

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

(APPELLATE JURISDICTION)

APPEAL NO. 228 OF 2015

Dated: 14.07.2022

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

In the matter of:

SARDAR SAROVAR NARMADA NIGAM LTD.

Narmada Bhavan, Block-A, 2nd Floor,
Indira Avenue, Vadodara – 390001
Gujarat

.... Appellant(s)

VERSUS

1. CENTRAL ELECTRICITY REGULATORY COMMISSION

3rd & 4th Floor, Cahnderlok Building,
36, Janpath,
New Delhi-110001

2. NARMADA CONTROL AUTHORITY

Narmada Sadan, Block B
Scheme 74, Vijay Nagar,
Indore 452010,
Madhya Pradesh

3. NARMADA VALLEY DEVELOPMENT AUTHORITY

Narmada Bhawan, 59, Arera Hills,
Bhopal- 462011,
Madhya Pradesh

**4. MADHYA PRADESH POWER MANAGEMENT
COMPANY LTD.**

(Previously known as Madhya Pradesh State Electricity Board)
Shakti Bhawan, Rampur
Jabalpur -482008,
Madhya Pradesh

**5. MAHARASHTRA STATE ELECTRICITY
DISTRIBUTION COMPANY LTD.**

(Previously known as Maharashtra State Electricity Board)
Prakashgad, Plot No. G-9, Bandra (East)
Mumbai-400051,
Maharashtra

6. GUJARAT URJA VIKAS NIGAM LTD.

Sardar Patel VidyutBhavan
Head Office, Race Course,
Vadodara-390007, Gujarat

.... Respondents

Counsel for the Appellant (s): Mr.TejasKaria
Ms.AvlokitaRajvi
Mr. Samarth Madan

Counsel for the Respondent (s): Mr.AveakGanguly
Mr. Manu Seshadri for R-1

Mr.Ruchir Mishra
Mr.Ramneek Mishra
Mr.Sanjiv Kumar Saxena for R-2

Mr.Gopal Jain, Sr. Adv.
Mr.Anup Jain for R-5/MSEDCL

Ms.SwapnaSeshadri
Ms.SrishtiKhindaria
Mr. Jai Dhanani for R-6

J U D G M E N T

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

1. *Sardar Sarovar Narmada Nigam Ltd.* (hereinafter referred to as “SSNNL”), the appellant herein, was promoted and established by the State of Gujarat and incorporated under the provisions of the Companies Act, 1956 as a Special Purpose Vehicle (‘SPV’) in 1988. A hydro project named *Sardar Sarovar Project* (hereinafter referred to as “SSP”) was established, on the river ‘Narmada’, by SSNNL which has been operating and maintaining it ever since. The electricity generated by SSP is shared by three States viz. Gujarat, Maharashtra and Madhya Pradesh in the ratio of 16:27:57 respectively through 400 kV double circuit transmission lines viz. SSP-Kasor and SSP-Asoj for Gujarat, SSP-Dhule double circuit line to Maharashtra and SSP-Nagda double circuit line to Madhya Pradesh.

2. The *Central Electricity Regulatory Commission* (hereinafter referred to as “CERC” or “Central Commission”), the first respondent herein, by its *Suo Motu* Order dated 30.06.2015, passed in Petition no. 267/Suo Motu/2012, held that SSNNL is a generating company having a composite scheme for generation and sale of electricity in more than one State and, therefore, the jurisdiction for determination of tariff for generation and supply of electricity by SSNNL is vested with CERC. On the basis of such declaration, by the impugned order, the appellant/SSNNL has been directed to make an application before CERC for approval of the tariff of generating station and transmission lines, in accordance with *Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2014* for the period of Financial Year (FY) 2014-19. Feeling aggrieved, SSNNL has come up to this Tribunal by appeal under Section 111 of Electricity Act, 2003.

3. In the array of respondents, besides CERC, the power procurement agencies of the three States – *Madhya Pradesh Power Management Company Ltd.* (“MPPMCL”), *Maharashtra State Electricity Distribution Company Ltd.* (“MSEDCL”) and *Gujarat Urja Vikas Nigam Ltd.* (“GUVNL”) – have been impleaded as fourth to sixth respondents in addition to *Narmada Control Authority* (“NCA”) and *Narmada Valley Development Authority* (“NVDA”), in fray as the second and third respondents respectively. The appeal is contested by the Central Commission.

4. The history of the power project (SSP) takes us back to 06.10.1969 when the Central Government had invoked the provisions of *Inter State Water Dispute Acts, 1956* to constitute *Narmada Water Disputes Tribunal* (“NWDT”) to adjudicate the dispute over sharing of the water of river Narmada which has its origin near the city of Jabalpur in the State of Madhya Pradesh and runs its course in the westerly direction through the said State to enter the State of Gujarat and drains into Arabian Sea on the Gujarat coast. The NWDT passed its final award (“Award”) on 12.12.1979 and while resolving the water dispute between the competing States gave shape to setting up of *Sardar Sarovar Dam* (“SSD”) and the hydro project, the benefits whereof were also to be shared in terms of its recommendations. Clause VIII of the said Final Award, laying down the arrangement for sharing of costs and benefit amongst three above-mentioned States, is of interest to the present proceedings and may be quoted as under:

“Clause VIII - Sharing of Costs and Benefits.

(1) (i) *The Tribunal hereby determines that out of the net power produced at Navagam at Canal Head and River Bed Power Houses on any day the share of Madhya Pradesh will be 57 percent; Maharashtra's share will be 27 per cent and Gujarat's share will be 16 per cent.*

(ii) *The party States shall make available in annual instalments their share of funds required according to approved construction programme and take all the necessary steps to complete the Sardar Sarovar Dam within ten years of the date of publication of the Final Order and Decision of the Tribunal in the Official Gazette.*

(2) *The Tribunal makes the following further Orders :-*

(i) The power generated in the River Bed and Canal Power Houses at Navagam will be integrated in a common switchyard.

(ii) Madhya Pradesh and Maharashtra will be entitled to get 57 per cent and 27 per cent respectively of the power available at bus bar in the switchyard after allowing for station auxiliaries.

(iii) The above entitlement applies both to availability of machine capacity for peak loads and to the total energy produced in any day.

(iv) The entitlement of power and energy for any day can be utilised fully or partly by the concerned States or sold to another participating State under mutual agreement. It cannot, however, be carried forward except under a separate agreement or working arrangement entered into among the effected parties.

(v) Gujarat will construct and maintain the transmission lines needed to supply the allotted quantum of power to Madhya Pradesh and Maharashtra upto Gujarat State border, along an alignment as agreed to between the parties and if there is no agreement along such alignment as may be decided by the Narmada Control Authority. The transmission lines beyond Gujarat State border shall be constructed and maintained by Madhya Pradesh and Maharashtra in their respective States.

(vi) The power houses and appurtenant works including the machinery and all installations as well as the transmission lines in Gujarat State will be constructed, maintained and operated by Gujarat State or an authority nominated by the State.

(vii) The authority in control of the Power Houses shall follow the directions of the Narmada Control Authority in so far as use of water is concerned.

(viii) The scheme of operation of the Power Houses including the power required and the load to be catered for the different party States during different parts of the day shall be settled between the States at least one week before the commencement of every month and shall not be altered during the month except under agreement among the States or under emergencies. If and when Sardar Sarovar Power Complex gets linked with the Regional or National Power Grid, the operation of the Sardar Sarovar Power Complex will be governed by such altered system conditions. But in that event the Narmada Control Authority should arrange to take such steps as are necessary to enable the three States of Gujarat, Madhya Pradesh and

Maharashtra to get their entitlement of power and energy from the Sardar Sarovar Power Complex according to these orders.

(ix) The capital cost of the power portion of Navagam Complex shall comprise the following :-

(a) Full cost of Unit III electrical works and control works pertaining thereto, upto and including the switchyard.

(b) Full cost of transmission lines in Gujarat State constructed for supplying power to Madhya Pradesh and Maharashtra.

(c) 56.1 per cent of the net cost of common facilities such as Dam and Appurtenant Works i.e. Unit I of Sardar Sarovar Project, after allowing for credits, if any:

(d) 56.1 per cent of the credit given to Madhya Pradesh for the downstream benefits derived from Narmada Sagar Dam.

(x) Madhya Pradesh and Maharashtra shall respectively pay to Gujarat 57 per cent and 27 percent of the capital cost of the power portion of the Sardar Sarovar headworks worked out vide (ix) above. This amount shall be paid in annual instalments until the capital works are completed. Each instalment will be worked out on the basis of the budgeted figures of the concerned works at the commencement of each financial year and shall be set off and adjusted against actual figures at the end of the financial year.

(xi) In addition to the payments vide (x) above, Madhya Pradesh and Maharashtra shall also pay to Gujarat 57 per cent and 27 per cent respectively of the operation and maintenance costs of the Sardar Sarovar Power Complex each year. These payments are also to be based on budgeted figures at the commencement of each financial year and adjusted against actual cost at the end of the year.

(xii) Notwithstanding the directions contained hereinabove, the party States may, by mutual agreement, alter, amend, or modify any of the directions in respect of sharing of power and payment for it.”

5. The Central Government framed and notified a scheme known as *Narmada Water Scheme, 1980 (“NWS”)*, in the wake of the Award of NWDT and thereby constituted the second respondent, *Narmada Control*

Authority (“NCA”) for the purposes of securing compliance with decisions taken on the basis of Final Award. As noted at the outset, SSNNL, the appellant herein, was incorporated on 24.03.1988 essentially to implement the resolve to set up the SSP on river Narmada. There is no dispute as to the fact that capital cost and the operating cost for the purposes of establishing, operating and maintaining the hydro-project are fully contributed by the three beneficiary States, (Madhya Pradesh, Maharashtra and Gujarat) in proportion of their respective shares, SSP being a project co-owned by the said three States in such proportion.

6. In terms of the Award of NWDT, the Government of Gujarat has vested its share of electricity generated to the appellant herein (SSNNL) while the Governments of Madhya Pradesh and Maharashtra own their respective shares and take the same from SSP, upon its transmission through the lines mentioned earlier. It has been clarified that SSP is primarily an irrigation-based project, the priority being given to use of water to meet the irrigation requirements of Governments of Gujarat and Rajasthan, the generation of power being incidental.

7. The Electricity Act, 2003 was enacted by the Parliament to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry. It replaced the existing legal framework governing the power sector thereby repealing the Indian

Electricity Act, 1910, Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1988. Following the extant policy, however, various activities relating to electricity have been kept under the regulatory control of Electricity Regulatory Commissions, generally described as the “Appropriate Commissions”. On one hand, we have the *Central Electricity Regulatory Commission*, constituted under Section 76 and, on the other, we have in position various *State Electricity Regulatory Commissions*, constituted under Section 82, in addition to a Joint Commission (under Section 83) wherein two or more Governments of States or Union Territories may have collaborated for such purposes with each other.

8. The functions assigned to the Central Commission are specified by the provision contained in Section 79 which, to the extent relevant, reads thus:

“Section 79. (Functions of Central Commission): ---
(1) *The Central Commission shall discharge the following functions, namely:-*
(a) *to regulate the tariff of generating companies owned or controlled by the Central Government;*
(b) *to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*
(c) *to regulate the inter-State transmission of electricity ;*
(d) *to determine tariff for inter-State transmission of electricity;*
...”

9. In contrast, the functions of the State Commissions are prescribed by Section 86 which, to the extent germane, reads as under:

*“Section 86. (Functions of State Commission): ---
 (1) The State Commission shall discharge the following functions, namely: -(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case maybe, within the State:
 Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;
 (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;
 (c) facilitate intra-State transmission and wheeling of electricity;
 ...”*

10. Two expressions stand out from the above-quoted provisions contained in Section 79 and 86, viz. *Inter-State Transmission* and *Intra-State Transmission*. Some guidance as to what is the import of the said expressions can be taken from the following definition clauses contained in Section 2:

“Section 2. (Definitions): --- In this Act, unless the context otherwise requires,--

*...
 (36) “inter-State transmission system” includes -
 (i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;
 (ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;
 (iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility.*

(37) “intra-State transmission system” means any system for transmission of electricity other than an inter-State transmission system ;
...”

11. After the SSP had been set up, and around the period when Electricity Act, 2003 was in the making, questions seem to have arisen as to the status of the power project, and reference was made to CERC by NCA. Upon scrutiny of the material placed before it at the time, the Central Commission by its communication dated 29.08.2003 took the view that since power generated by SSP is allocated amongst the three States of Madhya Pradesh, Maharashtra and Gujarat in the ratio of 57:28:16 which is the same ratio in which cost of power component of the project has been shared by the said three States, it does not involve sale of power by SSP to any State.

12. Subsequently, the relevant agencies in each participating State receiving electricity as per its share proceeded to have the tariff determined and entered into Power Purchase Agreements (“PPAs”) in consonance with the terms of the Final Award of NWDT. For completion, it may be mentioned here that Government of Madhya Pradesh had agreed to the provisional tariff of Rs. 2.0 per unit payable by the fourth respondent (then, *Madhya Pradesh State Electricity Board*) to the third respondent by PPA signed on 16.08.2004, it receiving the imprimatur of *Madhya Pradesh Electricity Regulatory Commission* (“MPERC”) on 18.01.2008. On similar lines, the State of Gujarat approved the draft PPA on 01.03.2005, to be

executed with SSNNL, such PPA having been executed with tariff rate of Rs. 2.05 per kWh on 09.03.2005, the procurement under the PPA having received the approval from *Gujarat Electricity Regulatory Commission* (“GERC”) on 23.03.2007. Likewise, the fifth respondent (MSEDCL) proposed the tariff at Rs. 2.05 per unit from SSP which received the approval of *Maharashtra Electricity Regulatory Commission* (“MERC”), by its Order dated 17.08.2009.

13. Since a parallel has been drawn with *Bhakra-Beas Power Project*, it is essential to note at this stage certain facts in its regard.

14. Upon reorganization of the erstwhile State of Punjab by *Punjab Reorganization Act, 1966*, enacted by the Parliament, the Central Government had constituted *Bhakra Management Board* (“BMB”). The then conceived Beas project was transferred to BMB in 1967 by the Central Government from erstwhile *Beas Construction Board* and resultantly it became the subject under the control of *Bhakra Beas Management Board* (“BBMB”). The power project that came to be established in the result generates electricity from two projects viz. *Bhakra Nangal* and *Beas Project* which is shared by States of Punjab, Haryana, Rajasthan, Himachal Pradesh and Union Territory of Chandigarh.

15. Questions had come up for consideration, particularly as to jurisdiction, in the context of BBMB project as well. The said matter

eventually reached this tribunal for adjudication by Appeal no. 183 of 2011 whereby the decision of the Central Commission rendered on 15.09.2011 asserting its jurisdiction *vis-à-vis* BBMB project was assailed. The said appeal was dismissed by judgment passed by this tribunal on 14.12.2012 (hereinafter referred to as “*decision in Bhakra Beas case*”).

16. The view taken by the Central Commission *vis-à-vis* Bhakra Beas project having been upheld by this tribunal by judgment 14.12.2012, the Central Commission, by its *suo motu* Order passed on 20.12.2012, observed, *inter alia*, that since the power is supplied from SSP generating station to the participating States for some consideration in the form of operation and maintenance (O&M) expenses, it being a component of tariff, the tariff of the generating station of the hydro-power project of the appellant shall be determined by CERC. On such *prima-facie* view, the Central Commission, by its Order dated 20.12.2012, called upon the appellant and other respondents herein to submit their responses. The matter was contested by the beneficiaries of SSP upon consideration of which the impugned order was passed on 30.06.2015 with directions for submission of an application before CERC for approval of the tariff for generating stations and transmission lines.

17. The impugned order of the Central Commission is challenged on the grounds that there is no sale of electricity from SSP by SSNNL and that SSNNL does not own the power at SSP and hence cannot sell the same,

there being no supply of electricity within the meaning of Section 2(70) of Electricity Act, 2003. It is also the contention of the appellant that SSNNL is not a generating company nor there is any inter-state transmission of power, the arrangement being not in the nature of a composite scheme for generation within the meaning of Section 79(1)(b). The appellant seeks to distinguish the case of SSNNL from the facts of *Bhakra Beas* case primarily on the ground that this project is not established by the Central Government.

18. The Central Commission defends its decision by arguing that appellant is a generating company engaged in supply and sale of electricity from one State to the other, the process involving inter-state transmission akin to the case of *Bhakra Beas*.

19. Since the SSP has neither been established nor is owned or controlled by the Central Government, the provision contained in Section 79(1)(a) will not apply. Even if we were to assume that SSP has been set up pursuant to a composite scheme for generation, conceived by three States joining together, for attracting Section 79(1)(b), it would have to be shown if it involves “sale of electricity in more than one State”. For purposes of Section 79(1)(c)&(d), inter-state transmission of electricity is essential. From such perspective, it is clear that the questions to be addressed by us essentially are as to whether the appellant is engaged in (i) sale of electricity in more than one State and (ii) inter-state transmission

of electricity. If the answers to either of these questions are in affirmative, the impugned order must be upheld. But if the answer to both questions in the negative, the view taken by the Central Commission will not be correct and consequently the matter would fall within the domain and jurisdiction of the respective State Commissions in terms of Section 86 quoted earlier.

20. We have already noted the definitions of *inter-state* and *intra-state* transmission systems. Intra-state transmission system, simply put, is not what is covered by the definition of inter-state transmission system. We are concerned only with the first clause of Section 2(36), quoted earlier. In order to support its case, it is necessary for the Central Commission to demonstrate that the process undertaken by the appellant involves conveyance of electricity by means of main transmission line “from the territory of one State to another State”. It may be noted here that it is not disputed by the Central Commission that the Electricity generated at SSP is taken by the transmission lines mentioned earlier to the respective border of the State of Madhya Pradesh and Maharashtra from where the same is carried by the beneficiaries of the said states to their respective utilities for further transmission, distribution, etc.

21. Before proceeding further, we must also note the meaning of word “supply”, as given in Section 2(70) of the Electricity Act, 2003, which reads thus:

“Section 2. (Definitions): --- In this Act, unless the context otherwise requires,--

*...
(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;
...”*

22. The learned counsel for the Central Commission laid great emphasis on the fact that the appellant is a generating company. He referred in this context to the Memorandum of Association (“MoA”) and Articles of Association (“AoA”) where under the appellant was established and incorporated and the material relating to the steps taken for establishing SSP, pursuant to the Final Award of NWDT. We note that power is generated by SSP through its River Bed Power House (“RBPH”) and Canal Head Power House (“CHPH”) and distributed amongst the three participating States as per their respective shares. From these facts, we assume that it is indeed a generating company and further that SSP was established under a composite scheme. But the crucial question would be as to whether this involves sale of electricity by transmission from one State to the other.

23. The Central Commission insists that the requirements for such purposes as above are fulfilled and, therefore, the decision in the *Bhakra Beas* case would squarely apply. Reliance is placed by the Central Commission on the following part of the decision in *Bhakra Beas* case:

“24. Now, it is not that supply by the BBMB to the participating States or the Electricity Boards does prima facie appear to be supply within the meaning of section 2

(70) of the Act, 2003. The word 'supply' as used in section 79 (3)(b) of the Act, 1966 has to be understood in the totality of context in which it is used. Since, right to receive and utilize the power as is conferred under section 78 (3) (b) of the Act, 1966 has not been expressly associated with sale such supply may not come under section 2(70) of the Act, 2003. But there does not end the matter. Mr. Ramachandran, learned advocate appearing for the appellant is correct in saying that section 79 (1) must not be read in isolation of section 62 (1). Supply to the owner of the goods is no doubt a sale, but in case of supply of electricity by a generation company to a distribution licensee question of tariff comes. Now the point is: tariff has nowhere been defined, neither in the Act 2003 nor in the Central Electricity Regulatory Commission Regulations. Therefore, the ordinary meaning of tariff that has to be accepted would be rates, charges, fees etc.

...

The BBMB make supply to these business entities and they pass on the costs to the consumers. Legally, therefore, when a generating company supplies electricity to the distribution companies including the deemed distribution licensees tariff requires to be determined by the Appropriate Commission, in this case the authority is the Central Commission. Section 79 (1) (a) of the Act, 2003 empowers the Central Commission to 'regulate' the tariff of generation companies, while in case of inter-state transmission of electricity, the word 'determine' has been used in section 79 (1) (d). In case of inter-state transmission of electricity, the word 'regulate' appears in section 79 (1) (c). There is no difficulty in considering the BBMB to be the generating company under the control of the Central Govt..

...

The Act, 1966 clearly regarded the BBMB as a generation company and spoke of distribution to the Electricity Boards. The argument of Mr. Ramachandran that the word 'supply' as is meant in section 2(70) of the Act, 2003 cannot be attributed to the word 'supply' as used in the Act, 1966 and, therefore, the BBMB does not come under the jurisdiction of Central Electricity Regulatory Commission is fallacious because unlike the word 'supply' as has been defined in the Act, 2003, there is no definition of the word supply either in the Act, 1910 or in the Act, 1948. There was no occasion on the part of the author of the Statute to import the idea of 'supply' of Electricity Act, 2003 in the Act, 1966. Therefore, there could not be conveyance of the idea of sale in the Act,

1966. The idea of sale of the Act, 2003 has been necessitated because of unbundling of all the functions and making all the functionaries as Corporations with allowance of private players joining in the venture of electricity business. Therefore, the absence of the idea of sale as is used in the Act, 2003 in the 1966 Act does not make the Central Commission not available with the BBMB. In most of the States, the State Electricity Board has been unbundled with the Govt. creating separate corporate entities for generation, transmission and distribution. Now, the functions of the Central Govt. under the 1966 Act are relatable to the Central Commission under the Electricity Act, 2003. As a Govt. company as the BBMB now is, it cannot escape scrutiny and regulatory jurisdiction of the Central Commission. The BBMB cannot be compared to that of a contractor as is contended in the written note of argument. Though there is no actual sale by the BBMB and supply is made in terms of the Act, 1966 such supply does not become absolutely divorced from any consideration. The provision of section 79 (5) of the Act, 1966 will apply also to the Beas Project *mutatis mutandis* in terms of subsection (5) of section 80. Thus expenses including salaries and allowances of the staff and other amounts to meet expenses shall have to be provided to the BBMB and the amount shall be apportioned having regard to the benefit of the States / Boards as the Central Govt. may specify. Therefore, there are operation and maintenance expenses, renovation and modernisation expenses which are associated with components of tariff and it is the BBMB that has to meet all these expenses. Regulation of these expenses so far is not the function of any of the State Commission because it is an inter-state Central Govt. owned generation entity.

...

Yes, section 79 (1) has to be read with section 62(1) of the Act, 2003, but if any of the components of section 62(1) is attracted then the jurisdiction of the Central Electricity Regulatory Commission is attracted. With the reorganisation of the then existing State of Punjab, the control of the Bhakra Projects ceased to remain in the hands of that State and it vested in the BBMB. It is the BBMB that has the statutory power to supply electricity to the Boards or authority in charge of distribution. Under section 79 (3) (c) of the Act, 1966, the BBMB has to carry out construction of the remaining works connected with the Right Bank Power House.

...

*Under sections 79 and 80 of the Act, 1966, the projects vested in the BBMB and the BBMB is made under the control of the Central Government. The expression 'subject to' conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. Reference in this connection can be made to Chandavarkar Sita Ram Rao Vs. Ashalata S. Guram (1986) 4 SCC 447. Actually, right in section 78 (1) & (2) has been crystallised in section 79 (3) (b) of the Act, 1966. Therefore, we conclude that the Central Electricity Regulatory Commission has the jurisdiction in respect of the BBMB within the periphery of the Electricity Act, 2003.
...”*

24. From the material placed before us, particularly the Final Award passed by NWDT, we find share of power generated from SSP was determined as 57:27:16 apportioned between Madhya Pradesh, Maharashtra and Gujarat, the same to be utilized by the concerned States under mutual agreement. Under the said dispensation, the State of Gujarat was responsible to construct and maintain the transmission lines as were required to supply the allotted quantum of power to Madhya Pradesh and Maharashtra up to Gujarat State border, as was duly done. The power houses and operational works, including machinery and installations as well as transmission lines within the state of Gujarat, were to be constructed, maintained and operated by the nominee agency of the State, the appellant having been set up as the SPV for such purposes, it having carried out the task as determined, the two power houses placed under the control of NCA for use of water. In terms of the Award and the mutual agreement of the three States, Madhya Pradesh and Maharashtra have borne (along with Gujarat) capital cost equivalent to their respective shares

in the power of SSP, they also having contributed correspondingly towards O&M cost of SSP each year.

25. The Memorandum of Association (MoA) and Articles of Association (AoA) of the appellant leave no doubt that appellant is a government company promoted and set up by the State of Gujarat which had taken the responsibility of implementing the SSP under the Final Award. In such terms, the appellant does not have any power for sale of electricity to participating States which are entitled to draw their respective share, it being obligatory on their part to do so even if they were to back down their own generation or forgo shares from other central sector projects. There is only sharing of the electricity amongst the three States and *not* sale of power by the appellant to any of them or by one of them to the others.

26. The appellant does not transfer or own 84% of the power generated at SSP, only 16% falling to the share of State of Gujarat having been assigned to it. The remainder 84% is owned by Madhya Pradesh and Maharashtra who have contributed to the capital cost and O&M cost. No price is charged by the appellant nor revenue of any other kind generated from such allocation of power to Madhya Pradesh and Maharashtra as per their shares. The revenues generated from NVDA and MSEDCL are received by the Governments of Madhya Pradesh and Maharashtra respectively. The transmission lines carrying the electricity from SSP to the respective peripheries of States of Madhya Pradesh and Maharashtra have

been constructed by the said States at their own respective expense, there being no control in such regard in the hands of the appellant, its role being restricted to that of an operating agent only. This position is same as what had satisfied the Central Commission in initial period when it recorded satisfaction, by its communication dated 29.08.2003, that there was no sale of power from SSP to any State.

27. The Central Commission has referred to Section 62(1)(a) of Electricity Act, 2003 to assert its statutory obligation to determine tariff under the law for supply of electricity by the appellant to the distribution licensees. Section 62(1), by itself, does not confer exclusive jurisdiction to Central Commission. For such purposes, the proposition requires to be tested on the touchstone of Section 79 which has been quoted, to the extent relevant, earlier. The supply of electricity necessarily takes us back to the definition of Section 2(70) which essentially means sale of electricity to a licensee or consumer. There is nothing before us from which it could be concluded that the appellant has been engaged in supply or sale of electricity to the distribution licensee operating in the States of Madhya Pradesh or Maharashtra, within the meaning of Section 62 read with Section 79. The context here is entirely distinct, the argument raised by Central Commission misconceived and misplaced. It is not a case where the appellant has appointed any agent to supply electricity. The States of Madhya Pradesh and Maharashtra own the electricity, as per their defined

shares, which only is taken by them through their own transmission lines and utilized after gathering the commodity at the State border(s).

28. In the above factual matrix, it cannot be accepted that the case involves inter-state transmission of electricity by the appellant. There is no material placed before us to show that any activity of transmission is undertaken by the appellant outside the geographical area of Gujarat. The transmission lines do not form part of the SSP assets. The conveyance of electricity within the State of Gujarat cannot be described as incidental to inter-state transmission.

29. The case of *Bhakra Beas* is distinguishable on facts. Unlike SSP, BBMB was constituted by the Central Government. BBMB is a creation of statute enacted by Parliament, it being not accountable to any of the beneficiary States and, therefore, squarely covered by Section 79(1)(a) of Electricity Act. Admittedly, for BBMB, its surplus capacity of transmission lines are utilized for transmission of electricity to central utilities and, therefore, are considered inter-state transmission systems. By contrast, SSP was constituted by Government of Gujarat to implement the Final Award of NWDT. It does not have any surplus power since its capacity is apportioned between the three States as per NWDT. As noted earlier, the electricity is transmitted to the participating States up to Gujarat border from where it is made over to the respective beneficiaries. The electricity generated by SSP and utilized by the beneficiary States is subject to

scrutiny by the respective State Regulatory Commissions and, therefore, not without appropriate regulatory control under the law.

30. In the foregoing facts and circumstances, we find that the Central Commission has fallen into serious error in asserting its jurisdiction *vis-à-vis* the generating stations of the appellant at SSP. We are unable to subscribe to, or accept, its views on the subject. We hold that the Central Commission is not entitled in law to exercise any such jurisdiction as has been asserted through the impugned decision, the matter falling squarely within the domain and statutory functions of the State Commissions, as rightly exercised by them.

31. The appeal thus succeeds. The impugned Order dated 30.06.2015 passed by Central Electricity Regulatory Commission in Petition no. 267/SuoMotu/2012 is hereby set aside.

32. The appeal is allowed accordingly.

PRONOUNCED IN THE OPEN COURT ON THIS FOURTEENTH DAY OF JULY, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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