed or struck down by the Appellate Forum.*

31. *The observations made by the Hon'ble Supreme Court in these judgments are as follows:*

(a) Bhopal Sugar Industries Ltd. v. Income Tax Officer, Bhopal, AIR 1961 SC 182;

"………………..

8. We think that the learned Judicial Commissioner was clearly in error in holding that no manifest injustice resulted from the order of the respondent conveyed in his letter dated March 24, 1955. By that order the respondent virtually refused to carry out the directions which a superior tribunal had given to him in exercise of its appellate powers in respect of an order of assessments made by him. Such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on a hierarchy of courts. <u>If a subordinate tribunal refuses to carry out directions given to it by a superior tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice</u> and we have indeed found it very difficult to appreciate the process of reasoning by which the learned Judicial Commissioner while roundly condemning the respondent for refusing to carry out the directions of the superior tribunal, yet held that no manifest injustice resulted from such refusal".

(b) Shri Baradakant Mishra v. Bhimsen Dixit: (1973) 1 SCC 446;

"…………

*15. The conduct of the appellant in not following the previous decision of the High Court is calculated to create confusion in the administration of law. It will undermine respect for law laid down by the High Court and impair the Constitutional authority of the High Court. His conduct is therefore comprehended by the principles underlying the law of Contempt. The analogy of the inferior court's disobedience to the specific order of a superior court also suggests that his conduct falls within the purview of the law of Contempt. Just as the disobedience to a specific order of the Court undermines the authority and dignity of the court in a particular case, similarly the deliberate and malafide conduct of not following the law laid down in the previous decision undermines the Constitutional authority and respect of the High Court. Indeed, while the former conduct has repercussions on an individual case and on a limited number of persons, the latter conduct has a much wider and more disastrous impact. It is calculated not only to undermine the Constitutional authority and respect of the High Court, generally, but is also likely to subvert the Rule of Law and engender harassing uncertainty and confusion in the administration of law.***

(c) Smt. Kausalya Devi Bogra v. Land Acquisition Officer: (1984) 2 SCC 324;

"…….

9. The direction of the appellate court is certainly binding on the courts subordinate thereto. That apart, in view of the provisions of Article 141 of the Constitution, all courts in India are bound to follow the decisions of this Court. Judicial discipline requires and decorum known to law warrants that appellate directions should be taken as binding and

followed. It is appropriate to usefully recall certain observations of the House of Lords in Broom v. Cassell & Co. [1972] 1 All E.R. 801 Therein Lord Hailsham, L.C. observed:

The fact is, and I hope it will never be necessary to say so again, that in the hierarchical system of courts which exist in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tier".

(d) RBF Rig Corporation, Mumbai v. Commissioner of Customs (Imports), Mumbai: (2011) 3 SCC 573;

"……………..

19. We hasten to add, if for any reason, the subordinate authority is of the view that the directions issued by the Court is contrary to statutory provision or well established principles of law, it can approach the same Court with necessary application/petition for clarification or modification or approach the superior forum for appropriate reliefs. In the present case, as we have already noticed, the Respondents have not questioned the order passed by the High Court, which order has reached finality. In such circumstances, we cannot permit the adjudicating authority to circumvent the order passed by the High Court."

(e) Maninderjit Singh Bitta v. UOI: (2011) 11 SCC 315

"………………..

16. Disobedience of Court orders, more so persistent disobedience, has been viewed very seriously by the concerned Courts. It is not only desirable but an essential requirement of law that the concerned authorities/executive should carry out their statutory functions and comply with the orders of the Court within the stipulated time. Such course attains greater significance where the statutory law is coupled with the directions issued by a Court of law in relation to

attainment of a public purpose and public interest".

32. *The reading of the above judgments would make it clear that the conduct of the Delhi Commission in refusing to implement this Tribunal's directions, is highly reprehensible and the same is liable to be condemned.*

33. *Though the Act provides for suitable action against the Delhi Commission by imposing fine or cost for having violated our directions given in the Appeal under Section 111 of the Act, 2003, we refrain from doing so in view of the fact that the Delhi Commission in another Appeal filed before this Tribunal in Appeal No. 14 of 2012 in which similar allegations have been leveled against the Delhi Commission, filed Affidavit tendering unqualified apology for non-compliance of the directions and expressed its willingness to implement our directions earnestly in letter and spirit in future*."

(emphasis supplied)

98. A bare reading of the provision contained in Section 16 of Contempt of Courts Act is sufficient to dispel illusion or doubts, if any entertained, that person(s) sitting in judicial capacity are not bound by the discipline of this law. They fall within its purview just as any other person would be, proof of having acted "*judicially*" possibly being a saving clause. A willful disobedience of a binding direction of superior authority at the appellate level, *prima facie*, amounts to civil contempt and since the facts at hand appear to carry the element of designed obstruction to the administration of

justice, seemingly with the objective of skirting around or bypassing, yet again, the binding decision of this tribunal, as upheld by Supreme Court, ostensibly to sub-serve ulterior ends, it *ex facie* demonstrative of injudicious conduct, also appears to be constituting criminal contempt. Since the judgment dated 09.05.2008 of this tribunal was upheld in appeal by the Supreme Court, the impugned order is in teeth and *prima facie* contempt of said decision.

DECISION

99. We could have closed the chapter simply by having recourse to the power and jurisdiction vested in this tribunal to execute and enforce the decision which has attained finality. We do not think that would suffice in the case at hand. It is necessary to set the law on contempt into motion in the situation that we have at hand for several reasons.

100. As is clear from the narration of the factual background, in the preceding round of appeal to this tribunal, a disapproval of the conduct of the State Commission had been expressed, it having been reminded (para 42 of judgment dated 09.05.2008) that in its capacity as a quasi-judicial body it was duty-bound to "*adhere to*

judicial discipline", the attitude betrayed by "*repeated attempts to bypass the dictum of this tribunal*" being not conducive to the growth of the electricity sector, it instead leading to "*litigation and consequent waste of public money and public time*". It appears the said observations have fallen on deaf ears. Then, as noted earlier, midway the hearing on the present appeal, we had given the opportunity to the State Commission to make amends by revisiting the impugned order in light of contentions of the appellant. The State Commission declined to avail of the said opportunity knowing full well that appellant was pressing for coercive action for the willful defiance. Since there is a need to curb the growing tendency of the regulatory authorities at the bottom of the rung of taking liberties with the binding directives, or acting contrary to the judicially settled principles so as to deny lawful claims, reflective of whimsical, injudicious and inconsistent approach, this possibly endangering rule of law, this is an occasion to send out a strong message.

101. For the foregoing reasons, we decide and direct as under:

(a) The impugned order dated 16.01.2020 passed by the Karnataka Electricity Regulatory Commission in case no. N/07/08, to the extent thereby fresh true up of the appellant for the period FY 2000-01 to FY 2005-06 was unreasonably, improperly and illegally carried

out and the full benefit of "*carrying cost*" of 12% on the additional power purchase cost of Rs. 545.87 Crores in terms of judgment dated 09.05.2008 of this tribunal in Appeal no. 09/2008 was unjustly denied with consequential directions is hereby set-aside.

(b) The Karnataka Electricity Regulatory Commission is given one more opportunity for making amends and is directed to pass a fresh order within four weeks hereof for appropriate and scrupulous "*implementation*" of the directions in the above-mentioned judgment dated 09.05.2008, bearing in mind the observations recorded in this judgment and the judgments on the subject at hand rendered earlier.

(c) In order to ensure that the "*pass through*" of the "*carrying cost*" allowed in favour of the appellant in terms of the above decision does not lead to "*tariff shock*" in the form of steep rise in the price of retail sale of electricity by distributing companies to the consumers at large, and to soften its impact, the appellant would be obliged to take measures for, and the State Commission would be duty-bound to

oversee, the creation of corresponding regulatory asset and the same being amortized over the next five years for facilitating gradual increase of tariff, following the letter and spirit of judgment dated 19.10.2006 in Appeal no. 107 of 2006.

(d) Reports shall be submitted by the State Commission, and also by the appellant, of steps / action taken in compliance with the above directions immediately after the elapse of the period specified above.

(e) Without prejudice to the above, this tribunal reserving its jurisdiction to take further requisite action in accordance with law for execution and enforcement of our decision(s), we call upon the Chairperson and Members of the Karnataka Electricity Regulatory Commission who rendered the impugned decision dated 16.01.2020 to show cause within four weeks hereof as to why contempt action be not initiated against them for willful defiance and disobedience of the directions contained in the above mentioned judgment dated 09.05.2008 and obstruction of the administration of justice.

102. The appeal and the applications filed therewith are disposed of in above terms. The matter, however, shall continue to be alive on the file of this tribunal. It shall be taken up further proceedings vis-à-vis the directions given above and shall be listed accordingly on 27.11.2020.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 05th DAY OF OCTOBER, 2020

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member