IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 397 OF 2022
AND
APPEAL NO. 147 OF 2021

Dated: 14.11.2022

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

APPEAL NO. 397 OF 2022

In the matter of:

SOUTHERN POWER DISTRIBUTION COMPANY OF AP LIMITED
[Through CGM (IPC & RAC)
D.No. 19-13-65/A, Srinivasapuram,
Tiruchanoor Road,
Tirupati – 517 503, Chittoor District, A.P. ... Appellant(s)

VERSUS

1. ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
[Through its Secretary]
11-4-660, 5th Floor, Singareni Bhavan,
Ref Hills Road, Khairatabad, Redhills,
Hyderabad, Telangana – 500004

2. JSW POWER TRADING COMPANY LIMITED
[Through its Authorized Representative]
JSW Centre, Bandra Kurla Complex,
Bandra (East)
Mumbai – 400 051 … Respondents

Counsel for the Appellant (s): Mr. Ardhendumauli Kumar Prasad
Mr. Ashish Madaan

Counsel for the Respondent (s): Mr. Sridhar Potaraju
Ms. Shiwani Tushir
Mr. Yashvir Kumar for R-1

Mr. Sanjay Sen, Senior Advocate
Mr. Aman Anand
Mr. Aman Dixit for R-2

APPEAL NO. 147 OF 2021

In the matter of:

JSW POWER TRADING COMPANY LIMITED
[Through its Authorized Representative]
JSW Centre, Bandra Kurla Complex,
Bandra (East)
Mumbai – 400 051 ... Appellant(s)

VERSUS

1. ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
[Through its Secretary]
11-4-660, 5th Floor, Singareni Bhavan,
Ref Hills Road, Khairatabad, Redhills,
Hyderabad, Telangana – 500004

2. SOUTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LIMITED
[Through Managing Director]
Tiruchanoor Road, Behind Srinivasa Kalyana Mandapam
Kesavayana Gunta,
Tirupathi 517 501
Andhra Pradesh … Respondents

Counsel for the Appellant (s): …… Mr. Sanjay Sen, Senior Advocate
Mr. Aman Anand
Mr. Aman Dixit

Counsel for the Respondent (s): …… Mr. Sridhar Potaraju
Ms. Shiwani Tushir
Mr. Yashvir Kumar for R-1

Mr. Ardhendumauli Kumar Prasad
Mr. Ashish Madaan for R-2

J U D G M E N T

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

1. The desirability of recourse to arbitration as the alternative mode in relation to dispute resolution jurisdiction of the Regulatory Commissions established by the Electricity Act, 2003 has come up as the focal point of consideration in the captioned appeals.

2. The appeals at hand are directed against Order dated 06.03.2020 passed by the respondent, *Andhra Pradesh Electricity Regulatory Commission* ("the State Commission") in Original Petition (no. 34 of 2019) which had been presented by *JSW Power Trading Company Limited* ("the trading licensee"), the appellant in the second captioned matter, it being directed against *Southern Power Distribution Company of Andhra Pradesh Limited* ("the procurer"), the appellant in the first captioned matter.

3. The background facts lie in a narrow compass and may be noted at the outset.

4. In the wake of a short tender notice for purchase of power issued on 17.07.2014 by *Andhra Pradesh Power Coordination Committee*, it being the authorized representative of distribution licensees in the State of Andhra Pradesh, the trading licensee – appellant JSW Power Trading Company – had participated and was declared as successful bidder, it being awarded the contract for supply of power sourced from *JSW Energy Limited* ("the generating company") located in the State of Karnataka. A formal *Power Purchase Agreement* ("PPA") was executed on 29.09.2014 between the trading licensee and the procurer. It is pointed out that under the bid documents, as also the PPA, the *delivery point* for supply of electricity by the trading licensee was described as "*Southern Regional Periphery*", a provision having been made for resolution of disputes related to determination of tariff *by adjudication* before the State Commission and in

relation to "*other disputes*" *by arbitration* under the Arbitration and Conciliation Act, 1996.

5. We may note some of the relevant clauses of the PPA, having a bearing on the dispute at hand, the same being as under:

> *"3.1 Delivery Point:*
>
> *The Delivery Point for supply of power from JSWEL to APSPEDCL through JSWPTC shall be Southern Regional Periphery.*
>
> *…*
>
> *3.7 Payment:*
>
> *The due date for payment would be the 9th day after the date of receipt of fax/email bill subject to receipt of original invoice within due date. In case the due date is a Bank holiday in A.P., the next working day would be treated as due date.*
>
> *The bill received before 02.00 P.M. on a working day at APSPDCL/APDISCOMS will only be considered as date of receipt, otherwise the next day will be considered as date of receipt. If the bill is not in full shape and needs to be corrected, the date of receipt of corrected bill will be treated as date of receipt. Bills are to be raised in favour of DY CCA (PP & S)? APPCCA, Fax No. 040-23395370 and email id: dyccaappcc@gmail.com duly mentioning the Purchase Order No. on invoice.*
>
> *The amount would be deposited through RTGS in JSWPTC's Current Account No. 000405029195, IFSC Code ICIC0000004 maintained with ICICI Bank Limited. Free Press House, 215 Nariman Point, Mumbai by APSPDCL towards payment(s) within the "due date" for payments. SPSPDCL shall ensure timely payments to JSWPTC within Due dates.*
>
> *…*
>
> *3.9 Surcharge for late Payment*
>
> *A delayed payment surcharge of 1.25% (one and quarter percent) per month shall be applicable on all payments remaining unpaid for more than 30 days from the date of receipt of the bill. If the due date for payment is a Bank holiday in AP, the immediate next working day will be treated as due date of payment. The surcharge would be calculated on a day-to-day basis for each day of the delay.*
>
> *In case of open access charges, a surcharge of 15% per annum shall be applicable on all payments outstanding after 07 days from the date of issue of the bill by fx calculated on day to day basis from the date of each bill.*
>
> *…*

3.12 Settlement of Disputes and Arbitration:

a) In the event of any difference/dispute arising between the Parties, such dispute/difference shall in the first instance be resolved amicably by mutual consultation within 15 days of the reference of dispute by either Party.

b) If amicable settlement is not reached between the parties in respect of any matter arising out of and relating to this Agreement then such unresolved dispute/difference shall be resolved through Arbitration under the provisions of the Electricity Act, 2003 as amended from time to time and as per the provisions of the Arbitration and Conciliation Act, 1996. Both the parties shall share the cost of Arbitration proceeding equally.

c) Notwithstanding the existence of any Dispute, whether referred to arbitration or not, the Parties hereto shall continue to perform their respective obligations under this Agreement throughout the Term of this Agreement.

…

3.15 Law of Jurisdiction

The Law of Jurisdiction for dispute will be Courts of Hyderabad.

…

3.17 Governing Law:

All matters arising out of or in conjunction with this Agreement shall be governed by and construed in accordance with India Law and the courts of Hyderabad shall have exclusive jurisdiction on all such matters.
…"

[Emphasis supplied]

6. Concededly, the procurer made certain payments belatedly. This gave rise to claims being made by the trading licensee for payment of surcharge for late payment and interest. At least three demand notices for payment of surcharge for late payment have been relied upon, the same having been issued on 04.04.2018, 24.04.2018 and 19.06.2018. Admittedly, the procurer did not respond nor made the payment of surcharge. Eventually, the trading licensee issued a legal notice of demand on 24.09.2018 asking for immediate payment of Rs. 52.74 crores, giving three days' time for

compliance and putting the procurer on notice that, in case of default, appropriate legal proceedings would be initiated.

7. It is against this backdrop that the trading licensee approached the State Commission by the Original Petition (no. 34 of 2019), the reliefs sought wherein were set out as under:

> *"i. Admit the petition and direct the respondent to pay to the Petitioner the sum of Rs. 52.74 Crores (Rupees Fifty Two Crores and Seventy Four Lakh only) towards surcharge.*
>
> *ii. Direct the respondent to pay interest on aforesaid surcharge of Rs. 52.74 Crores (Rupees Fifty Two Crores and Seventy Four Lakh only) at the rate of 15% per annum from its due date till the date of payment.*
>
> *iii) Direct the respondent to pay costs of the petition; and*
>
> *iv) Grant such other and further reliefs as are just."*

8. The petition was resisted by the procurer and the proceedings that were taken out in its wake culminated in the impugned order being passed by the State Commission on 06.03.2020.

9. The procurer raised objections of waiver, acquiescence and estoppel on the ground that the payments against the regular invoices had been accepted all along, without any demur. The claim was inclusive of late payment surcharge not only on regular energy bills but also against invoices relating to reimbursement of open access charges. The procurer objected to such part of the claim on the ground that there was no liability of surcharge on claim of reimbursement of open access charges. Additionally, the procurer also objected to the claim being entertained submitting that it was barred by law of limitation.

10. The State Commission, by the impugned order, rejected the objections of waiver, acquiescence and estoppel as also the plea that surcharge was not leviable against claim of reimbursement of open access charges. Crucially, however, the Commission found merit in the objection of the procurer to the computation presented with reference to the law of limitation. It was found, as a fact, that the claim submitted with the original petition by the trading licensee was for surcharge computed for period even prior to three years preceding the filing of the petition.

11. Whilst the claim of the trading licensee *vis-à-vis* the liability of the procurer to bear the surcharge for late payment was up-held, the conclusion was that the amount payable was not what was originally claimed but only Rs. 43.82 crores (it being inclusive of Rs. 37.34 crores towards LPS on energy bills and Rs. 6.48 crores relating to open access bills) as having fallen due within three years preceding the filing of the claim. The burden was, however, "*reduced by 50%"* for reasons of *"justice, equity and good conscience"*, the views in such regard having been articulated as under:

> *"21. Ordinarily, parties to an executory contract are bound by the terms thereof. However, when one of the parties to the contract pleads inability to pay, the Courts having regard to the facts and circumstances of the case, exercise their equitable jurisdiction to advance the cause of justice by appropriately reducing the interest liability. Indeed there are instances where the legislature stepped in to relieve the debtors from the undue burden of interest by enacting statutes such as The Usurious Loans Act, 1918, The Madras Debtors' Protection Act (VII of 1935), The Madras Debt Conciliation Act, 1936 and Money-Lenders' Act, to name a few. The main purpose of these enactments is to reduce the interest burden on the debtors, thereby extending some relief to them. This Commission is however conscious of the fact that these enactments have no application to*

the present case on hand. However, Regulation 55 (1) of the Business Rules of Andhra Pradesh Electricity Regulatory Commission (Regulation 2 of 1999) empowers the Commission to make such orders as may be necessary for meeting the ends of justice. Evidently exercising this power, this Commission in the past scaled down the rate of interest albeit with the consent of the creditors. In Orange Uravakonda Power Limited Vs APSPDCL & batch (O.P.Nos.21 to 27 and 35 of 2017 and O.P.Nos.1 and 7 of 2018 dated 14-06-2018), this Commission persuaded the various Power Producers / creditors to accept the dues with interest only at 25% of what was stipulated under Article 5.2 of the respective PPAs, having regard to the precarious financial position of the DISCOMs in the State. Similar indulgence is being shown by this Commission in several other cases, scaling down the interest component in varied percentages depending upon the quantum of interest due and payable by the DISCOMs.

22. Though the terms of a bilatory contract have to be respected and regarded by the parties, when a dispute over payment of money is brought before the authority such as this Commission, a duty is cast on the latter to render even handed justice, instead of stead fastly holding to the terms of the agreement, more so, in a dispute pertaining to payment of interest. Justice, equity and good conscience are inseparable aspects of dispute adjudication even if the adjudicatory forum is not a full-fledged court, but only a quasi judicial forum. Indubitably, the respondent is a public utility undertaking, whose main object is not profit making, unlike the private distribution licensees. For various reasons which are not germane for discussion in the present context, the distribution utilities in the State of Andhra Pradesh including the respondent are in huge debts. As per the material available with this Commission, the respondent is in arrears of Rs.16,000 crores (approximately) payable to the power suppliers. Year after year revenue gap is increasing. The respondent is struggling for bear survival and hardly in a position to service its debts. In this situation, payment of interest at the agreed rate to the petitioner and similarly situated power suppliers does not appear to be possible at all. Keeping this precarious position of the respondent in mind, I have allowed both parties to reconcile and settle their dispute amicably. However, they failed to arrive at a negotiated settlement. In these facts and circumstances of the case, though this Commission is of the opinion that in normal course, the respondent is strictly bound by the stipulations in the PPA regarding late payment surcharge, in the circumstances explained above and in public interest, I am constrained to exercise the Commission's inherent power to reduce the respondent's liability to a reasonable extent. Accordingly, the late payment surcharge and also the surcharge on delayed payment of Open Access charges are reduced by 50% of the respondent's liability as shown in Annexures A and B filed along with rejoinder of the petitioner."

[Emphasis supplied]

12. The procurer, by its appeal (no. 397 of 2022), assails the impugned order of the State Commission on the ground that it did not have the requisite jurisdiction since the transaction covered by the PPA involved *inter-State* sale of electricity, the generating unit being located in the State of Karnataka and the beneficiary being in the State of Andhra Pradesh, and also because the contract binding the parties contains an arbitration clause which could not be overlooked, the jurisdiction of the statutory forum for adjudication being thereby ousted. Additionally, it was argued that the procedure followed was improper, the principles of natural justice having been violated.

13. The trading licensee is aggrieved and is in appeal (no. 147 of 2021) on the ground that principles of equity and good conscience could not have been invoked in a money claim of such nature as at hand particularly since it was founded on express provision of the contract (PPA) binding the parties, the trading licensee having not agreed to the reduction, there being no such *inherent power* as has been exercised, the view taken by the State Commission amounting to impermissible rewriting of the contract.

14. The Electricity Act prescribes the functions of the *Central Electricity Regulatory Commission* ("the Central Commission") by Section 79 which, to the extent relevant here, reads as under:

> *"Section 79. (Functions of Central Commission): --- (1) The Central Commission shall discharge the following functions, namely:-*
>
> *…*
>
> *(d) to determine tariff for inter-State transmission of electricity;*
>
> *…*

> *(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*
> *…"*
>
> *[Emphasis supplied]*

15. Likewise, the functions entrusted to the State Commission, by Section 86 of the Electricity Act, 2003, include *adjudication* upon the disputes. The relevant clause – Section 86(1)(f) - reads as under:

> *"Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -*
>
> *…*
>
> *(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;*
> *…"*
>
> *[Emphasis Supplied]*

16. Having heard the learned counsel on both sides, we do not find any substance in the arguments of the procurer based on the fact that the generating unit is located in the State of Karnataka. The generating station may be located in another State but that, by itself, does not render the sale of electricity by the trading licensee in the case at hand a transaction of *inter-State sale or supply* within the meaning of Section 79 of the Electricity Act, 2003. As noted earlier, the delivery point agreed upon by the parties is Southern Regional Periphery. The trading licensee, procuring electricity from its source in Karnataka, has been bringing the same to the State border for delivery. In these facts and circumstances, it cannot be described as an *inter-State* sale so as to divest the State Commission of its jurisdiction under Section 86 of the Electricity Act, 2003, particularly when the bid documents

had also envisaged the adjudicatory process over disputes to be undertaken before the State Commission, this also being the import and effect of the contractual clause on jurisdiction (Article 3.15).

17. We find some substance in the grievance of the trading licensee *vis-à-vis* the reasoning on the basis of which its claim of surcharge has been cut down to a half. The source of "inherent power" has not been spelt out. Given the course we proceed to adopt, we wish to say no more on the subject.

18. More crucial than above, in our considered view, the procedure followed by the State Commission in upholding the claim of the trading licensee to the extent of Rs. 43.82 crores is flawed, violative of principles of natural justice, and, therefore, liable to be set aside. Pertinent to note here that the Commission had the requisite power to hold a fact-finding inquiry on the subject, *inter alia,* by calling for and receiving evidence (Section 94 of Electricity Act, 2003). As already noted, the claim of surcharge on account of regular energy bills and against invoices relating to reimbursement of open access charges was in sum of Rs. 52.74 crores. The procurer objected, by its counter affidavit, to the said computation taking plea of bar of limitation. It is only thereafter that the trading licensee submitted revised computation, presenting it with the rejoinder. The Commission does not seem to have called for any response of the procurer to such re-computation. The amount of Rs. 43.82 crores has been awarded, held liable to be paid, accepting the re-computation without any scrutiny or examination only on the ground that

what was time-barred – i.e. the claim relating to period anterior to three years prior to filing of the petition – had since been taken out. In a case where an inflated claim had been filed, part of the claim being found time-barred, a closer scrutiny of the fresh computation, after ascertaining specific response of party against whom such claim was pressed was necessary. This exercise not having been done, the appellant has been condemned unheard, the end result being vitiated.

19. The error which goes to the root lies, however, also in not giving reasons as to why the mode of dispute resolution chosen by the parties was not being allowed to run its course. We find merit in the submissions that against the backdrop of Article 3.12 (on the subject of *"settlement of disputes and arbitration"*), it was wrong on the part of the State Commission to proceed with the adjudication in the dispute over non-payment of surcharge for delayed payment, particularly without considering, or giving reasons, as to why the matter be not referred to arbitration, that being the dispute resolution method chosen (preferred) by the parties. The relevant PPA clause (Article 3.12), as noted earlier, clearly stipulates that the parties had mutually agreed that their endeavor would be to resolve the disputes or differences initially by mutual consultation and if that were not to succeed *"through arbitration under the provisions of the Electricity Act, 2003 as amended from time to time and as per the provisions of Arbitration and Conciliation Act, 1996".*

20. The Regulatory Commissions have been established by the Electricity Act with prime expectation that they would act as expert bodies that guide and regulate the power sector. At the same time, they have been vested with the adjudicatory role in situations requiring dispute resolution, as a substitute for the civil courts. The contribution of these Commissions to the evolution and development of the regulatory framework for the power industry and its impact on the growth and strengthening of infrastructure in the service of the country has been immense and must be acknowledged. The orders passed by the Commissions in matters that are technical, particularly such as have a bearing on determination of tariff, invariably necessitate bearing in mind the legislative objectives of adoption of measures "*conducive to development of electricity industry, promoting competition therein, protecting interest of consumers … rationalisation of electricity tariff, ensuring transparent … efficient and environmentally benign policies*". The credit for laying the groundwork for fundamentals of the jurisprudence that has evolved on these subjects over the years will have to be given to these regulating authorities. We, however, have had the occasion to deal with a large number of decisions rendered by the Regulatory Commissions, particularly in matters involving money claims which require adjudication based on interpretation of contractual terms and application of principles of mercantile law. It has been our experience that, for various reasons, the adjudicatory role performed by the Regulatory Commissions, in recent times, has left much to be desired on touchstones of quality or

adherence to the principles of natural justice or doctrines of commercial law. Though the Commissions are constituted by inclusion of members drawn from such varied backgrounds as include power engineering, finance, economics, law or management, for reasons we need not venture into detail at this stage and in these proceedings, (but what may range from deficiency in procedural knowledge or judicial skill or lack of effective assistance), the adjudicatory processes undertaken in a large number of matters, particularly of such nature as at hand, have been found to be derelict and wanting.

21. To illustrate the above, we may extract some observations *vis-à-vis* inappropriate handling of the jurisdiction to adjudicate on the part of the various Regulatory Commissions.

22. In *D.B. Power Ltd. v. Central Electricity Regulatory Commission & Ors.* by judgment dated 04.02.2021 in Appeal No. 56 of 2020 & batch [2021 SCC OnLine APTEL 3], this tribunal observed thus:

> *"13. From the submissions of the parties noted in the various previous proceedings, and the submissions made now, we do note that Respondent TANGEDCO had some objections to the correctness of the entire claim which was brought for adjudication before the Central Commission. Lest we are misunderstood, we clarify that we are not accepting the merits of such objections as have been raised during these proceedings before us. On the correctness of the entire claim of the Appellant, what we wish to point out is only that these issues, in all fairness, should have been raised at the appropriate stage before the Central Commission, the forum of first instance where inquiry into questions of fact was expected to be held.*
> *14. The proceedings before the Central Commission, in the matter brought before it by the Appellant, if we may use such analogy, was in the nature of civil suit for recovery of money claimed as due. The party against whom such claim had been*

pressed was expected to render all assistance to the adjudicatory forum so that, if any issues required to be determined, necessary inquiry could be made and clear decision thereupon was rendered. The Central Commission, while dealing with a matter of this nature, was expected to reach a decision that was clear, unambiguous, executable and led to finality. In such adjudicatory proceedings, the liability, if it exists, requires to be found and enforced. If there was any amount found due from the Respondent TANGEDCO unto the Appellant, in absence of any provision to the contrary in the contract or law, there was no occasion for the Commission to give any extended time for payment unless, of course, the party claiming had given consent for such enlargement of period for payment to be granted on request.

15. Concededly, there was neither any contest to correctness of the claim nor any specific request for three months to be given to TANGEDCO for satisfaction of the claim. Be that as it may, the three months period offered by the Central Commission also passed by with no effective compliance being attempted by the Respondent TANGEDCO.

16. What we are unable to understand is the justification for the inclusion of qualifying clause that was added by the Central Commission as tailpiece to the operative portion of the Impugned Order requiring payment to be made of the amount thereby determined it being made conditional upon "reconciliation of bills with the Petitioner". If in the opinion of the Central Commission there was a need for reconciliation, questions of fact had arisen. If so, it was the responsibility of the Commission itself to ask the parties to present or discover their respective accounts and on such basis and with their assistance, on the basis of evidence gathered, determine the liability which was to be directed to be discharged. The decree, if we may borrow that expression from the civil jurisprudence, that the Central Commission was intending to pass could not have been made conditional or subject to reconciliation since that would relegate the parties to the same stage as they were prior to the adjudicatory process being initiated. It has to be remembered that such disputes end up before adjudicatory authorities because the parties are unable to reconcile or resolve on their own. Rendering the enforcement of legitimate claim of a creditor subject to reconciliation by the debtor at its own convenience is throwing the former into a vicious circle, virtually denying the relief indefinitely. Such condition added to the direction to pay the lawful dues is in fact taking back by one hand what has been given by the other. The parties to the case are left in uncertainty as to what is the extent to which the claim has been allowed and what is the roadmap

ahead for the liability to be discharged. If we may add, this smacks of abdication of responsibility vested by law in the adjudicatory forum."

[Emphasis supplied]

23. In *Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission,* by judgment dated 27.04.2021 in Appeal No. 77 of 2018: 2021 SCC OnLine APTEL 13, we were constrained to hold as under:

"*27. It has been submitted by the respondent generators that in a large number of cases, this tribunal decides matters on principle question of law, leaving the compliance to be made by the Regulatory Commission. In most of such cases, the implementation of judgments gets delayed for several reasons like absence of timelines for compliance, the amounts liable to be paid by one party to the other not having been quantified, not even by the Regulatory Commission in the original round of adjudicatory process, it being left for determination after the claim (for example, compensation on account of change in law, as in matter at hand) is accepted in principle. This, it is submitted, not only impacts the generating companies but also leads to additional burden in terms of LPS/carrying cost accumulation. The respondents seek to illustrate this deficiency in present practices of the adjudicatory process in the jurisdiction under Electricity Act by referring to the case of dispute between PSPCL and Nabha Power Limited - reported as (2018) 11 SCC 508 - wherein Hon'ble Supreme Court had directed coal charges to be paid by PSPCL. It is submitted that there was non-payment/non-compliance by PSPCL on quantification of the claim which ultimately resulted in contempt petitions being filed against the Government of Punjab and PSPCL, the Supreme Court having eventually in C.P (Civil) No. 1766-1767 of 2018 in C.A No. 10525-10526 of 2017 vide Order dated 07.08.2019 directed payment within eight weeks.*

28. We may add here the example of a case (Appeal no. 97 of 2020) wherein we had found the conduct of the regulatory authority to be recalcitrant and not conducive to hierarchical judicial discipline, it having kept a licensee deprived of the fruits of judicial process in spite of being successful in at least three rounds of appellate scrutiny in relation to its claim for pass

through for carrying cost, the claim put forward in 2002 having attained closure only when this tribunal was constrained, by judgment dated 05.10.2020, to put the Commission on notice for contempt action.

…

32. We agree that the extant practice of decision-making primarily on principles of law concerning claims is not helping in securing timely relief for the parties. It unnecessarily drags them into fresh round of proceedings before the Commission where, as experience shows - ready illustration would be Appeal no. 97 of 2020 decided by us on 05.10.2020 (supra), the party resisting the claim (unjustly) puts forward new arguments so as to distract and dilate, taking it forward by another round of appeal making it a never-ending process. This - and there can be no dispute in such regard - is neither conducive for the financial health of the sector nor in public interest in as much as the burden when it comes will, more often than not, bring along baggage in the form of carrying cost, an element that will unfortunately be met by the consumer at the end of the supply chain.

…

34. There is a need for all concerned to do a re-think on the propriety of the procedure adopted under the existing legal framework. Speaking only of a dispute involving claim for recovery of money, there is nothing stopping the party approaching the regulatory commission to not only quantify its claim but also support it not only by the principle on which it is founded but also by furnishing all necessary details and evidence so that the correctness is tested in the same adjudicatory process. If detailed averments are made in the petition, the law on pleadings would compel the opposite party to respond not only on justification but also, should the claim be found justified, on the arithmetic involved. It is natural that from such pleadings issues of fact would arise for determination. The Regulatory Commissions would be obliged in law, in such a scenario, to answer all issues, not only on principle of law but also the claim on facts which are established. An effective assistance from the learned counsel for the parties would keep the Commission informed of its duty (reference to the spirit of Rule 2 of Order XIV of Code of Civil Procedure, 1908) to adjudicate on all issues in one go, rather than only on questions of law. Insistence on a comprehensive adjudicatory process before the Commissions will ensure its views on the quantification of the claim (which was rejected on principle of law) are available when denial of relief is challenged by appeal before this tribunal. Needless to add, if the

appellant in such situation were to succeed on issue of law, the findings on facts can also be subjected to simultaneous appellate scrutiny by this tribunal so that the decision rendered in appeal is comprehensive and ready for execution subject, of course, to remedy of second statutory appeal before the Supreme Court. There would, in such sequence, hardly be scope for indulgence in multiplicity of proceedings respecting same dispute."

[Emphasis supplied]

24. The above decision was upheld by the Hon'ble Supreme Court in *Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission*, [(2022) 4 SCC 657].

25. In the case of *Fortum Solar v. KERC & Ors.* (Appeal no. 104 of 2021 & batch), decided by judgment dated 21.05.2021, it was observed as under:

"5. In our reading, the above highlighted sentence does not make any sense. It appears from the submissions of the appellant, and the distribution licensees (respondents), that the parties have understood the above-quoted order to the effect that the Commission expected them to sit together and after verifying the documents relating to the additional expenditure also arrive at the additional tariff that has to be levied consequent to the CIL event in question. Noting our difficulty to comprehend the meaning, import and effect of the above quoted observations of the State Commission, while issuing notice by order dated 07.05.2021, we had directed the Commission to explain it to us at the hearing today through counsel. The learned counsel for the State Commission was at pains to explain it on the same lines as the above quoted observations seem to have been understood by the parties as well.

6. The appeals at hand were presented before us with several grievances including the issue of substantial part of the claim of the Appellant for compensation as a CIL event having been denied; the rejection of claim towards carrying cost; the verification exercise as directed having been undertaken, the relevant documents having been shared but there being no consensus; the actual compensation not having inured to the benefit of the Appellant till date.

7. Having gone through the impugned order with the assistance of the learned counsel on all sides, we are of the considered view that the State Commission has miserably failed to discharge its responsibilities for several reasons. We elaborate this conclusion hereinafter.

8. That the CIL event will result in compensation in additional tariff is a crucial binding term of the Power Purchase Agreements executed by the parties with the approval of the Commission. In terms of the PPAs, and the relevant law on the subject, it is the responsibility of the State Commission to sit in judgment over the claim of CIL. And if the answer be in favour of such claim, it is again the duty (adjudicatory function) of the State Commission to determine the consequential compensation that is to be granted while specifying the date from which such compensation would be payable, also considering the additional burden of carrying cost, if any, leading eventually to determination of the additional tariff (by the Commission), that being the mode agreed upon by the parties for recompense.

… 11. In the matter at hand, the Commission in discharge of its adjudicatory function did undertake the exercise of considering the claim of CIL event and reached a definite affirmative finding. It then applied its mind to the material presented and reached a decision about the amount to which the Appellant is entitled as CIL compensation. Having reached such conclusion, there was no occasion for the parties thereafter to be called upon to exchange documents and verify the actual amount payable. The parties could not have been given such liberty after the determination by the Commission. This would amount to asking them virtually to sit in review of what had been decided by the Commission itself. If the intent behind such exercise was to bring about amicable resolution to the dispute, it should have preceded the determination of the claim by the Commission. Once the Commission had reached a conclusion, there was no occasion for the parties to be thrown back into another such round – a vicious circle - or being asked to decide again, now on their own. The impugned directions in effect amount to delegation of adjudicatory function which is impermissible. For these reasons, we do not give any credence or significance to the parleys that the parties may have engaged themselves in post the determination of the claim by the Commission. All such exercise would be treated as inconsequential.

12. The Commission, in our view, has abdicated its responsibility also by expecting the parties to reach a decision, by consensus, on the incremental tariff that is to be levied post the CIL event. No doubt, if the parties could reach a consensus and present it

to the Commission for approval it would be an ideal way. But then, again, such opportunity has to precede determination of the matter by the Commission, not afterwards.

13. In our view, the impugned order not only amounts to abdication of the jurisdiction by the Commission but also comes across as an exercise at adjudication which remains inchoate. The proceedings before the Commission could not have been terminated till the stage the incremental tariff had been determined. That not having been done, we are unable to uphold the operative part of the impugned order treating the proceedings to have come to an end.

14. For the foregoing reasons, we set aside the operative part of the impugned order. We also set aside and vacate the observations in para 55 of the impugned order quoted as above, they conveying virtually no meaning. We direct the Commission to take up further the exercise of the determination of incremental tariff consequent to the determination already done by it on the quantum of compensation to which the Appellant is entitled as a result of CIL event. Having regard to time that has been wasted, such exercise must be completed within two months of this judgment.

15. We are conscious that Appellant is not satisfied with the determination of the quantum of compensation to which it is entitled. We are also conscious that the Appellant is also aggrieved by denial of carrying cost. Since we are remitting the matter for completion of the proceedings in accordance with law by the Commission, it would be appropriate to preserve and protect such contentions of the Appellant for the same to be agitated, if so desired, in appropriate forum after the fresh final order has been passed by the Commission pursuant to compliance with above directions."

[Emphasis supplied]

26. Again, by judgment dated 20.09.2021 in the matter *Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission,* reported as 2021 SCC OnLine APTEL 65, passed in Appeal No. 386 of 2019, it was observed thus:

"23. … What is jarring is the fact that the directions were made subject to "reconciliation", the responsibility of the Commission to determine having been all but forgotten - irresponsibly abdicated.

44. We are deeply disturbed over the manner in which the appellant has been warding off its creditors depriving them of timely payments of their legitimate dues. This is reflective of financial mis-management on the part of the appellant but, more gravely, a conduct not expected of a distribution licensee. The MERC seems to have been playing along believing the promises held out through payment-plans without insisting on scrupulous adherence thereto. This has been leading to unnecessary litigation adding to the cost for all stake-holders. The Commission, as the sector regulator, equipped as it is with the requisite powers, can do better. If the reasons for the mess indicated in the additional affidavit dated 29.07.2021 (mentioned earlier) are any pointer, it is the duty of the regulator to effectively deal with some of the issues that statedly plague the food chain and are attributable to actions (or inaction) of the regulatory authority including certain disallowances, delayed implementation of the tariff orders, approvals of gains and losses in MYT Order instead of True up; belated approval of the final true up etc. It is the obligation of the State Commission to ensure, by issuing appropriate directions and enforcement thereof to the logical end, that the Distribution licensee conducts itself in such a manner that it lives up to the objectives of the Electricity Act by maintaining financial discipline, adopting efficient systems, aiding in recovery of the cost of electricity in a reasonable manner and conduct of its business of distribution and supply on commercial principles which only would safeguard the consumers' interest.

45. We direct the State Commission to examine the financial affairs of the appellant and take appropriate measures in such regard in accordance with law so as to bring about financial discipline in a time-bound manner, bearing in mind the observations recorded above."

[Emphasis supplied]

27. The judgment in the case of *NRSS-XXIX Transmission Limited v. CERC & Ors.* (OP no. 01 of 2022 & batch), rendered on 05.04.2022, held as under:

"68. The approach adopted by CERC in disposing of the claims of TSPs without deciding Change in Law claims is not only contrary to its statutory duty and functions but would also lead to multiplicity of litigation, causing delay in the process which, in turn, would not be in larger interest of the Consumers, it also being against the letter and spirit of the contractual terms.

…

72. For the foregoing reasons, we find the impugned orders of the Central Commission applying the CIL Rules to matters pending before it for adjudication under Section 79(1)(f) of Electricity Act on the date of coming into force of said rules wholly erroneous, improper and bad in law. The said orders are thus set aside. In the result, the proceedings in claim cases (in which impugned orders were passed – and that includes the orders dated 04.02.2022 in the Original Petitions) remain inchoate. The Central Commission is duty-bound to consider each of them on the merits of the claims and adjudicate in accordance with law on the dispute(s) in proper exercise of its jurisdiction under Section 79 of the Electricity Act. It is directed to proceed to do so expeditiously.

73. We would be failing in our duty if we do not also note here (as also indicated earlier in this judgment) that prior to the decisions which were challenged by the captioned petitions/appeals, as indeed subsequently, the Central Commission has been taking the impugned approach on pending claims which has and would have resulted in a large number of such claims being unduly scuttled, non-suiting the parties similarly placed as the petitioners/appellants herein. If the factual back-ground is same as in the cases at hand, such decisions would also constitute want of performance of statutory function by the Central Commission meriting an appropriate direction by this tribunal. This would mean each of such affected claimant would be constrained to seek remedy against such order, if it thereby feels aggrieved. The remedies available in law include approaching the Central Commission for review or this tribunal ordinarily by an appeal.

74. Such that the affected parties do not suffer on account of faulty approach of adjudicatory authority, and this tribunal is not flooded by appeals raising identical issues against such other decisions as above, rendered in similar fact-situation by the Central Commission, it would be appropriate that it be asked to properly and fully perform its statutory function by exercise of its review jurisdiction, suo motu, in all similarly placed claims for compensation founded on change in law events where similar decisions have been taken by the Central Commission after coming into force of CIL Rules on 22.10.2021 and, if such

decisions are found running afoul of the view taken by this tribunal by this judgment, to vacate the same and restore the concerned Claim cases to its file and complete the process of adjudication thereupon in accordance with law. Needful action in above nature shall be initiated by the Central Commission within four weeks of this judgment. Of course, review can be undertaken even at the instance of the parties in question should they approach the Commission on their own. We may add that these directions are without prejudice to the remedy, if any, already pursued or intended to be pursued by the concerned parties vis-à-vis other such cases."

[Emphasis supplied]

28. In *Sahyadri Industries Ltd v. Maharashtra Electricity Regulatory Commission & Anr*., a judgment rendered on 06.10.2022 (Appeal no. 13 of 2019) reported as 2022 SCC OnLine APTEL 88, this tribunal held as under:

"8. For the reasons already set out in the previous decisions quoted above, we do not approve of the approach adopted by the State Commission. In a dispute of such nature, it is the responsibility of the adjudicatory forum sitting in judgment to return clear findings on the amount due, if any, and issue proper enforceable directions for discharge of such liability by the opposite party. Since this has not been done, the proceedings before the State Commission, arising out of the petition of the appellant, are found to be inchoate. For complete adjudication, the Commission will have to undertake further exercise, by hearing both sides, to clearly determine the amount due, of course, taking into account the payments which have been made over the period, giving clear decision on the liability which has to be discharged by MSEDCL including on account of DPC and carrying cost, having resort, at the same time, to appropriate measures for enforcement of such liability in a time bound manner. We order accordingly."

[Emphasis supplied]

29. On similar lines in the matter of *Shah Promoters and Developers v. Maharashtra Electricity Regulatory Commission & Anr.* (Appeal no. 144 of 2019 & batch) passed on 17.10.2022, it was held as follows:

"2. …the appeal at hand was filed, it being pointed out that the MSEDCL had not filed any pleadings taking objection to the calculation of dues, the entire decision being based on the assurances held out by a plan submitted by MSEDCL to discharge the liability unto to the Appellant(s) in a time-bound manner, the Commission having failed to either determine or issue time-bound directions or enforce the liability by appropriate measures, the plan submitted by MSEDCL also being vague, there being no clarity as to the timelines within which the payments would be made for full discharge of the liability including on account of Delay Payment Charges (DPC) and carrying cost.

3. We have come across similar orders passed by the State Commission in other similarly placed cases in several appeals earlier, one of similar improper dispensation rendered by Central Electricity Regulatory Commission (CERC) having been noticed in the case of DB Power Limited (Appeal No. 56 of 2020 decided by judgment dated 04.02.2021).

4. The approach of CERC of issuing directions of such nature (payments to be made to the extent of admitted liability on the basis of plan submitted by the procurer and both parties to reconcile on their own) having been adopted by the State Commission in other cases, illustratively including the case of MSEDCL (Appeal No. 386 of 2019 decided by this Tribunal by judgment dated 20.09.2021) and in the case of Sahyadri Industries Limited (subject matter of Appeal No. 13 of 2019 decided by judgment dated 06.10.2022).

…

6. For the above reasons we set aside the impugned order to the extent it relates to the appellants herein. For complete adjudication, we direct the Commission to undertake further exercise by hearing both sides to clearly determine the amount due, of course, taking into account the payments which have been made over the period, giving clear decision on the liability which has to be discharged by MSEDCL including on account of DPC and carrying cost, having resort, at the same time, to appropriate measures for enforcement of such liability in a time bound manner. We order accordingly."

[Emphasis supplied]

30. In another recent decision passed on 18.10.2022, in the matter of *Koppal Green Power Ltd. v. Gulbarga Electricity Supply Co. Ltd. & Anr* (Appeal no. 298 of 2019), we noted and observed as under:

"1. The appeal at hand has brought to us, yet again, a very disturbing trend showing piecemeal adjudication of the disputes brought before the Electricity Regulatory Commissions leading to multiplicity of proceedings forcing the stakeholders into unending spiral of litigation.

…

8. Noticeably the Commission failed to take any decision on the other prayers viz. direction for payment of the differential on account of revision of tariff and initiation of penal action for non-compliance with the order for supplementary agreement to be consequently signed.

…

13. The defaults and delays throughout were on the part of the licensee which were wholly unjustified. The claim for payment of the differential, pressed by the OP No.20/2015, had remained unaddressed till the licensee eventually made the payments in July, 2017. In these circumstances, it is also a case of failure on the part of the State Commission to render a complete and effective adjudication which has resulted in the claim having remained not fully satisfied till date. The appellant had been deprived of the time value of the money which was due immediately upon the revision of the tariff by Commission's order dated 22.01.2015. In these circumstances, the claim cannot be said to be hit by the provision contained in Order II Rule 2 of CPC and definitely not on the ground that such claim could not have been raised till the revised tariff had been incorporated in the amended PPA."

[Emphasis supplied]

31. The case at hand presents another disturbing scenario, adding to the pattern of inappropriate handling of the adjudicatory functions by the Regulatory Commissions.

32. The provisions of Sections 79(1)(f) and 86(1)(f) have to be read in conjunction with Section 158, falling in Part-XVI (*Dispute Resolution*), reading as under:

"Section 158. (Arbitration): Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996."

33. The above-mentioned statutory provisions had come up for consideration before the Hon'ble Supreme Court and were expounded upon by judgment reported as *Gujarat Urja Vikas Nigam Ltd. v Essar Power Ltd.* (2008) 4 SCC 755. We may quote the following observations of the Hon'ble Supreme Court in the said case:

"26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word `and' in Section 86(1)(f) between the words 'generating companies' and `to refer any dispute for arbitration' means `or'. It is well settled that sometimes `and' can mean `or' and sometimes `or' can mean `and' (vide G.P. Singh's `Principle of Statutory Interpretation' 9th Edition, 2004 page 404.)

27. In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word `and' between the words `generating companies' and the words `refer any dispute' means `or', otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some Arbitrator. Hence the word `and' in Section 86(1)(f) means `or'.

28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation.

…

59. In the present case we have already noted that there an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section

11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitrary and Conciliation Act, 1996, the Court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail.)

60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dtd. 30.5.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute."

61. We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996. However, as regards, the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003). In other words, Section 86(1)(f) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies. Procedural and other matters relating to such proceedings

will of course be governed by Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003."

[Emphasis supplied]

34. Clearly, the view taken by the Supreme Court in above-mentioned case was that after coming into force of the Electricity Act, 2003, all adjudication of dispute between licensees and generating companies can be done by the Regulatory Commission or by the arbitrator nominated by it, the legislative mandate being that the authority to take a call is the Commission. We do not, however, agree that the power to refer a dispute to arbitration is available in the context of remedies for dispute resolution envisaged in the Electricity Act *only* if there is an arbitration clause in the contract or the parties otherwise agree for such reference to be made. This is not the dictum in *Gujarat Urja Vikas Nigam Ltd.* (supra).

35. Experience has shown that though the law permits reference of the disputes *"for arbitration"* – under Section 79(1)(f) or Section 86(1)(f), the Commissions have generally opted to retain the litigation with themselves for *adjudication,* contrary examples being very rare. On first blush, it would appear that technically no fault can be found with such approach in as much as it is a choice given to the Regulatory Commission by the law. On closer scrutiny, however, in particular context of special regime of sector-specific Electricity Act, we find that the choice between adjudication by the Regulatory Commission and arbitration is being exercised capriciously. This is not a happy state of affairs. The exercise of option has to be properly

guided, informed and be in accord with law. In cases which require resolution of dispute that may not involve exercise of any regulatory power – illustratively, by availing power to relax or power to remove difficulties or power to amend (regulatory frame-work), it might be advisable that the Regulatory Commissions choose the course of making reference to arbitration which is permitted by the afore-quoted provisions read with Section 158 of Electricity Act, 2003, in as much as it would ensure effective and expeditious adjudicatory process relieving them, at the same time, of the burden enabling them to focus energies more vigorously on regulatory functions.

36. This tribunal has been established by section 110 of the Electricity Act, 2003 as the forum of first appeal, with the objective of 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. The appeals are brought under Section 111. This tribunal has also been entrusted with the responsibility to perform the role of superintendence and control by exercising the jurisdiction conferred by Section 121, the provision reading as under:

> *"Power of the Appellate Tribunal:- The Appellate Tribunal may, after hearing the Appropriate Commission, or other interested party, if any, from time to time, 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."*

37. The essential elements of Section 121 were highlighted by the Hon'ble Supreme Court in the case of *PTC India Ltd vs. CERC and Ors*, (2010) 4 SCC 603 as under:

> *"52. Before concluding on this topic, we still need to examine the scope of Section 121 of the 2003 Act. In this case, appellant(s) have relied on Section 121 to locate the power of judicial review in the Tribunal. For that purpose, we must notice the salient features of Section 121. Under Section 121, there must be a failure by a Commission to perform its statutory function in which event the Tribunal is given authority to issue orders, instructions or directions to the Commission to perform its statutory functions. Under Section 121 the Commission has to be heard before such orders, instructions or directions can be issued."*
>
> *[Emphasis Supplied]*

38. This tribunal, by its judgment dated 11.11.2011 passed in OP no. 1 of 2011, had observed in the context of Section 121 as under:

> *"54. This section confers powers to Appellate Tribunal to issue such directions to any Appropriate Commission whenever it finds that the Commission has not performed its statutory functions. This power has been conferred on this Tribunal to ensure that the statutory functions of the Commission as prescribed under the Act and the Regulations are performed by the Commissions.*
>
> *…*
>
> *59. Tariff determination ought to be treated as a time bound exercise. If there is any lack of diligence on the part of the Utilities which has led to the delay, the State Commission must play a pro-active role in ensuring the compliance of the provisions of the Act, Regulations and the Statutory Policies under the Electricity Act, 2003.*
>
> *60. In the absence of the performance of functions and duties enjoined under the Act and Regulations by the State Commission, it is the duty of the Tribunal to intervene and wake them up from their deep slumber and to make them act to ensure that the Regulations are being followed scrupulously by the Commissions as well as the Utilities.*
>
> *61. It is quite strange on the part of the State Commissions to contend that they may not follow their own Regulations as they would not prevail over Section 64 of the Act and therefore, they have to keep quite without taking any steps for performing their functions. This plea is made by these Commissions even though they have got the powers to take a suo-moto action for determination of tariff by virtue of the Regulations and the policies. As indicated*

above, Section 64 provides for procedure to ultimately achieve the purpose which is more important. It is quite surprising to notice that the State Commissions have taken up the stand to plead before this Tribunal that their own Regulations are wrong. How can they take such a stand, so long as those Regulations approved by the legislature are in force? This monstrous plea taken by the three State Commissions would indicate only one thing i.e. State Commissions have ventured to give mere lame excuses for non-performance of their statutory duties. In such a surprising and shocking situation, it becomes our bounden duty to invoke the powers under section 121 of the Act, to intervene and to put the house in proper order."

[Emphasis Supplied]

39. Though the appeal at hand has been brought invoking our appellate jurisdiction under Section 111 of Electricity Act, 2003, we find it an appropriate occasion for dealing with the core issue to consider issuance of appropriate directions to the Commissions in exercise of the jurisdiction vested in us by Section 121.

40. This Appellate Tribunal is not "*bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908)*", but in terms of Section 120 it has the prerogative ("*subject to the other provisions of*" the statute) "*to regulate its own procedure*", bound by law to always be "*guided by the principles of natural justice*". At the same time, the statute unambiguously 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.

41. The *Code of Civil Procedure, 1908* (for short, "CPC") was amended by Act 46 of 1999 brought into force w.e.f. 01.07.2002 thereby inserting Section 89 which represents the extant public policy adopted by the State, as under:

> *"89. Settlement of disputes outside the Court.—*
> *(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for :—*
>
> *(a) arbitration;*
>
> *(b) conciliation;*
>
> *(c) judicial settlement including settlement through Lok Adalat: or*
>
> *(d) mediation.*
>
> *(2) Were a dispute has been referred—*
>
> *(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;*
>
> *(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall .apply in respect of the dispute so referred to the Lok Adalat;*
>
> *(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;*
>
> *(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."*

42. The question of giving impetus to alternative modes of dispute resolution, by recourse to Section 89 CPC, came up before Hon'ble Supreme Court in a matter leading to judgment reported as *Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Construction Co. (P) Ltd & Ors. (2010) 8 SCC 24*. Given the objectives and scheme of time bound adjudication of claims envisaged by Electricity Act, particularly with reference to the legislative

mandate for the Commissions to consider referring the disputes "for arbitration", it is appropriate to take note of the following part of the decision in *Afcons Infrastructure* (supra):

> "***26.*** *Section 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred under Section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1-A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain visualizes excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR processes, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under Section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other cases reference to ADR process is a must."*
>
> *27. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:*
>
> *(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).*
>
> *(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association, etc.).*
>
> *(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.*
>
> *(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.)*
>
> *(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.*
>
> *(vi) Cases involving prosecution for criminal offences.*

28. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

(i) All cases relating to trade, commerce and contracts, including

- *disputes arising out of contracts (including all money claims);*
- *disputes relating to specific performance;*
- *disputes between suppliers and customers;*
- *disputes between bankers and customers;*
- *disputes between developers/builders and customers;*
- *disputes between landlords and tenants/licensor and licensees;*
- *disputes between insurer and insured;*

(ii) All cases arising from strained or soured relationships, including

- *disputes relating to matrimonial causes, maintenance, custody of children;*
- *disputes relating to partition/division among family members/coparceners/co-owners; and*
- *disputes relating to partnership among partners.*

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- *disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.);*
- *disputes between employers and employees;*
- *disputes among members of societies/associations/apartment owners' association;*

(iv) All cases relating to tortuous liability, including claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes, including disputes where a trader/supplier/manufacturer/ service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of "suitable" and "unsuitable" categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

...

43. We may summarize the procedure to be adopted by a court under section 89 of the Code as under:

a) *When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.*

b) *The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.*

c) *In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.*

d) *The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.*

e) *If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.*

f) *If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes: (a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.*

g) *If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.*

h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in Ih the reference is made, but also other disputes which are not the subject matter of the suit.

j) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability."

[Emphasis supplied]

43. Pertinent to note here that under the general law in civil disputes taken to the civil courts for adjudication invoking their ordinary jurisdiction, a reference is made mandatorily to arbitration "*where there is an arbitration agreement*" [*Section 8 of Arbitration and Conciliation Act, 1996*]. In *Afcons Infrastructure* (supra), Hon'ble Supreme Court opened the doors for such reference to be made for arbitration even if there was no prior arbitration agreement binding the parties. But such reference encouraged by the court was contingent upon the Court using its persuasive power to nudge the parties to agree to the alternative mode of conciliation or arbitration.

44. In our considered view, the possibility of reference to arbitration of a dispute by Regulatory Commissions under the Electricity Act is not contingent upon existence of a prior arbitration agreement or consent being

given by the disputants before the Commission for such reference to be made. We take this view because the existence of an arbitration agreement – prior or post the dispute – is not mentioned as a pre-requisite or *sine qua non* under Section 79(1)(f) or Section 86(1)(f). The discretion to refer "*any dispute*" for arbitration, as an alternative to adjudication by the Commission itself, is conferred upon the appropriate Commission. To put it simply, the special legislation (the Electricity Act) vests the prerogative of reference to arbitration in the regulatory authority and not conditional upon the discretion or choice of the parties.

45. We may approach the subject from another perspective.

46. As noted above, Section 120(1) of the Electricity Act provides that the Appellate Tribunal shall have the power to regulate its own procedure and can even travel beyond the provisions of CPC to meet the ends of justice. In this regard, reliance is placed on the following Judgment passed by this tribunal in *New Bombay Ispat Udyog Ltd v Maharashtra State Electricity Distribution Co. Ltd & Anr.,* 2010 SCC OnLine APTEL 44:

> ***"22.*** *A careful perusal of these judgments would make it abundantly clear that provisions of Section 120(1) of the Electricity Act, 2003 was not enacted with the intention to curtail the power of Tribunal with reference to the applicability of the Code of Civil Procedure to the proceedings before the Tribunal. On the contrary, the Hon'ble Supreme Court has clearly held that the words "shall not be bound by" do not imply that the Tribunal is precluded or prevented from invoking the procedure laid down by the CPC. It further, says the words "shall not be bound by the procedure laid down by CPC" only imply that the Tribunal can travel beyond the CPC and the only restriction on its power is to observe the principles of natural justice."*

47. Thus, this tribunal is entitled to draw upon the principles underlying the provisions of CPC while adopting its own procedure under Section 120(1) of the Electricity Act.

48. Given the objective and scheme of time-bound adjudication of claims envisaged by the Electricity Act, particularly in matters which have an impact on tariff and hence also on carrying cost/late payment surcharge payable, it may be desirable to consider adapting the principles enunciated by the Hon'ble Supreme Court in its judgment in the case of *Afcons Infrastructure* (supra); particularly because they were formulated and envisaged to apply to all "*cases of civil nature"* regardless whether pending in civil courts "*or other special tribunals / forums"*.

49. All Standard Bidding Documents generally contain an arbitration clause. Under the dispute resolution clause, disputes are categorised into tariff and non-tariff related disputes. Under the current regulatory regime, the PPAs are approved by Electricity Regulatory Commissions. Ostensibly, arbitration clauses are also approved in that process. Once the PPAs, and the arbitration clause, are approved, the Appropriate Commission is deemed to have exercised its jurisdiction under Section 79 (1) (f) or Section 86 (1) (f) of the Electricity Act. Therefore, in terms of Section 8 of the Arbitration and Conciliation Act, the Appropriate Commission is *bound* to refer non-tariff related disputes for arbitration.

50. The jurisdiction of Electricity Regulatory Commissions over tariff related disputes and mandatory referral of non-tariff related disputes for arbitration, if properly exercised, would give harmonious meaning to the dispute resolution sub-clauses in the PPAs. Otherwise, the arbitration clause is rendered redundant since the Regulatory Commissions prefer to sit in judgment over all disputes.

51. It is an important issue as to what constitutes tariff and non-tariff disputes. While all payments made to, or in favour of, a generating company may be considered as tariff related disputes, it is necessary to segregate issues into matters directly impacting tariff such as change in law, which is essentially a part of the regulatory dispensation of the Electricity Regulatory Commissions. Simpliciter, money claims such as *Late Payment Surcharge*, *Liquidated Damages, termination or breach of contract* etc., may be considered as non-tariff related disputes and referred to arbitration.

52. Whilst the Electricity Act is a complete code in itself, Electricity Regulatory Commissions, having been elevated to the status of a 'civil court of original jurisdiction', are bound to decide tariff and non-tariff related disputes in accordance with the 'rule of law'. [*Maharashtra State Distribution Company Limited v. Maharashtra Electricity Regulatory Commission & Ors.* (2022) 4 SCC 657 and *APPC v. Lanco Kondapalli* (2016) 3 SCC 468]. *Rule of Law* mandates that where there is an arbitrable dispute and an arbitration clause (in this case, duly approved by the Electricity Regulatory

Commission), the mandate under Section 89 CPC read with Section 8 of the Arbitration and Conciliation Act is bound to be followed referring the parties to arbitration.

53. It is settled law that when a discretion is vested in a statutory body, it is required to exercise such discretion in a judicious manner. We may quote Hon'ble Supreme Court in *Sant Raj v. O.P. Singla*, (1985) 2 SCC 349 holding as under:

> *"4. In the present case, the Labour Court having held that the termination of services of the appellants would constitute retrenchment and as the pre-requisite for a valid retrenchment having not been satisfied, the termination of service was bad, yet in the facts of the case in his discretion declined to grant the relief of reinstatement. Whenever, it is said that something has to be done within the discretion of the authority then that something has to be done according to the rules of reason and justice and not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful but legal and regular and it must be exercised within the limit to which an honest man to the discharge of his office ought to find himself. (See Sharp v. Wekfield [1891 AC 173]). Discretion means sound discretion guided by law. It must be governed by, rule, not by humour, it must not be arbitrary, vague and fanciful. (See S.G. Jaisinghani v. Union of India [AIR 1967 SC 1427])"*
>
> *[Emphasis supplied]*

54. Similarly, in *U.P. State Road Transport Corpn.v. Mohd. Ismail*, (1993) 3 SCC 239, the contours of discretion were explained as under:

> *"15. These are, in our opinion, extreme contentions which are not sustainable under law. There are two aspects to be borne in mind in exercising the discretion. Firstly, there are constraints within which the Corporation has to exercise its discretion. The Corporation is a public utility organisation where mediating motion is efficiency and effectiveness of public service. Efficiency and effectiveness of public service are the basic concepts which cannot be sacrificed in public administration by any statutory corporation. The Corporation has to render this public service within the resource use and allocation. It is within these constraints the Corporation has to exercise its*

discretion and perform its task. The second aspect relates to the manner in which statutory discretion is to be exercised. The discretion allowed by the statute to the holder of an office, as Lord Halsbury observed in Sharp v. Wakefield, [1891 AC 173, 179: 64 LT 180] is intended to be exercised "according to the rules of reason and justice, not according to private opinion; … according to law and not humor. It is to be, not arbitrary, vague and fanciful but legal and regular. And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself." Every discretion conferred by statute on a holder of public office must be exercised in furtherance of accomplishment of purpose of the power. The purpose of discretionary decision making under Regulation 17(3) was intended to rehabilitate the disabled drivers to the extent possible and within the above said constraints. The Corporation therefore, cannot act mechanically. The discretion should not be exercised according to whim, caprice or ritual. The discretion should be exercised reasonably and rationally. It should be exercised faithfully and impartially. There should be proper value judgment with fairness and equity. Those drivers would have served the Corporation till their superannuation but for their unfortunate medical unfitness to carry on the driver's job. Therefore, it would not be improper if the discretion is exercised with greater concern for and sympathetic outlook to the disabled drivers subject of course to the paramount consideration of good and efficient administration. These are some of the relevant factors to be borne in mind in exercising the discretion vested in the Corporation under Regulation 17(3).”

[Emphasis supplied]

55. The words “*refer any dispute for arbitration*”, appearing in Section 79(1)(f) and Section 86(1)(f) - in relation to functions of Central Commission and State Commissions respectively - are neither surplus nor hollow words nor of no consequence. They have been used by the legislature for a purpose, the objective sought to be thereby achieved being similar to the one behind Section 89 CPC jurisprudence. They cannot be rendered a dead letter. The Appropriate Commissions have the power “to adjudicate” or “to refer… for arbitration” but the choice to be exercised in this regard cannot be at the mercy of individual whims. The option has to be exercised “for reasons”, this requirement being the hallmark of a judicious and judicial

approach. In our considered view, the choice has to be made by the Commission by a conscious reasoned order, at the threshold scrutiny, in context of the dispute brought before it under Section 79(1)(f), or Section 86(1)(f), as the case may be. The Commission ought to proceed with adjudication by itself *only* if it decides, by such reasoned order, that the dispute is of such nature as ought not be referred for arbitration. For testing the arbitrability (or otherwise) of the dispute, the Commission will be guided by such considerations as have been noted earlier, particularly the principles enunciated in *Afcons Infrastructure* (supra).

56. It is trite that first appeal is a full re-hearing of the original proceedings and the appellate forum also possess all powers, jurisdiction and authority as the forum of first instance, the jurisdiction and range of subjects being co-extensive. In this context, we draw strength from two rulings of the Hon'ble Supreme Court.

57. In *Santosh Hazari v. Purushottam Tiwari*, reported as (2001) 3 SCC 179, it was held thus:

> *"15. A perusal of the judgment of the trial court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. <u>The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the</u>*

parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi v. Bijendra Narain Choudhary [AIR 1967 SC 1124]). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See Madhusudan Das v. Narayanibai [(1983) 1 SCC 35 : AIR 1983 SC 114]) The rule is — and it is nothing more than a rule of practice — that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh [AIR 1951 SC 120]) Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the

errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one."

[Emphasis supplied]

58. *In UP Power Corp. Ltd. v. NTPCL and Others and Batch,* (2009) 6 SCC 235, the Supreme Court ruled as under:

> *"66. Although on the question of jurisdiction the Central Commission might not have been correct, before parting with this case, we may, however, also notice a submission of Mr Gupta that the Appellate Tribunal should not ordinarily interfere with an order of the Central Commission. We do not agree. The jurisdiction of the Appellate Tribunal is wide. It is also an expert tribunal and, thus, it can interfere with the finding of the Central Commission both on fact as also on law. Both the Central Commission as also the Appellate Tribunal being expert, we do not see how the decisions of this Court in Union of India v. Cynamide India Ltd. [(1987) 2 SCC 720] and Shri Sitaram Sugar Co. Ltd. v. Union of India [(1990) 3 SCC 223] would be applicable."*
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> *[Emphasis supplied]*

59. Given the fact that both parties before the State Commission, the petitioner (the trading licensee) as also the respondent (the procurer), are aggrieved against the impugned order, there indeed having been deficiency in the adjudicatory process at the hands of the regulator, as already concluded, we set aside the impugned order and hold that the claims of the trading licensee have not been effectively adjudicated upon.

60. Ordinarily, the decision rendered by the Regulatory Commission having been set aside and vacated, we would have remanded the matter to the State Commission but being the first statutory appellate authority, possessed as we are with the power and jurisdiction to pass all such orders

as may be passed by the Regulatory Commission, including reference of the dispute for arbitration, we proceed to issue necessary directions in such light and towards such end.

61. We do not agree with the learned counsel for the trading licensee that the objection of arbitration clause not having been taken in the counter filed before the State commission, the procurer must be deemed to have waived the right to seek such arbitration, reference in this context being made to ruling of Supreme Court in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.,* (2011) 5 SCC 532. The proceedings held before, and the order passed upon its culmination by, the State Commission having been found to be vitiated, we virtually stand at the threshold. As observed earlier, the response of the procurer as to the revised claim presented through rejoinder pleadings will have to be called for. Therefore, the parties are relegated to the initial stages. Given the view we have taken vis-à-vis the responsibility of the State Commission to consider possibility of reference of the dispute to arbitration, the argument of deemed waiver cannot be accepted.

62. For similar reasons, we reject the opposition to the proposal for reference of the dispute at hand to arbitration, the matter to that extent being within the domain and responsibility of the regulatory authority. The observations of Hon'ble Supreme Court in *Afcons infrastructure* (supra) of impermissibility of reference to arbitration in absence of pre-existing

arbitration agreement or by consent given before the court have to be understood against the general scenario of suits or cases of civil nature brought before civil courts. The Electricity Act, 2003, is a special legislation which creates its own procedure and machinery, the Regulatory Commissions being the tribunals (fora of first instance) for resolution of disputes. In our reading, as already concluded for reasons set out in detail earlier, the reference to arbitration by such statutory authority is not dependent upon an arbitration agreement.

63. In our view, the *lis* taken by the trading licensee before the State Commission, by its petition (OP no. 34 of 2019), is a fit case for reference to arbitration, it having arisen out of a contract and being essentially a money claim, in a non-tariff dispute. In these facts and circumstances, instead of remitting the case for fresh adjudication to the State Commission, we consider it proper to refer it to arbitration.

64. The dispute resolution by adjudication under the Electricity Act is generally by a multi-member body i.e. the Electricity Regulatory Commissions. In some of the State Commissions – illustratively, the State Commission from where the matter at hand has come – *coram* of even one member is sufficient. The scrutiny at the level of the first appellate forum – this tribunal – however, is by a bench of two members (judicial and technical). Having regard to this, we asked the learned counsel for the parties to give their views as to the strength of the arbitral panel to which the matter may be

referred. The learned counsel for the parties submitted that if an arbitrator is to be appointed by this tribunal, it ought to be a sole arbitrator. It was also submitted that the seat of arbitration may be left to be regulated, in the matter at hand, by the contractual clauses, the venue being a matter within the discretion of the arbitral panel [*BBR (India) Pvt. Ltd. v. SP Singla Consultants Pvt. Ltd., reported as 2022 SCC Online SC 642*]. We agree with the submissions and would add that in such cases where technical assistance is required (a scenario that may not come up in the present case), it would always be open to the arbitrator to avail of such aid or advice by appropriate measures to be adopted.

65. Thus, we refer the dispute arising out of the claim of the trading licensee, forming subject-matter of OP no. 34 of 2019 presented before *Andhra Pradesh Electricity Regulatory Commission*, for adjudication by arbitration to Justice Mr. G.P. Mittal (mobile phone # 9910384619; email – gpmittal@gmail.com), a former Judge of the High Court of Delhi. The parties and their counsel shall have the liberty to approach the learned sole arbitrator so appointed for further proceedings in accordance with law. The learned arbitrator shall be duty bound to give his consent and make a declaration in accordance with the Arbitration and Conciliation Act, 1996 before entering upon the reference. The terms and conditions of the appointment, including arbitration fee, shall be regulated by the fourth schedule appended to Arbitration and Conciliation Act, 1996.

66. We are informed that some payment was made by the procurer to the trading licensee in terms of the impugned order of the State Commission. The payment already made need not be presently refunded but shall be liable for adjustment in terms of the arbitral award as and when rendered, subject to appropriate directions thereupon to be given by the learned arbitrator.

67. In view of the legislative policy, and the neglect thereof, it is necessary to issue suitable guidelines to be followed by the Regulatory Commissions under the Electricity Act in the matter of exercise of jurisdiction in the context of provision for reference of disputes to arbitration. We, thus, direct as under:

(i) Whenever a dispute is brought before the Appropriate Commission, whether under Section 79(1)(f), or Section 86(1)(f), of Electricity Act, 2003, upon the petition being entertained, the concerned Commission shall first examine, after hearing the parties, as to whether the dispute is of such nature as is suitable to be referred to arbitration, the possible touch-stones being as to whether it is a non-tariff dispute, one involving money claim or dispute arising out of contract or between supplier and procurer, the exclusions being matters that would require regulatory powers of the Commission to be exercised, guidance also being had from the observations recorded in this judgment while adhering to the terms of the arbitration clause, if any, binding the parties;

(ii) If the Commission is of the view that the case is not suitable for being referred to arbitration, it would pass an appropriate order setting out its reasons for such course being adopted, such order being amenable to scrutiny, upon challenge, before this tribunal;

(iii) If the Commission finds the matter suitable for reference to arbitration, it shall pass necessary order in such regard giving appropriate directions as to the composition of the arbitral tribunal having regard to prescription, if any, on the subject in the contract between the parties or their views as submitted at the time of such consideration; and

(iv) A matter referred to arbitration by the Commission, upon such decision, shall be governed by provision contained in Section 158 of Electricity Act, 2003.

68. The learned counsel for the procurer has pointed out that a Bill for amendment of the Electricity Act, 2003 was introduced in *Lok Sabha* on 08.08.2022, it being presently pending consideration, there being some changes mooted in the context of adjudicatory role of the State Commissions. Against this backdrop, we feel that the concerns expressed in this judgment as to the adjudicatory process undertaken by various Regulatory Commissions established under the Electricity Act, 2003, as also the solutions found there for, *inter* alia, by directions issued in above nature, must also receive the attention of the executive and legislative wings of the State, for ushering in appropriate reforms, if deemed necessary. In this view, we direct that a copy of this judgment be sent for information and necessary action to the Secretary, Ministry of Power in the Government of India.

69. We further direct that in addition to being certified to the parties, and to all Regulatory Commissions established under the Electricity Act, a copy of

this judgment shall also be sent to the learned sole arbitrator appointed as above, for needful action at their respective end.

70. The appeals stand disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 14TH DAY OF NOVEMBER, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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