

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO.148 OF 2021

Dated: 20.09.2022

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

**EAST DELHI WASTE PROCESSING
COMPANY LIMITED**

*Through Mr. Sumeet Salhotra,
Assistant Vice President
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New Delhi – 110 020*

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.... Appellant(s)

VERSUS

1. DELHI ELECTRICITY REGULATORY COMMISSION (DERC)

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2. STATE LOAD DESPATCH CENTRE, DELHI

*Through Ms. Sonali Garg
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.... Respondent(s)

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.
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Counsel for the Respondent (s) : Mr. Dhananjay Baijal for R-1

Mr. Pradeep Misra
Mr. Manoj Kumar Sharma for R-2

Mr. Gaurav Gupta
Mr. Naveen Goel
Ms. Sonali Garg Rep. for R-2

J U D G M E N T (O r a l)

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. *Waste to Energy* (“WtE”) is a concept and technology still at nascent stage undergoing the process of development, steered by imperatives primarily of environment and public health in as much as it statedly aids and assists in reducing accumulation of toxic waste and its deleterious effect on life. Having regard to its nature, however, it falls in the category of non-conventional (renewable) source of energy, the quantum of electricity thereby generated presently being minimal, having “extremely limited operational proceedings”, nowhere in comparison to the other sources like those based on hydro power, fossil-fuel, solar, wind etc.

2. By a *suo motu* order passed on 21.01.2019 (no.F.9 (164) /DERC / DS/2015-16/C.F 5110) – hereinafter referred to as the “2019 Exemption Order”, the respondent *Delhi Electricity Regulatory Commission* (hereinafter referred to as “DERC” or “the State Commission”), in exercise of powers vested in it, *inter alia*, under section 86 of Electricity Act, 2003, had decided to grant exemption, subject to conditions, to “generation

projects based on *Waste to Energy* sources” in the *National Capital Territory of Delhi*, from levy of “*Wheeling Charges, Transmission Charges, Regulatory Asset Surcharge, Pension Trust Surcharge and Cross Subsidy Surcharge* on sale of electricity within NCT of Delhi under *Open Access Regulations*” and from “*commercial / financial implication in case of deviation from the scheduled power under Deviation Settlement Mechanism*”, subject to certain conditions. By a subsequent order dated 15.02.2021 (on petition no.28/2020), the Commission has issued certain clarifications with regard to the *2019 Exemption Order*.

3. The appellant feeling aggrieved with the import and effect of the said clarifications given by the above-mentioned order dated 15.02.2021 (hereinafter referred to as “the impugned order”) has challenged the same by appeal invoking the jurisdiction of this tribunal under section 111 of Electricity Act, 2003, contending that the same is bad in law.

4. The background facts pertaining particularly to the appellant may be noted at the outset. The appellant – *East Delhi Waste Processing Company Limited* – is a company incorporated under the provisions of the Company law, engaged in activities of processing of Municipal Solid Waste (“MSW”) and operating WtE Power Plant located in *Ghazipur, Delhi*, commissioned on 24.08.2017, for producing electricity as a by-product. It

had entered into a *Power Purchase Agreement* (“PPA”) on 29.10.2009 with *BSES Yamuna Power Limited* (“BYPL”), the distribution licensee operating in the eastern and central parts of *National Capital Territory of Delhi* (“NCT of Delhi”) for generation and sale of 49 per cent net available electricity from its said WtE Power Plant, it being at liberty, in terms of the said PPA, for sale of the remainder 51 per cent of available capacity. The PPA was approved by the State Commission by order dated 11.07.2008 in petition no.26/2008 and had a tenure of 25 years. However, it contained a clause (referred to as “foreclosure clause”) permitting early termination, *inter alia*, by mutual consent. Admittedly, the said foreclosure clause was invoked by the appellant and the contractual arrangement under the PPA came to an end with approval of the State Commission granted by order dated 21.02.2020.

5. On 01.06.2017, the State Commission had passed a generic order on the subject of determination of Open Access Charges and related matters. The clause 6(2) of the said order dated 01.06.2017 applied to all renewable energy sources, including WtE projects, and would read as under:

“Wheeling, Transmission and Additional surcharge shall not be applicable on Open Access Consumers availing energy from all renewable energy sources within or outside Delhi. Open Access consumer receiving electricity from renewable energy sources shall be exempted from the cross-subsidy surcharge to the extent of RPO

Provided that the generators using renewable energy sources shall certify that no REC/PRO claim for this power has been made”

6. As mentioned at the outset, the State Commission passed the 2019 *Exemption Order* particularly for the benefit of WtE projects, the operative part read as under:

“For generation projects based on Waste to Energy sources in the National Capital Territory of Delhi shall be exempted from following:-

- (i) Wheeling Charges, Transmission Charges, Regulatory Asset Surcharge, Pension Trust Surcharge and Cross Subsidy Surcharge on sale of electricity within NCT of Delhi under Open Access Regulations;*
- (ii) Any commercial/financial implication in case of deviation from the scheduled power under Deviation Settlement Mechanism from the date of the commissioning of the project and the actual generation shall be treated as scheduled generation;*

Provided that the above exemptions shall be applicable for the useful life of the existing and future projects commissioned or Power Purchase Agreement signed on or before 31st March, 2022:

Provided further that the existing waste to energy projects having entered into a Power Purchase Agreement for sale of electricity with the distribution licensee at a tariff determined under section 62 or adopted under section 63 of the Act by the Commission shall not be eligible for availing the benefit under open access for availing cross subsidy surcharge and other charges as mentioned above in case of premature termination of the Power Purchase Agreement with a view to avail the benefits of exemption of cross subsidy surcharges etc.”

7. Indisputably, the appellant having committed 49 per cent of its generation capacity for sale to a distribution licensee operating in the NCT

of Delhi enjoyed the above-mentioned benefits under the 2019 Exemption Order.

8. Indisputably, citing various reasons, the appellant had approached the State Commission by a petition (no.10/2020) praying for approval of “foreclosure of the PPA” and for allowing the petitioner to sell the 49 per cent power under Open Access, post PPA, and exemption of various charges and relaxation of Deviation Settlement Mechanism (“DSM”) for factoring of said scheduling charges post foreclosure and allowance of 30 days period to enable its implementation by all stakeholders, the electricity generated during that period to be accounted for as being sold under the PPA.

9. The petition for approval of pre-mature termination of the PPA seems to have been resisted by BYPL, *inter alia*, on the ground that it had never “consented” to the foreclosure at the instance of the generator (the appellant), it also being the plea that such foreclosure would need approval of the State Commission and Government of NCT of Delhi. The Commission decided the matter, by order dated 21.02.2020, observing that since both parties were aggregable to the foreclosure, it being a bilateral contract, it was immaterial as to which party has approached it by a formal petition. Crucially, on the subject of continued entitlement of the appellant

to exemptions from payments of wheeling charges and other such levies, the Commission observed thus:

“11. Regarding the prayer for exemption from payment of wheeling charges, cross subsidy charges etc. in case of power being sold under open access regime, it is observed that the Petitioner has not provided any cogent or plausible reason in support of their demand so that the Commission may decide contrary to its own Order dated 21.01.2019. The Order dated 21.01.2019 is a considered order and unless anything extraordinary or exemplary is observed, it would not be prudent to reverse a considered order. It is also to be noted that the aforesaid Order dated 21.01.2019 has been issued in respect of WtE projects only, keeping in view the benefits and necessity of such projects in waste disposal management, so as to encourage and promote them. Therefore, the benefits of WtE project as cited by the Petitioner may not be considered as a cogent reason for reversing the decision of the Commission. Therefore, the prayer of the Petitioner for exemption from wheeling charges etc. in case of selling power through Open Access mode cannot be granted.”

10. The Distribution Licensee, (BYPL) had also raised the issue of its entitlement under the contract to claim liquidated damages. The Commission observed that the petition brought before it was only for foreclosure to be allowed but this did not mean that the legitimate claim of a party under the foreclosed PPA for cause of action prior to foreclosure would be affected. The right of BYPL to file a petition for such claim was thus reserved, it also being observed that the obligation to indemnify BYPL for any past, current, or future claims, losses or liabilities on the part of the appellant were inherent in the commercial arrangement. The petition seeking approval of foreclosure was, thus, granted, by order dated 21.02.2020, the operative part reading as under:

“16. In view of the foregoing discussions, following Orders are made:

- a. Foreclosure of PPA dated 29.10.2009 between EDWPCL and BYPL for purchase of 49% of power from Petitioner’s WtE plant at Ghazipur is allowed on the basis of mutual consent in terms of clause 2.2 of the PPA.*
- b. The power made available due to foreclosure of PPA will not be allocated again to the Discoms of NCT of Delhi under compulsory buying policy.*
- c. EDWPCL shall be free to sell available power under any mode including open access, however, exemption from wheeling charges, cross-subsidy charges etc. would not be available in terms of the Order of this Commission dated 21.01.2019.*
- d. 30 days time is allowed for making arrangement to enable implementation of the same by all stakeholders including the parties/Discoms/SLDC etc.; and for that duration the electricity generated by the Petitioner’s Plant will be accounted for as being sold under the PPA.*
- e. BYPL will make alternative arrangement to make good the shortfall of RPO due to foreclosure of the PPA within a period of one year and during the period the shortfall in RPO to the extent of this PPA shall not be considered against BYPL.*
- f. The claim of BYPL about liquidated damage etc. could not be decided through instant Petition. BYPL is at liberty to file Petition about its claim related to PPA being foreclosed.”*

11. The generating company did not bring a challenge to the above-mentioned order dated 21.02.2020. Instead, it approached the State Commission by another petition (no.28/2020) seeking exemption from various charges in respect of the sale of 49 percent of electricity under Open Access and relaxation of the Deviation Settlement Mechanism for intra-state scheduling purposes for the petitioner’s WtE Project.

12. The prime reliance of the appellant before DERC was on 2019 *Exemption Order*, the insistence being that the second proviso to the operative part of the said order was applicable to such PPAs as had been prematurely terminated with a view to avail benefit of exemption of Cross Subsidy Surcharge etc. It was argued that the case at hand was not of unilateral premature termination of PPA but one of termination “on mutual consent basis”, the objective not being of the kind covered by the said proviso.

13. The petition was contested by *State Load Despatch Centre* (“SLDC”) as well particularly in the context of the issue of deviation from scheduling of power under Deviation Settlement Mechanism. It was submitted by SLDC that when WtE generator draws power from the grid, the schedule of Open Access consumer is revised to zero, the drawal of power by the generator remaining unaccounted.

14. The Commission, *inter alia*, observed thus:

“12. The Petitioner has also been arguing that 51% of the Power from WtE plant is already exempted from various charges under Open Access as per Order dated 21.01.2019 and remaining 49% of the power released after termination of PPA is not exempted from various charges under Open Access. The Commission is of the view that allocation of energy to different consumers cannot be categorised whether this energy is out of 51% or remaining 49%. Further, the sale in open access to different consumers will also vary from time to time as open access can be availed by the consumer on

short term basis, medium term basis or long term basis. The treatment and applicability of charges for the total energy supplied under open access to the consumers other than distribution licensee has to be the same. The Commission is also aware of the fact that certain exemptions have already been given to Renewable Energy sources vide DERC Order dated 01.06.2017.”

15. Against the above backdrop, the State Commission proceeded to clarify the 2019 Exemption Order as under:

“13. In view of the foregoing discussion, following is held and clarified:

- (i) The exemptions stipulated in Order dated 21.01.2019 shall be applicable to the Waste to Energy Generating Projects of Delhi for the energy sold to the Distribution Licensees of Delhi.*
- (ii) In case the Waste to Energy generating project is selling power both to the distribution licensee of Delhi and other consumers through open access, the exemptions of charges as allowed in DERC Open Access Order dated 01.06.2017 as amended from time to time, shall be allowed on the power sold to the consumers (other than distribution licensee) through open access mode.*
- (iii) Exemption from Deviation Settlement Mechanism (DSM) shall be applicable in case the Waste to Energy generating project is selling power either to the distribution licensee only or to the both, the Distribution Licensee of Delhi and other consumers through open access and in such cases, the actual generation shall be treated as scheduled generation. In such mixed sale of electricity, the settlement of unaccounted energy of waste to energy plant shall be done in the energy account of distribution licensee where the waste to energy plant is located.*
- (iv) In the absence of part sale of electricity to a Distribution licensee, exemption from Deviation Settlement Mechanism shall not be allowed and the provisions of DERC Open Access Order dated 01.06.2017 for settlement of deviation at Injection Point shall be applicable.”*

16. It appears that by virtue of the impugned order the State Commission has clarified that *2019 Exemption Order* is applicable only to such WtE projects of Delhi as sell part of the power to distribution licensees of Delhi. It is the grievance of the appellant that, by the above quoted clarification given by the impugned order, it has been unfairly denied the benefit of exemptions accrued under *2019 Exemption Order* even in relation to sale of 51 per cent electricity to Open Access consumers. The submission is that the impugned order amounts to arbitrary modification of the *2019 Exemption Order*, no cogent reasons having been cited, without any notice or affording any opportunity to represent there against. It is also a submission of the appellant that the order takes away the benefits already granted under the law, discourages WtE projects and, thus, is contrary to the public policy as reflected in the Electricity Act, 2003, (as indeed the rules of *Green Energy Open Access* notified recently on 06.06.2022) whereunder non-renewable sources of energy are to be promoted. A lot of stress was laid on the argument that the prayer for foreclosure of the PPA, as approved by the Commission by order dated 21.02.2020, cannot be treated as premature termination of the contract.

17. Having bestowed our anxious consideration to the contentions raised in this appeal, we find that the same cannot be accepted for several reasons.

18. Nothing turns on the argument that the pre-mature termination of the PPA was by mutual consent and not on account of unilateral exercise of the discretion by the generator. The relevant clause has been loosely referred to as *foreclosure clause*, it actually described under the PPA as a provision for *early termination*, the clause reading thus:

“2.2 Early Termination

This agreement shall terminate before the Expiry Date:

i. if either the Procurer or Seller exercises a right to terminate, pursuant to Article 3.3.2. Article 3.3.3. Article 3.3.3A. Article 4.5.3. Article 14.4.5 or Schedule 10 of this agreement or any other provision of this Agreement; or

ii. in such other circumstances as the Seller and all the Procurer may agree, in writing.”

19. It is clear from bare reading of the above clause that the PPA could be terminated pre-maturely, either by mutual consent in writing or upon exercise of a right by either party under the various clauses which have been referred to above. Though the petition for approval of early termination (foreclosure) was presented by the appellant, it is clear from the order dated 21.02.2020 that, aside from certain technical objections (e.g. need for prior approval of GNCTD etc.), there was not much opposition by the procurer (BYPL) and, thus, the Commission proceeded on the

assumption that there was a mutual consent for early termination of the PPA.

20. The benefits in the nature of exemptions which are the subject matter of the dispute at hand arise from a conjoint reading of the generic order passed by the State Commission on 01.06.2017 read with *2019 Exemption Order*. The exemption (from such levies as wheeling charges, transmission charges and DSM etc.) were generally extended to sale of electricity within NCT of Delhi under Open Access Regulations but the provisos to clause (ii) of the operative part of *2019 Exemption Order* (quoted earlier) make it clear that in order to avail such benefits, a WtE project must not resort to pre-mature termination of PPA. To put in simply, it is inherent in the *2019 Exemption Order* that a generator operating a WtE plant must have a contract in the nature of PPA with the distribution licensee within the NCT of Delhi, may be committing only part of the generation capacity for availing such benefits, the pre-mature termination of such PPA rendering it disqualified for such purposes.

21. Thus, when the appellant had approached the State Commission for approval of pre-mature termination of the PPA, its prayer for grant of relief in the nature of continued entitlement to exemptions was rejected, expressly so by (para 11 of) order dated 21.02.2020. As already noted, the said order was never challenged. It had thus attained finality by the time

the appellant approached the State Commission by fresh petition (no.28/2020) on which the impugned order has been passed.

22. The operative part of the order under challenge, which is sought to be assailed by the appeal at hand, only clarifies the directions in the *2019 Exemption Order*, which were generic in nature. The clarifications thus given are in *sync* with the meaning and impart of the *2019 Exemption Order*, now leaving no uncertainty that for being entitled to avail the exemptions thereunder (i.e. waiver of Wheeling Charges, Termination Charges or relaxation of Deviation Settlement Mechanism), it is necessary for the WtE generator to sell the energy to distribution licensee of Delhi. We agree with the submissions of the learned counsel for the respondents that the generic order dated 01.06.2017, as indeed the *2019 Exemption Order* which carved out certain exemptions vis-à-vis the former, followed by the impugned order dated 15.02.2021 are not adjudicatory orders respecting a dispute *inter se* the parties but in the nature of regulatory orders which lay down generic rules on the subject of tariff and, therefore, not amenable to challenge before this tribunal under section 111 of Electricity Act.

23. By its judgment reported as *PTC India Ltd. v. Central Electricity Regulatory Commission* (2010) 4 SCC 603, the Supreme Court had clarified that a State Commission under the Electricity Act has the power to

regulate which is not restricted to the framing of subordinate legislation in the form of regulations, observing thus:

“49. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation-making functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, “between legislative and administrative functions we have regulatory functions”. A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also a part of administrative process resembling a judicial decision by a court of law. (See Shri Sitaram Sugar Co. Ltd. v. Union of India [(1990) 3 SCC 223].)

50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes “tariff” as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff. This basic scheme equally applies to the subject-matter “trading margin” in a different statutory context as will be demonstrated by discussion hereinbelow.

51. In Narinder Chand Hem Raj v. Lt. Governor, H.P. [(1971) 2 SCC 747] this Court has held that power to tax is a legislative power which can be exercised by the legislature directly or subject to certain conditions. The legislature can delegate that power to some other authority. But the exercise of that power, whether by the legislature or by the delegate will be an exercise of legislative power. The fact that the power can be delegated will not make it an administrative power or adjudicatory power. In the said judgment, it has been further held that no court can direct a subordinate legislative body or the legislature to enact a law or to modify the existing law and if courts cannot so direct, much less the tribunal, unless power to annul or modify is expressly given to it.

52. In *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* [(1985) 1 SCC 641 : 1985 SCC (Tax) 121] this Court held that subordinate legislation is outside the purview of administrative action i.e. on the grounds of violation of rules of natural justice or that it has not taken into account relevant circumstances or that it is not reasonable. However, a distinction must be made between delegation of legislative function and investment of discretion to exercise a particular discretionary power by a statute. In the latter case, the impugned exercise of discretion may be considered on all grounds on which administrative action may be questioned such as non-application of mind, taking irrelevant matters into consideration, etc. The subordinate legislation is, however, beyond the reach of administrative law. Thus, delegated legislation—otherwise known as secondary, subordinate or administrative legislation—is enacted by the administrative branch of the Government, usually under the powers conferred upon it by the primary legislation. Delegated legislation takes a number of forms and a number of terms—rules, regulations, bye-laws, etc.; however, instead of the said labels what is of significance is the provisions in the primary legislation which, in the first place, confer the power to enact administrative legislation. Such provisions are also called as “enabling provisions”. They demarcate the extent of the administrator's legislative power, the decision-making power and the policy-making power. However, any legislation enacted outside the terms of the enabling provision will be vulnerable to judicial review and *ultra vires*.

53. Applying the abovementioned tests to the scheme of the 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories —mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head “mandatory functions” whereas advising the Central Government on formulation of National Electricity Policy and tariff policy would fall under the head “advisory functions”. In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Therefore, functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.

54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation."

[Emphasis Supplied]

24. The foreclosure order dated 21.02.2020 adjudicated upon an *inter partes* dispute. All the other orders of the Commission which have been referred to above do not deal with issue of tariff or imposition of fees, they being concerned with the procedure for determination of Open Access charges payable by the stakeholders. The *2019 Exemption Order* was regulatory in nature specifically in relation to WtE plants, the impugned order being only clarificatory in its respect.

25. It is pertinent to quote the observations of the Supreme Court in *State of Gujarat v. Utility Users' Welfare Assn.*, (2018) 6 SCC 21:

“90. We may also look to the nature and functions performed by the State Commission. Functions of the State Commission are prescribed under Section 86 of the said Act. The enumerated functions are determination of tariff, regulation of electricity purchase and procurement process of distribution licensees, facilitating intra-State transmission, issuing licences to persons, promoting cogeneration and generation of electricity from renewable sources, levy fee, specify or enforce standards, fix trading margins. All these functions are regulatory in character rather than adjudicatory. The real adjudicatory function is only provided in sub-clause (f) whereupon the Commission has the option of adjudicating the disputes between the licensees and generating companies, or to refer such disputes to arbitration. There is also an advisory role to be performed by the State Commission as specified in sub-section (2). The issue, however, is not whether a Judge would be comfortable doing this function but whether these are types of functions which necessarily mandate a Judge to be a Chairperson. The answer to this would also be in the negative, supporting the view we have adopted on the plain reading of the section.

101. Now turning to the powers of the State Commission, we may note that the same are specified from Sections 94 to 96 of the said Act. The reference in these sections is to the “appropriate

Commission” i.e. it can either be the Central Commission or the State Commission or the Joint Commission. The relevant definition clause is as under:

“2. Definitions.—In this Act, unless the context otherwise requires—

(4) “appropriate Commission” means the Central Regulatory Commission referred to in sub-section (1) of Section 76 or the State Regulatory Commission referred to in Section 82 or the Joint Commission referred to in Section 83, as the case may be;”

The powers conferred under these sections are, thus, undisputedly exercisable by the State Commission.

102. A perusal of these provisions would show that apart from their definition, even otherwise, these are powers of a civil court under the Code of Civil Procedure, 1908 (hereinafter referred to as “the said Code”). Powers such as summoning, enforcement of attendance of any person and examination on oath, discovery and production of documents, receiving affidavit of evidence, requisitioning of public records, etc., all form part of Section 94. In terms of Section 95, all such proceedings before the State Commission would be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Penal Code, 1860 and the Commission would be a civil court for purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973. Not only that, Section 96 confers the extreme power of entry and seizure in respect of any building and place where the Commission has reason to believe that any document relating to the subject-matter of enquiry may be found and may be seized. The power is conferred on the Commission under Section 129 for securing compliances of orders and under Sections 142 and 146 for punishment for non-compliance of orders and directions. This, thus, leaves no manner of doubt that the State Commission, though defined as a “Commission” has all the “trappings of the court”.

103. We may also note that in terms of what has been opined in *Gujarat Urja Vikas Nigam Ltd. [Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755] (GJ-I)*, such adjudication of disputes between the licensees and generating companies by the State Commission or the arbitrator nominated by it under clause (f) of sub-section (1) of Section 86 of the said Act extends to all disputes and not merely to those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) of Section 86(1) as may arise between licensees and generating companies. In effect, it has been observed

that this is the only process of adjudication which has to be followed as there is no restriction in Section 86(1)(f) of the nature of the dispute that may be adjudicated. Similarly in A.P. Power Coordination Committee [A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., (2016) 3 SCC 468] while referring to the judgment in Gujarat Urja Vikas Nigam Ltd. [Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755] (GJ-I), it has been observed that the Commission has been elevated to the status of a civil court in respect of all disputes between the licensees and generating companies. Such disputes need not arise from exercise of powers under the said Act but even claims or disputes arising purely out of contract have to be either adjudicated by the Commission or be referred to an arbitrator nominated by the Commission. In that context it has also been observed that the advisability of having the State Commission presided over by a Judge of the High Court as a Chairperson was mentioned in Tangedco Ltd. [Tangedco Ltd. v. PPN Power Generating Co. (P) Ltd., (2014) 11 SCC 53] The provisions of the Limitation Act, 1963 like Sections 5 and 14 have also been imported into the Act as observed.

104. *What else can be called the “trappings of the court”? We are buttressed in our conclusion by judicial pronouncements dealing with the expression “the trappings of the court”. The expression “trappings of the court” initially found mention in a judgment of the Judicial Committee of the Privy Council in Shell Co. of Australia Ltd. v. Federal Taxation Commr. [Shell Co. of Australia Ltd. v. Federal Taxation Commr., 1931 AC 275 (PC)] It was observed by Sankey, LC that there are tribunals with many of the “trappings of a court” but are not courts in the strict sense of exercising judicial power.”*

[Emphasis supplied]

26. This tribunal had the occasion to examine the maintainability of similar appeal against the backdrop of challenge to an order on the subject of removal of difficulties passed by the Central Commission. By judgment reported as *MSEDCL v CERC*, 2011 SCC Online Aptel 119 (appeal no.92 of 2011), the tribunal took the following view:

“15. The question arises in this case is this “whether the impugned order amending the Regulations by the Central Commission is the outcome of the exercise of the power by the Central Commission under Regulatory power or under adjudicatory power?”. It is strenuously submitted by the Appellant that the impugned order is not in the nature of legislative exercise and as such Appeal is maintainable. This submission is misconceived. We are of the view that even assuming that the exercise is not in the legislative exercise, the Appeal cannot be maintained as the impugned order passed by the Commission was only by exercising its Regulatory power and not adjudicatory power and as such the submissions of the Appellant have to be rejected. The detailed reasons are as follows:” [Emphasis Supplied]

“24. Merely because the presentation through the petition was submitted by the NLDC (R 2) and the same was entertained by the Central Commission which heard the NLDC and passed the impugned order amending the Regulations by giving reasons, it cannot be held that this order has been passed by exercising the adjudication of quasi-judicial powers conferred upon the Commission under Section-62 of the Electricity Act, 2003.

28. As per the ratio, referred to above, laid down by the Hon’ble Supreme Court, this Tribunal, under Section 111 of the Act cannot interfere with the orders passed by the exercise of the Regulatory Powers vested with the Central Commission under Sections 61 and 178 of Electricity Act 2003. We can only entertain the Appeal related to the orders passed by the Commission for determination of tariff and for resolution of the disputes through the exercise of the adjudicatory power, but not against the orders passed under Regulatory Power.”

[Emphasis supplied]

27. The appeal at hand bringing a challenge to the clarifications given by the State Commission vis-à-vis 2019 Exemption Order is actually an endeavor to assail exercise of regulatory power by the State Commission,

there being no component of adjudication or fixation of any levy or tariff involved.

28. For above reasons, we do not find any merit in the appeal. Hence, it is dismissed.

Pronounced in open court on this 20th Day of September 2022

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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