

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**DFR NO. 245 OF 2023 & IA NOS. 892, 889, 891, 890 & 1175 OF 2023**  
**and**  
**DFR NO. 247 OF 2023 & IA NOS. 897, 894, 896 & 895 OF 2023**

**Dated: 31.08.2023**

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson  
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**DFR NO. 245 OF 2023 & IA NOS. 892, 889, 891, 890 & 1175 OF 2023**

**In the matter of:**

**Mr. Gagan Narang**

R/o. I-34, 3<sup>rd</sup> Floor, Jangpura Extension  
New Delhi – 110 014

Also at:

A-48, LGF, Lajpat Nagar-II  
New Delhi – 110024

.... Appellant(s)

VERSUS

**1. Delhi Electricity Regulatory Commission**

Through its Secretary  
Viniyamak Bhavan, C-Block  
Shivalik, Malviya Nagar  
New Delhi – 110 017

.... Respondent No.1

**2. Municipal Corporation of Delhi**

Through its Managing Commissioner  
Shri Gyanesh Bharti (I.A.S.)  
Dr. S.P.M. Civil Centre,  
Minto Road New Delhi – 110 002

Also at:

Municipal Corporation of Delhi  
Office of Executive Engineer (WtE) DEMS  
Room No. 1901, 19<sup>th</sup> Floor

- Dr. SPM, Civic Centre JLN Marg  
New Delhi – 110 002 .... Respondent No.2
3. **Tata Power Delhi Distribution Limited**  
Through its Chief Executive Officer  
33 KV Sub Station Building  
Hudson Lane, New Delhi – 110 009 .... Respondent No.3
4. **BSES Rajdhani Power Limited**  
Through its Director  
BSES Bhawan, Nehru Place  
New Delhi – 110 019 .... Respondent No.4
5. **BSES Yamuna Power Limited**  
Through its Director  
Shakti Kiran Building  
Karkardooma New Delhi – 110 092 .... Respondent No.5
6. **Military Engineering Services**  
Through its Chief Engineer (Utilities) CWE,  
Kotwali Road, Delhi Cantt,  
New Delhi – 110 011 .... Respondent No.6
7. **New Delhi Municipal Council**  
Through its Secretary,  
Palika Kendra, Sansad Marg  
New Delhi – 110 001 .... Respondent No.7
8. **Delhi Transco Limited**  
Through its Managing Director  
Shakti Sadan, Kotla Road  
New Delhi – 110 002 .... Respondent No.8
9. **State Load Despatch Centre**  
Through its General Manager  
Shakti Sadan, Kotla Road  
New Delhi – 110 002 .... Respondent No.9

Counsel on record for the Appellant(s) : Ranu Purohit For App.1

Counsel on record for the Respondent(s) : Mukund .P. Unny For Res.1

Anand K. Ganesan  
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Anand Kumar Shrivastava  
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Dushyant Manocha  
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Doel Bose  
Mrinalini Mishra  
Pritha Banerjee  
Darika Sikka For Res.4 & 5

Suresh Tripathy  
Shailja Kulshreshtha For Res.9

Hemant Sahai  
Shreshth Sharma  
Nitish Gupta  
Molshree Bhatnagar  
Shubhi Sharma  
Parichita Chowdhury  
Nishant Talwar  
Nipun Sharma  
Neel Rahate  
Deepak Thakur for IA 1175 of 2023  
(Impleader)

**DFR NO. 247 OF 2023 & IA NOS. 897, 894, 896 & 895 OF 2023**

**In the matter of:**

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R/o. I-34, 3<sup>rd</sup> Floor, Jangpura Extension  
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.... Appellant(s)

VERSUS

1. **Delhi Electricity Regulatory Commission**

Through its Secretary  
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New Delhi – 110 017

.... Respondent No.1

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Room No. 1901, 19<sup>th</sup> Floor  
Dr. SPM, Civic Centre JLN Marg  
New Delhi – 110 002

.... Respondent No.2

3. **Waste to Energy Research & Technology Council**

Through its Director  
R/o, C/2-Gandhar Towers,  
1<sup>st</sup> Khed Lane, Sayani Road,  
Prabhadevi, Mumbai-400025  
Maharashtra.

.... Respondent No.3

Counsel on record for the Appellant(s) : Ranu Purohit For App.1

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Swapna Seshadri  
Surbhi Sharma For Res.2

## **JUDGMENT**

### **PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON**

1. The question of law which arises for consideration in these Appeals is whether the jurisdiction of the State Regulatory Commission can be invoked by a person or a local authority, (which is neither a generating company nor a licensee under the Electricity Act), seeking adoption of tariff under Section 63 of the said Act. Both Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, and Mrs. Swapna Seshadri, Learned Counsel for the 2<sup>nd</sup> Respondent-MCD, would agree that the question, which arises for consideration in the present appeal, has not been considered earlier either by this Tribunal or by the Supreme Court.

2. Since this question of law relates to the jurisdiction of the State Regulatory Commission (in the present case, the Delhi Electricity Regulatory Commission or the “DERC” for short), we have confined our examination, in the present appellate proceedings, only to this question as, in case we are satisfied that no such petition could have been entertained, then the entire proceedings, culminating in the impugned orders being passed, must be set aside on this ground alone. We shall, however, record the facts involved for the sake of completion of narration, and to consider the question of law in its context.

#### **I. A BRIEF BACKGROUND:**

3. The Appeal in DFR No. 245 of 2023 is filed against the order passed by the DERC in petition No. 72 of 2022. The said petition was filed by the Municipal Corporation of Delhi (“MCD”) requesting the DERC to approve the fresh bidding process conducted by MCD, to approve the Draft PPA to be executed by the Distribution Licensees/Respondent Nos. 1 to 5 viz

TPDDL, BRPL, BYPL MES and NDMC, and for adoption of the lowest levelized tariff arising through the competitive bidding process. By the impugned order, the DERC adopted the tariff of Rs.7.38/kWh in respect of the Municipal Waste based plant at Narela – Bawana to Electricity plant as determined through bidding process. The DERC observed that the ratio of power to be purchased by Respondent Nos. 1 to 5 would be decided at the time of approval of PPA, and the parties were directed to negotiate the terms of PPA and submit negotiated signed PPA before the Commission within three months from the date of issuance of the order.

4. The first line of the order, passed by the DERC in Petition No. 72 of 2022 dated 07.03.2023, records as if the petition before the DERC was filed by M/s Tata Power Delhi Distribution Ltd. (TPDDL) seeking approval of the bidding process of the municipal waste based plant at Narela, Bhawna, for adoption of tariff and for approval of the draft PPA. It is, however, agreed by Mr. B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, Ms. Swapna Seshadri, learned Counsel for the 2<sup>nd</sup> Respondent-MCD and Ms. Molshree Bhatnagar, learned Counsel for the impleaded 10<sup>th</sup> Respondent, that the petition was filed not by M/s Tata Power Delhi Distribution Ltd, but by the Municipal Corporation of Delhi (MCD). It is also not in dispute that the MCD is neither a generating company nor a licensee under the Electricity Act, 2003.

5. The 2<sup>nd</sup> Respondent herein (ie the MCD) issued a notice inviting tender, along with a request for proposal, on 15.07.2022 for selection of a developer to design, finance, engineer, construct, commission, operate and maintain the waste to energy project, and for undertaking the project. The bidding documents, which related to setting up of the project, were sent to the DERC, for its consideration, on 03.08.2022. The order,

impugned in DFR No. 245 of 2023, records that, in response thereto, the DERC, vide its letter dated 24.08.2022, had directed the MCD to file a petition for approval of the draft PPA. In terms of the RFP, bids were invited by the MCD and, based on calculation of the levelized tariff, the financial bids were evaluated and a letter of award was issued by the MCD in favour of the 10<sup>th</sup> Respondent.

**6.** The Appeal in DFR No. 247 of 2023 is filed to set aside the order passed by the DERC in Petition No. 65 of 2022 dated 06.03.2023. Petition No. 65 of 2022 was filed by the Waste to Energy Research & Technology Council (“WTERT”) under Section 142 read with Section 86(1)(e) and Section 86(1)(k) of the Electricity Act, 2003 to (a) declare that the Request for Proposal (RfP) dated 21.10.2022 for setting up of Municipal Solid Waste (MSW) to Energy facility at Narela-Bawana, Delhi issued by the Respondent is illegal; (b) initiate appropriate proceedings in terms of Section 142 of the Act and issue appropriate directions against the Respondent; and (c) declare that the impugned tender issued by the Respondent is violative of environmental laws, incomplete, technically non-feasible and cannot be performed under the terms of the impugned tender document. By the order impugned in this appeal, the DERC observed that, since MCD was a statutory body mandated under the SWM Rules, 2016 to facilitate construction, operation and maintenance of solid waste processing facilities and associated infrastructure, there was no bar in the National Tariff Policy, 2016 that the Waste to Energy plant cannot be set up through the competitive bidding route under Section 63 of the Electricity Act, 2003; and the petition was not maintainable.

**7.** In Petition No. 65 of 2022, Waste to Energy Research Technology Council, had questioned the authority of the MCD to issue a Request For

Proposal (RFP), as the MCD was not a licensee within the meaning of the Electricity Act; they had no authority under the statutory framework to issue RFP in relation to procurement of power as the MCD was not a licensee under the Act; as the MCD did not have any valid license under Section 14 of the Act to undertake trading of electricity, the notice inviting tender, issued by the MCD, exceeded its authority; and the same was in violation of the objects and provisions of the Electricity Act.

8. The Order, impugned in DFR No. 245 of 2023, records that it is only the Commission which has, at its functions under Section 86(1)(b) of the Electricity Act, the authority to approve the power procurement process of the Distribution Licensee; the Petition was filed by the MCD under Sections 63 and 86(1)(b) of the Electricity Act, 2003 for approval of the bidding process of the Municipal Waste based plant, adoption of tariff arrived at through a Competitive Bidding Process, and approval of the Draft PPA; MCD was augmenting its Waste Management capability and expanding its Waste processing management and disposal capabilities, and had decided to set up a Municipal Solid Waste (MSW) to Energy Processing Facility of a minimum of 28 MW Capacity at Narela, Bawana, New Delhi for 3000( $\pm$ 20%) TPD of MSW; the DISCOMs had raised a preliminary objection that pending disposal of Petition No. 65 of 2022, wherein WtE Research and Technology Council had challenged the entire tendering process in relation to this project, no action should be taken; the contention of the DISCOMs was that the order in Petition No. 65 of 2022 would have a bearing on the present Petition, and therefore the present proceedings be kept in abeyance till an order was passed by the Commission in Petition No. 65 of 2022; the Commission was not inclined to entertain Petition No. 65 of 2022 on the ground of maintainability; however, an opportunity was given to the Respondent to file reply to the



Petition, and both parties to argue; the matter was taken up for hearing on 31.01.2023 and, after hearing arguments of both the parties, the Commission had reserved the order; however, the order in Petition No. 65 of 2022 had already been issued on 06.03.2023; and, therefore, this issue has become redundant.

9. The DERC then observed that the pleadings, and arguments put forth by the Respondents, showed that the DISCOMs had raised an objection that the MCD did not have any valid licence under Section 14 of the Act to undertake trading of electricity, therefore MCD was exceeding its authority, and the same was violative of the objects and provisions of the Act; Rule 3 (3) of the MSW Rules, 2016, notified by the Ministry of Environment, Forest and Climate Change on 08.04.2016, defined “local body”, for the purpose of the said rules, to mean and include the municipal corporation, nagar nigam, municipal council, nagar palika, nagar palika parishad, municipal board, nagar panchayat and town panchayat, census towns, notified areas and notified industrial townships with whatever name they were called in different states and union territories in India; Rule 15 of MSW Rules, 2016 dealt with the duties and responsibilities of local authorities, village Panchayats, census towns and urban agglomerations, and Rule 15(v) provided that the local authorities and Panchayats shall facilitate construction, operation and maintenance of solid waste processing facilities and associated infrastructure on their own or with private sector participation or through any agency for optimum utilization of various component of solid waste adopting suitable technology including the following technologies and adhering to the guidelines issued by the Ministry of Urban Development from time to time and standards prescribed by the Central Pollution Control Board; preference shall be given to decentralized processing to minimize transportation cost and

environmental impact such as: (a) bio-methanation, microbial composting, vermi-composting, anaerobic digestion or any other appropriate processing for bio-stabilisation of bio-degradable wastes; and (b) waste to energy processes including refused derived fuel for combustible fraction of waste or supply as feedstock to solid waste based power plants or cement kilns.

**10.** The DERC further observed that the DISCOMs had also raised an objection that the levelized tariff of Rs.7.38/kWh, calculated in terms of the tender was very high, making the same economically unviable for the distribution companies; and in this regard the Commission had analysed the price of power procured through WtE plants in Delhi as well as in other States of India. The DERC concluded holding that, in view of the above and considering the submissions made by the Petitioner (ie MCD), as well as on examination of the documents containing financial evaluation report and certificate on conformity to the bidding process, the tariff of Rs.7.38/kWh, in respect of Municipal Waste based plant at Narela – Bawana to Electricity plant as determined through bidding process, was being adopted by the Commission; and the ratio of power to be purchased by the Distribution licensees would be decided at the time of approval of the PPA. The parties were directed to negotiate the terms of the PPA, and submit a negotiated signed PPA before the Commission, within three months of the order.

## **II. RIVAL SUBMISSIONS:**

**11.** Elaborate submissions were put forth by Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the appellant, Mrs. Swapna Seshadri, Learned Counsel for the 2<sup>nd</sup> Respondent-MCD, and Ms. Moishree Bhatnagar, Learned Counsel for the Impleaded 10<sup>th</sup>

Respondent. It is convenient to examine the rival submissions urged by the Learned Senior Counsel appearing on behalf of the appellant, and the learned Counsel appearing on behalf of the 2<sup>nd</sup> and 10<sup>th</sup> Respondents under different heads.

**III. DO SECTIONS 63 AND 86(1)(b) PERMIT THE DERC TO ENTERTAIN A PETITION, FOR ADOPTION OF TARIFF, FILED BY THE MCD AS A LOCAL AUTHORITY?**

**12.** Mr. B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would submit that it is evident, from the impugned order, that the distribution licensees had also objected to the petition, filed by the 2<sup>nd</sup> Respondent-MCD, for adoption of tariff under Section 63; the Municipal Corporation of Delhi is a local authority, and the provisions of the Electricity Act, 2003 does not permit it to invoke the jurisdiction of the Commission seeking adoption of tariff either under Section 63 or sub-sections (b) and (f) of Section 86(1); the 2<sup>nd</sup> Respondent-MCD is neither a generator nor is it a licensee under the Electricity Act; the DERC lacked jurisdiction to entertain a petition for adoption of tariff at the behest of the MCD; and, since the DERC should exercise its jurisdiction strictly in accordance with the provisions of the Electricity Act, it can only entertain a petition, seeking adoption of tariff, either from a generator or from a licensee, (ie a transmission licensee or a distribution licensee as the case may be). In support of his submission, that no such petition could have been entertained by the DERC on its jurisdiction being invoked by the 2<sup>nd</sup> Respondent- MCD, Sri B.P. Patil, Learned Senior Counsel, would rely on the judgement of this Tribunal in **Tamilnadu Generation and Distribution Corporation Ltd vs Ms. Penna Electricity Ltd & another: (Order in Appeal No. 112 of 2012 dated 10.07.2013).**

**13.** On the other hand, Ms. Swapna Seshadri, Learned Counsel for the 2<sup>nd</sup> Respondent-MCD, would distinguish between Sections 62 and 64 of the Electricity Act on the one hand, and Section 63 on the other, to submit that, unlike determination of tariff under Section 62(1) for which an application under Section 64(1) can be made only by a generating company or a licensee, there is no such stipulation for adoption of tariff under Section 63; the obligation cast on the Appropriate Commission, under Section 63 of the Act, is to adopt the tariff, if such tariff had been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Govt; the exercise required to be undertaken by the Commission is only to ascertain whether the tariff, adoption of which is sought, has been determined (i) through a transparent process of bidding; and (ii) it is in accordance with the guidelines issued by the Central Govt; unlike Section 64(1), Section 63 does not place any fetters on who can file a petition seeking adoption of tariff; and the emphasis placed by Section 86(1)(b) is on the regulation of electricity purchase and procurement process, and not on who can invoke the jurisdiction of the Commission. In support of her submission that the DERC was not barred from entertaining a petition filed by the 2<sup>nd</sup> Respondent-MCD, seeking adoption of tariff, Learned Counsel would rely on **Energy Watchdog vs CERC: (2017) 14 SCC Page 80, Paras 19 and 20.**

**14.** Ms. Moishree Bhatnagar, Learned Counsel for the Impleaded 10<sup>th</sup> Respondent, would refer to Section 2(41) of the Electricity Act to submit that MCD is a local authority, and was therefore entitled to file a petition before the Commission seeking adoption of tariff under Section 63 of the Electricity Act. She would rely on the judgement of this Tribunal in **JBM**

**Solar Power Pvt Ltd vs Haryana Electricity Regulatory Commission:**  
**2018 SCC Aptel Page 71, Paras 9, 10 and 13** in this regard.

**A. JUDGEMENTS RELIED UPON BY LEARNED COUNSEL ON BOTH SIDES:**

**15.** The appeal in **Tamilnadu Generation and Distribution Corporation Ltd vs Ms. Penna Electricity Ltd & another, (Order in Appeal No. 112 of 2012 dated 10.07.2013)**, (on which reliance has been placed on behalf of the appellant), was filed before this Tribunal by the Distribution Licensee. The Board had approved payment of fixed charges for supply of 30 MW continuous power, for the period before the commercial operation date of the combined cycle, on condition that, if there was an audit objection in future regarding payment of fixed charges, the Generator would then be liable to refund the entire amount in one lump-sum along with interest. The Respondent sent a reply requesting the Electricity Board to make payment of fixed charges without insisting on fulfilment of the conditions stipulated in their letter. The Appellant reiterated its stand stating that, as per Section 5.3 of the PPA, the Generator would be eligible only for the variable charges for the infirm power supplied by it before the date of commercial operation. Aggrieved by non-payment of the fixed charges as claimed, the Respondent-Generator filed a Petition before the State Commission seeking directions for payment of fixed charges and variable charges for the power generated during the period between 29.10.2005 and 30.6.2006. After hearing the parties, the State Commission, by its order dated 30.12.2011, allowed the Petition holding that the fixed charges shall be payable to the Respondent by the Appellant for the period between 29.10.2005 and 30.6.2006, during which period the plant had operated in Open Cycle.

**16.** In appeal, this Tribunal held that, under Section 86(1)(b) of the Electricity Act, 2003, it is only the licensee who should approach the State Commission for approval of its Power Purchase Agreement with the Generator; under this provision, the Power Purchase procurement process of the Distribution Licensee is subject to scrutiny and approval of the State Commission; the said provision does not contemplate any scrutiny and approval by the State Commission for the sale of energy by a generator independently from that of the Power procurement of the Distribution Licensee; if there is conflict between the terms of the unapproved PPA, and the concerned Notification and Regulations, it is the provision of the concerned notification and Regulations which would hold the field, and not the terms of the PPA; Section 63 of the Electricity Act, 2003 relates to determination of tariff by a bidding process, notwithstanding anything contained in Section 62 - which empowers the State Commission to determine the tariff in accordance with the provisions of the Electricity Act, 2003; even Section 63 of the Act does not dispense with the mandatory approval of the Power Purchase Agreement, by the State Commission, as provided under Section 86 of the Electricity Act; admittedly, in this case, the PPA had not even been placed before the State Commission for approval; hence, the question of application of Section 63 of the Electricity Act, 2003 would not arise; under Section 62 of the Electricity Act, the State Commission is required to determine the tariff and, accordingly in the present case, the State Commission has rightly determined the same by invoking Section 62 of the Electricity Act, as Section 63 of the Electricity Act, 2003 cannot be invoked; and, as such, there was no infirmity in the finding rendered by the State Commission on this issue.

17. Both Mrs. Swapna Seshadri, Learned Counsel for the 2<sup>nd</sup> Respondent-MCD, and Ms. Molshree Bhatnagar, Learned Counsel for the Impleaded 10<sup>th</sup> Respondent, would submit that the appeal, preferred against the afore-said order of this Tribunal, is pending before Supreme Court, and an interim order was passed therein that the Appellant therein should pay Rs.50 crores to the respondent-generator, and the IA was disposed of accordingly. The appeal filed before the Supreme Court was by the appellant before this Tribunal and, as it is a distribution licensee, it cannot be said to be aggrieved by the observations of this Tribunal that it is only a distribution licensee which can file a petition before the State Commission seeking adoption of tariff under Section 63 of the Act.

18. In ***Energy Watchdog v. CERC*, (2017) 14 SCC 80**, (on which reliance is placed on behalf of the 2<sup>nd</sup> Respondent-MCD), the Supreme Court held that the non-obstante clause in Section 63 is a non obstante clause covering only Section 62; unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not “determine” tariff but only “adopts” the tariff already determined under Section 63; such “adoption” is only if such tariff has been determined through a transparent process of bidding, and, this transparent process of bidding is in accordance with the guidelines issued by the Central Government; the appropriate Commission does not act as a mere post office under Section 63; it must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government; the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1); this regulatory power is a general one, and it is very difficult to state that, when the Commission adopts the tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b); for

one thing, such regulation takes place under the Central Government's guidelines; for another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, it cannot be said that the Commission's power to "regulate" tariff is completely done away with; considering the fact that the non-obstante clause advisedly restricts itself to Section 62, there is no reason to put Section 79 out of the way altogether; the reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61), or under Section 63 where the Commission adopts the tariff that is already determined by a transparent process of bidding; in either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff; in fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff; Section 79(1)(b) is a wider source of power to "regulate" tariff; where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines; in a situation where there are no guidelines framed at all, or where the guidelines do not deal with a given situation, the Commission's general regulatory powers under Section 79(1)(b) can then be used.

**19. In JBM Solar Power Pvt Ltd VS Haryana Electricity Regulatory Commission : 2018 SCC OnLine APTEL 71,** (on which reliance has been placed on behalf of the impleaded 10<sup>th</sup> Respondent), the appellants were solar power generators, and the 2<sup>nd</sup> Respondent- Haryana Power



Purchase Corporation was the power procurement agency established for procuring electricity from various sources for the purpose of supply to the distribution licensees in the State of Haryana. The State Commission had fixed the levelized tariff for solar projects at Rs. 7.45/kWh for FY 2014-15. The 2<sup>nd</sup> Respondent had issued a Notice Inviting Tender (NIT) for procurement of 50 MW  $\pm$  10% of solar power on long term basis from grid connected solar PV power projects through a tariff based competitive bidding process; in terms of the tender documents, the tariff determined by the State Commission, for FY 2014-15, had to be the ceiling tariff; bids were submitted and finalised; prior to the bidding process, the 2<sup>nd</sup> Respondent had approached the State Commission for approval of the power procurement, and had adopted the standard bidding documents as a reference to draft the bidding documents; the State Commission, by its communication dated 08.08.2014, had granted permission to the 2<sup>nd</sup> Respondent to proceed with the bidding process, and to file with the State Commission the outcome of the bidding process, for approval of the PPAs; thereafter, the State Commission took up the process for approval of the power procurement by the 2<sup>nd</sup> Respondent pursuant to the competitive bidding process; by the impugned Order, the Chairman of the State Commission held that the competitive bidding process was not conducted in terms of Section 63 of the Act, following the standard bidding guidelines of the Government of India (GoI); and there were deviations which were not approved, the price discovered in the bidding process was not aligned to market prices, and electricity was not required to be procured as there was substantial surplus capacity already tied up by the distribution licensees. The power procurement was rejected.

**20.** A dissenting order was passed by the member of the Commission stating that the basic fallacy in the approach was to consider the bidding

process as being in terms of the bidding guidelines under Section 63 of the Act; there were no guidelines under Section 63 for procurement of renewable sources of energy; and the question of considering the petition under Section 63 did not arise. The Chairman, however, exercised a casting vote, and held that the main order, and not the dissent, would be the operative order. Aggrieved thereby, an appeal was preferred to this Tribunal.

**21.** This Tribunal observed that the whole issue of power purchase/PPAs hovered around the application of Section 63 of the Act; in the present case, no guidelines/SBD had actually been issued/notified by Gol at the point of bidding and till completion of the bid process, and even up to the date of the Impugned Order; the 2<sup>nd</sup> Respondent had initiated the bidding process on draft guidelines only; they had informed the State Commission of the same at a later stage when the bidding process was completed, and they had approached the State Commission for approval of the PPAs they had entered into with the selected bidders; the State Commission had also not gone into the details by checking whether such guidelines/SBD had been notified by Gol; and the State Commission had also given its go ahead for the bidding process to the 2<sup>nd</sup> Respondent.

**22.** After going through various aspects of the case, this Tribunal held that both the State Commission and the 2<sup>nd</sup> Respondent had made a mistake; the 2<sup>nd</sup> Respondent had mistakenly made its bid process on non-existent guidelines/SBD, and the State Commission had passed the impugned Order on the premise of Section 63, as if guidelines/SBD existed; while the issue was between the State Commission and the 2<sup>nd</sup> Respondent, the sufferers were the Appellants who had already installed

the solar power plants based on the Lol issued, and had signed the PPAs, for no fault of theirs.

**23.** Relying on the judgement of the Supreme Court, in ***Energy Watchdog v. CERC***: (2017) 14 SCC 80, this Tribunal held that, in cases where there are no guidelines, regulatory powers under Section 79(1)(b) and under Section 86(1)(b) of the Act empowered the CERC and the State Commission respectively to provide necessary approval for the bidding process, and to approve the PPA including the price at which electricity should be procured by or on behalf of the distribution licensees; considering the circumstances of the case equitably, the fact that the Solar Power Projects had been established by the Appellants, and in terms of Section 86(1)(e) of the Act, power generation from renewable sources of energy needed to be promoted, this Tribunal considered it appropriate to approve the PPAs between the Appellants and the 2<sup>nd</sup> Respondent for procurement of solar power at the reduced tariff of Rs. 5.68/kWh (without accelerated depreciation) as allowed in its interim orders dated 13.12.2016 and 29.3.2017.

#### **B. LAW DECLARED IN THE AFORESAID JUDGEMENTS:**

**24.** The law laid down by this Tribunal, in ***Tamilnadu Generation and Distribution Corporation Ltd vs Ms. Penna Electricity Ltd & another, (Order in Appeal No. 112 of 2012 dated 10.07.2013)***, is that, under Section 86(1)(b) of the Electricity Act, 2003, the Power Purchase procurement process of the Distribution Licensee is subject to scrutiny and approval of the State Commission; therefore, it is only the distribution licensee who can approach the State Commission for approval of its Power Purchase Agreement with the Generator; and Section 86(1)(b) does not contemplate any scrutiny and approval by the State Commission

for the sale of energy by a generator independently from that of the Power procurement of the Distribution Licensee.

**25.** In the light of the law declared by the Supreme Court, in ***Energy Watchdog v. CERC*, (2017) 14 SCC 80**, it is clear that the regulatory powers of the State Commission, so far as tariff is concerned, are specifically mentioned in Section 86(1); this regulatory power is of a general nature, and when the State Commission adopts the tariff under Section 63, it exercises its functions under Section 86(1)(b); determination of tariff can take place either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61), or under Section 63 where the Commission adopts the tariff that is already determined by a transparent process of bidding; in either case, the general regulatory power of the Commission under Section 86(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff; “determination” of tariff, dealt with under Sections 62 and 63, is part of “regulating” tariff; Section 86(1)(b) is a wider source of power to “regulate” tariff; where the guidelines issued by the Central Government under Section 63 cover the situation, the State Commission is bound by those guidelines, and must exercise its regulatory functions, albeit under Section 86(1)(b), only in accordance with those guidelines; in a situation where there are no guidelines, or where the guidelines do not deal with a given situation, the State Commission's general regulatory powers under Section 86(1)(b) can then be used.

**26.** The law laid down by this Tribunal, in **JBM Solar Power Pvt Ltd VS Haryana Electricity Regulatory Commission : 2018 SCC OnLine APTEL 71**, is that, in cases where there are no guidelines, regulatory powers under Section 79(1)(b) and Section 86(1)(b) of the Electricity Act

empowered the CERC and the State Commission respectively to accord approval for the bidding process, and to approve the PPA including the price at which electricity should be procured by or on behalf of the distribution licensees.

**27.** Unlike the present case where the petition was filed before the DERC by the 2<sup>nd</sup> Respondent-MCD, (which is neither a generating company nor a licensee under the Electricity Act), the petition filed before the State Commission, in **JBM Solar Power Pvt Ltd**, was by the 2<sup>nd</sup> Respondent- Haryana Power Purchase Corporation which was the power procurement agency established for procuring electricity from various sources for the purpose of supply to distribution licensees in the State of Haryana ie the petition was filed on behalf of the distribution licensees by the State power procurement agency.

### **C. RELEVANT PROVISIONS OF THE ELECTRICITY ACT:**

**28.** Before we examine the rival contentions, it is useful to note the provisions of the Electricity Act to the extent relevant. Section 2(5)(b) of the Electricity Act (“the Act” for short) defines “Appropriate Government” to mean, in any case other than Section 2(5)(a), the State Government, having jurisdiction under the Electricity Act. Section 2(17) defines “distribution licensee” to mean a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply. Section 2(28) defines “generating company” to mean any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station. Section 2(39) defines “licensee” to mean a person who has been granted a licence under Section 14. Section 2(41) defines “local authority” to mean any Nagar

Panchayat, Municipal Council, municipal corporation, Panchayat constituted at the village, intermediate and district levels, body of port commissioners or other authority legally entitled to or entrusted by the Union or any State Government with the control or management of any area or local fund. The Municipal Corporation of Delhi, which filed the petition before the DERC seeking adoption of tariff under Section 63, is undoubtedly a local authority within the meaning of Section 2(41) of the Electricity Act.

**29.** The question which would, however, necessitate examination is whether such a local authority can file a petition seeking adoption of tariff under Section 63 of the Electricity Act, 2003. Part IV of the Electricity Act relates to licencing. Section 12 stipulates that no person shall (a) transmit electricity, or (b) distribute electricity, or (c) undertake trading in electricity, unless he is authorised to do so by a licence issued under Section 14 or is exempt under Section 13. Section 13 relates to the power to exempt, and thereunder the Appropriate Commission may, on the recommendations, of the Appropriate Government, in accordance with the national policy formulated under Section 5 and in the public interest, direct, by notification, that, subject to such conditions and restrictions, if any, and for such period or periods, as may be specified in the notification, the provisions of Section 12 shall not apply to any local authority, Panchayat Institution, users' association, co-operative societies, non-governmental organizations, or franchisees. While it is true that Section 13 confers power on the State Commission to exempt a local authority from the ambit of Section 12, a conjoint reading of Sections 12 and 13 makes it clear that, on the recommendation of the concerned State Government, the Appropriate Commission may, on fulfilment of the other conditions stipulated in Section 13, pass orders to the effect that Section 12 shall not

apply to such a local authority. Consequent of such exemption being granted the local authority may, even without a licence under Section 14, be entitled to transmit, distribute or undertake trading in electricity. It is not in dispute that the MCD does not discharge any of these functions under the Electricity Act nor is it anyone's case that the DERC has exercised its powers under Section 13 to exempt the Municipal Corporation of Delhi in this regard. Therefore, for it to be held to be a licensee, the Municipal Corporation of Delhi must have obtained a licence under Section 14 of the Electricity Act.

**30.** Rule 15(v) of the MSW Rules, 2016, (on which reliance was placed by the DERC while passing the impugned Order), merely provided that the local authorities and panchayats shall facilitate construction, operation and maintenance of solid waste processing facilities and associated infrastructure on their own or with private sector participation or through any agency for optimum utilization of various component of solid waste adopting suitable technology. The obligation placed, by Rule 15(v) of the 2016 MSW Rules, on the MCD was only to facilitate, construct, operate and maintain a solid waste processing facility and nothing more. The said Rule would neither enable nor justify the MCD filing a petition before the DERC for adoption of tariff.

**31.** Section 14 enables the Appropriate Commission, on a application made to it under Section 15, to grant any person a licence (a) to transmit electricity as a transmission licensee, (b) to distribute electricity as a distribution licensee, and (c) to undertake trading in electricity as a electricity trader, in any area which may be specified under the licence. The provisos thereunder are not relevant to the case on hand, since they relate to deemed transmission/distribution licensees. Suffice it to note that

the last proviso to Section 14 stipulates that a distribution licensee shall not require a licensee to undertake trading in electricity.

**32.** Section 86 of the Electricity Act, 2003 relates to the functions of the State Commission and, under sub-section (1) thereof, the State Commission shall discharge the following functions namely:-

*(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:*

*Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;*

*(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*

*(c) facilitate intra-State transmission and wheeling of electricity;*

*(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;*

*(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;*



- (f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration; (g) levy fee for the purposes of this Act;*
- (h) specify State Grid Code consistent with the Grid Code specified under clause*
- (h) of sub-section (1) of section 79;*
- (i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;*
- (j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and*
- (k) discharge such other functions as may be assigned to it under this Act.*

#### **D. SECTION 86: ITS SCOPE:**

**33.** While Section 86(1)(a) relates to determination of tariff for generation, supply, transmission and wheeling of electricity which function the State Commission is required to discharge in terms of Section 62 of the Electricity Act, Clause (b) of Section 86(1) requires the State Commission to regulate electricity purchase and procurement process of a distribution licensee, including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. Adoption of tariff under Section 63 would, in the light of the law declared by the Supreme Court in ***Energy Watchdog v. CERC, (2017) 14 SCC 80***, and this Tribunal in ***Tamilnadu Generation and Distribution Corporation Ltd vs Ms. Penna Electricity Ltd & another, (Order in Appeal No. 112 of 2012 dated 10.07.2013)***, fall within

the ambit of the regulatory power of the State Commission under clause (b) of Section 86(1) of the Act.

**34.** Section 86(1)(b) of the Electricity Act is widely worded and covers the entire process of the power procurement of a Distribution Licensee. The regulatory jurisdiction of the State Commission extends to the procurement of electricity from Generating Companies or licensees or from other sources. Such a procurement can be made from any place within or outside the State, inter-State or Intra State. In other words, all purchasers of electricity from persons, including trading licensees, falls under the regulatory jurisdiction of the State Commission. The entire process of power procurement, including the price at which power is to be procured by a Distribution licensee, is therefore subject to the regulatory jurisdiction of the State Commission in terms of Section 86(1)(b) of the Electricity Act. **(M/s Pune Power Development Private Ltd. v. Karnataka Electricity Regulatory Commission: (Order in Appeal No. 200 of 2009 dated 23rd February, 2011)).**

**35.** Since the function which a State Regulatory Commission discharges, under Section 86(1)(b), relates to the purchase of electricity, the process of procurement including the price at which electricity shall be procured through Power Purchase Agreements for distribution and supply within the state, it is only with respect to a distribution licensee that such a function is discharged by the State Commission. It is only on a petition filed before it by a distribution licensee, seeking adoption of the tariff to be paid by it, for procurement of power through Power Purchase agreements, that the State Commission can exercise its regulatory powers and discharge its regulatory functions under Section 86(1)(b) of the Act.

**36.** Section 86(1)(f) confers power on, and vests jurisdiction in, the State Commission to adjudicate upon disputes between distribution licensees and generating companies. The scope of Section 86(1)(f) is very wide as it covers all disputes between a licensee, be it a Distribution Licensee or a trading licensee or a transmission licensee, so long as it relates to the regulatory jurisdiction of the State Commission. The State Commission has jurisdiction, under Section 86(1)(f) of the Act, to adjudicate upon disputes not only between licensees and generating companies, (**M/s Pune Power Development Private Ltd. v. Karnataka Electricity Regulatory Commission: (Order in Appeal No. 200 of 2009 dated 23rd February, 2011)**), but also between two licensees. (**Global Energy Private Limited v. Maharashtra Electricity Regulatory Commission, 2018 SCC OnLine APTEL 102**). Since the petition was filed by neither a licensee nor a generating company, Section 86(1)(f) has no application to the case on hand. In any event, the DERC was not called upon to adjudicate any dispute between a generator and a distribution licensee.

**37.** When we asked Ms. Swapna Seshadri, Learned Counsel for the 2<sup>nd</sup> Respondent-MCD, whether accepting her submission would not require us to hold that, irrespective of who has filed a petition invoking its jurisdiction seeking adoption of tariff under Section 63 of the Electricity Act, the appropriate Commission would be bound to examine the process and then adopt the tariff, Learned counsel admits that such may be the result. In short, the logical corollary of the submission of the learned Counsel is that a consumer or even a complete stranger can file a petition seeking adoption of tariff under Section 63.

**38.** Such a submission would thereby run contrary to the settled law that a consumer is not entitled to approach the State Commission against a licensee, for the State Commission lacks jurisdiction to decide disputes

raised by consumers (**Dakshin Haryana Bijli Vitran Nigam Ltd. v. Princeton Park Condominium: 2007 Aptel 764; BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission, 2009 SCC OnLine APTEL 52**), against a licensee. A consumer cannot approach the State Commission and get its grievances redressed against the distribution licensee. (**BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission, 2009 SCC OnLine APTEL 52**). Disputes between licensees and generating companies can alone be adjudicated under Section 86(1)(f) of the Electricity Act, and not between licensees and consumers. (**Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd., (2019) 17 SCC 82; Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755; T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd., (2014) 11 SCC 53**). The State Commission cannot also adjudicate disputes relating to grievances of individual consumers, (**Maharashtra Electricity Regulatory Commission v. Reliance Energy Ltd., (2007) 8 SCC 381**), as it has no jurisdiction in respect of consumer disputes. (**Usha Martin Ltd. v. Jharkhand State Electricity Regulatory Commission, 2006 SCC OnLine APTEL 24**).

**39.** If a consumer cannot invoke the jurisdiction of the State Commission under Section 86(1)(f), it does not stand to reason that he should be held entitled to file a petition under Section 86(1)(b) requesting it adopt the tariff at which a distribution licensee should purchase electricity, from the bidding generators through Power Purchase Agreements, for its distribution and supply within the State. The petition filed before the DERC, in the present case, was by the Municipal Corporation of Delhi, which is neither a generating company nor a licensee under the Electricity Act. The DERC, therefore, lacked jurisdiction to entertain the petition, or

to act in furtherance thereof, to either adopt the tariff or, like in the case on hand, to call upon the distribution licensee to enter into negotiations with the generating company, and thereafter to submit a negotiated PPA.

#### **IV. DOES ABSENCE OF ANY SUCH PROHIBITION IN SECTION 63 ENTITLE THE MCD TO FILE THE SUBJECT PETITION BEFORE THE DERC?**

**40.** Ms. Swapna Seshadri, Learned Counsel for the 2<sup>nd</sup> Respondent-MCD, would submit that there is nothing in the language of either Section 63 or Section 86(1)(b) which prohibits the 2<sup>nd</sup> Respondent-MCD from filing a petition seeking adoption of tariff; since Section 63 of the Electricity Act does not explicitly bar invocation, of the jurisdiction of the State Commission, by the 2<sup>nd</sup> Respondent-MCD, it is always open to them to file a petition seeking adoption of tariff; and other urban local bodies have floated similar tenders.

**41.** Let us now examine the submission, urged on behalf of the second Respondent-MCD, that, independent of Section 86(1) of the Act, the DERC can exercise jurisdiction under Section 63 to adopt the tariff, even on a petition filed by a person other than a licensee or a generating company. Before doing so, it is necessary to take note of the distinction between Section 62(1) read with Section 64 on the one hand and Section 63 on the other. Section 62(1) requires the Appropriate Commission to determine the tariff in accordance with the provisions of the Electricity Act for (a) supply of electricity by a generating company to a distribution licensee, (b) transmission of electricity, (c) wheeling of electricity, and (d) retail sale of electricity. Section 64(1) stipulates that, an application for determination of tariff under Section 62, shall be made by a generating company or a licensee in such manner and accompanied by such fee, as

may be determined by regulations. On the other hand, Section 63 relates to determination of tariff by a bidding process and thereunder, notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government.

**42.** The submission, put forth on behalf of the 2<sup>nd</sup> Respondent-MCD, is that, while Section 64(1) requires an application, seeking determination of tariff under Section 62, to be made only by a generating company or a licensee, there is no such restriction under Section 63; therefore, a petition seeking adoption of tariff can be filed by a person other than a generating company or a licensee; and the Municipal Corporation of Delhi, which undertook the exercise of inviting bids to establish a waste to energy generation plant, is also entitled to file a petition before the DERC seeking adoption of the tariff quoted by the lowest bidder (generator) in the said bidding process.

**A. THE STATE COMMISSION, CREATED UNDER THE ELECTRICITY ACT, IS A TRIBUNAL OF LIMITED JURISDICTION:**

**43.** The State Commission is a creation of the Electricity Act under Section 82(1), and a body corporate under Section 82(2) thereof. It exercises adjudicatory functions, and its tariff orders are quasi-judicial in nature (**BSES Rajdhani Power Ltd vs DERC: (Judgement of the Supreme Court in Civil Appeal No.4324 of 2015 dated 18.10.2022)**). Such tribunals exercise limited jurisdiction (**S.D. Joshi v. High Court of Bombay, (2011) 1 SCC 252**) strictly in terms of the Act by which they are governed. Every tribunal of limited jurisdiction is bound to determine whether the matter, in which it is asked to exercise its jurisdiction, comes

within the limits of its special jurisdiction, and whether the jurisdiction of such tribunal is dependent on the existence of certain facts or circumstances. Its obvious duty is to see that these facts and circumstances exist to invest it with jurisdiction, and where a tribunal derives its jurisdiction from the statute that creates it, and that statute also defines the conditions under which the tribunal can function, it goes without saying that, before that tribunal assumes jurisdiction in a matter, it must be satisfied that the conditions requisite for its acquiring seisin of that matter have in fact arisen. **(Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572).**

**44.** The jurisdiction conferred on the Regulatory Commission, both Central and States, is by the Electricity Act, 2003, an Act of Parliament. Wherever jurisdiction is given to a court (or Tribunal) by an Act of Parliament, and such jurisdiction is only given upon certain specified terms contained in that Act, these terms must be complied with, in order to create and raise the jurisdiction for, if they be not complied with, the jurisdiction does not arise. **(Nusserwanjee Pestonjee v. Meer Mynodeen Khan [LR (1855) 6 MIA 134 (PC); Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572).**

**45.** The State Regulatory Commission is a creation of the Electricity Act, and derives its powers from the express provisions of the said Act. The powers, which have not been expressly given thereby, cannot be exercised by it. **(Rajeev Hitendra Pathak v. Achyut Kashinath, (2011) 9 SCC 541).** Quasi-judicial tribunals function within the limits of its jurisdiction, and its powers are limited. Its area of jurisdiction is clearly defined. **(Union of India v. Paras Laminated (P) Ltd., (1990) 4 SCC 453 : AIR 1991 SC 696).** An authority created by a statute must act under the Act and not outside it. As it is a creation of the statute it can only decide

the dispute in terms of the provisions of the Act. (**K.S. Venkataraman & Co. v. State of Madras**, AIR 1966 SC 1089; **Mysore Breweries Lt. v. Commissioner of Income-Tax**, (1987) 166 ITR 723 (KAR)). The State Regulatory Commission can exercise jurisdiction only when the subject matter of adjudication falls within its competence, and the order that may be passed is within its authority, and not otherwise. (**Dakshin Haryana Bijli Vitaran Nigam Ltd. v. Princeton Park Condominium**: 2007 Aptel 764; **BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission**, 2009 SCC OnLine APTEL 52).

46. A Tribunal, which is a creation of a Statute, has only the powers expressly conferred on it, or resulting directly from the powers so conferred. Acting otherwise goes to the very existence of the power. Statutory tribunals, set up under an Act of legislature, are creatures of the Statute, (**R.K. Jain v. Union of India**, (1993) 4 SCC 119), and should be guided by the conditions stipulated in the statutory provisions while exercising powers expressly conferred or those incidental thereto. (**Commissioner of Central Excise v. Sri Chaitanya Educational Committee**, 2011 SCC OnLine AP 1078). Statutory tribunals, created by an Act of Parliament, have limited jurisdiction and must function within the four-corners of the Statute which created them. (**O.P. Gupta v. Dr. Rattan Singh**, (1964) 1 SCR 259). It is not open to the Tribunal to travel beyond the provisions of the statute. (**D. Ramakrishna Reddy v. Addl. Revenue Divisional Officers**, (2000) 7 SCC 12). Since these tribunals are required to function in accordance with the provisions of the Act, the restriction placed on the exercise of their jurisdiction, by the provisions of the Act, cannot be said to interfere with their quasi judicial functions under the Act. (**Tirupati Chemicals v. Deputy**



**Commercial Tax Officer, 2010 SCC OnLine AP 1189; State of Telangana v. Md. Hayath Uddin, 2017 SCC OnLine Hyd 356).**

47. Consequently, it is only when it is specifically authorised by the Electricity Act, can the State Regulatory Commission entertain a petition for adoption of tariff, from an entity which is statutorily entitled to file such a petition, and since Section 63 does not specifically authorise a local authority to do so, it goes without saying that the DERC lacked jurisdiction to entertain a petition filed by the MCD.

**B. UNLESS EXPRESSLY PROVIDED BY THE STATUTE, NOTHING IS WITHIN THE JURISDICTION OF AN INFERIOR COURT OR TRIBUNAL:**

48. This aspect can be examined from another angle also. The chief distinction between superior and inferior courts are found in connection with jurisdiction. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court. An objection to the jurisdiction, of the superior courts of general jurisdiction, must show what other court has jurisdiction, so as to make it clear that exercise by the superior court of its general jurisdiction is unnecessary. This principle would squarely apply to Superior courts in India also. **(Halsbury's Laws of England (4th Edn., Vol. 10, para 713; M.M. Thomas v. State of Kerala, (2000) 1 SCC 666)**

49. Apart from the Supreme Court, the High Courts in India are also superior courts of record. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers.

**(Naresh Shridhar Mirajkar :AIR 1967 SC 1; M.V. Elisabeth v. Harwan Investment & Trading (P) Ltd. (1993) Supp (2) SCC 433: AIR 1993 SC 1014; M.M. Thomas v. State of Kerala, (2000) 1 SCC 666; Election Commission of India v. Ashok Kumar, (2000) 8 SCC 216; and T.D. Dayal v. Madupu Harinarayana, 2013 SCC OnLine AP 565).**

**50.** While Superior Courts, like the Supreme Court and the High Courts, are courts of unlimited jurisdiction, the State Regulatory Commission, a creation of the Electricity Act, is a tribunal of limited jurisdiction ie its jurisdiction is limited to what has been specifically conferred on it by the provisions of the Electricity Act, the Rules and the Regulations made thereunder. Nothing is within the jurisdiction of an inferior court (or Tribunal such as the State Regulatory Commission) unless it is expressly shown on the face of the proceedings that the particular matter is within its cognizance. The test to determine the jurisdiction of a tribunal, created under a Statute, is whether the relevant Section of the said Enactment so provides, and not whether the said Section prohibits. Consequently, since Section 63 does not specifically provide for the MCD to file a petition seeking adoption of tariff, the DERC must be held to lack jurisdiction to entertain and adjudicate a petition filed by them.

**51.** Unlike Section 62, whereunder the State Commission is required to determine the tariff in accordance with the provisions of the Electricity Act, the State Commission is not required, in a case where the tariff is determined through a bidding process under Section 63, to undertake such an exercise of determination, and is required to adopt the tariff provided such a tariff has been determined (1) through a transparent process of bidding, (2) it is in accordance with the guidelines issued by the Central Government. Unlike Section 62, Section 63 involves a process of bidding, and the best bid received through such a process is, ordinarily,

adopted (and not determined like under Section 62) by the Appropriate Commission.

**52.** The mere fact that the scope of enquiry by the State Commission, under Section 63 of the Act, is confined to ascertaining whether the process of bidding is fair and transparent, and that it is not in violation of the Central Government guidelines issued in this regard, does not mean that any person, other than a distribution licensee, can file a petition before the Commission for adoption of tariff. As held by the Supreme Court, in ***Energy Watchdog v. CERC, (2017) 14 SCC 80***, when the State Commission adopts the tariff under Section 63, it exercises its functions under Section 86(1)(b); be it under Sections 62 or 63, the general regulatory power of the Commission under Section 86(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. As held by this Tribunal, in ***Tamilnadu Generation and Distribution Corporation Ltd vs Ms. Penna Electricity Ltd & another, (Order in Appeal No. 112 of 2012 dated 10.07.2013)***, the Power Purchase procurement process of the Distribution Licensee is subject to scrutiny and approval of the State Commission under Section 86(1)(b) of the Electricity Act, 2003; and, therefore, it is only the distribution licensee which can approach the State Commission for adoption of tariff and for approval of its Power Purchase Agreement with the Generator. The petition filed by the MCD, before the DERC seeking adoption of tariff, was therefore not maintainable.

**53.** Generation of electricity is not a licensed activity under the Electricity Act, 2003 and, ordinarily, it is the distribution licensee which invites bids from generating companies and, subject to adoption of such tariff under Section 63 and approval of the PPA by the State Commission, enters into a PPA with them. Permitting a petition to be filed by a person, other than

a distribution licensee, may well result in an unwilling distribution licensee being forced to procure electricity from a generating company, and being forced to enter into a PPA with them, at the behest of a third party. In the absence of any specific provision in this regard, either under Section 86(1)(b) or under Section 63 of the Electricity Act, such a course of action is impermissible.

**54.** As the DERC can exercise jurisdiction to adopt the tariff under Section 63, only in exercise of its regulatory functions under Section 86(1)(b) on a petition filed by a Distribution licensee, it lacks jurisdiction to entertain and adjudicate a petition filed by any one else. Even if the 2<sup>nd</sup> Respondent MCD's obligation to dispose municipal waste, through the process of generating electricity, is held to be the result of the order of the National Green Tribunal, that neither entitles them to file a petition before the DERC seeking adoption of tariff, without there being a specific provision under the Electricity Act in this regard nor does it justify the DERC exercising a jurisdiction, which is not specifically conferred on it, to entertain such a petition.

## **V. SECTION 175 OF THE ELECTRICITY ACT: ITS SCOPE:**

**55.** Mrs. Swapna Seshadri, Learned Counsel for the 2<sup>nd</sup> Respondent-MCD, would refer to the Section 175 of the Electricity Act to submit that the provisions of the Electricity Act are in addition to, and not in derogation of, other laws including the Solid Waste Management Rules made under the Environmental Protection Act. When we asked Learned Counsel whether these rules contain any provision for an application to be made to the DERC for adoption of tariff, she would fairly state that there is no such provision therein.

**56.** Section 174 of the Electricity Act provides for the said Act to have overriding effect and thereunder, save as otherwise provided in Section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. Section 175 stipulates that the provisions of the Electricity Act are in addition to and not in derogation of any other law for the time being in force.

**57. In A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., (2016) 3 SCC 468,** the Supreme Court held that a plain reading of Section 175 leads to the conclusion that, unless the provisions of the Electricity Act are in conflict with any other law- when the Electricity Act will have overriding effect as per Section 174, the provisions of the Electricity Act will not adversely affect any other law for the time being in force. In other words, as stated in Section 175, the provisions of the Electricity Act will be additional provisions without adversely affecting or subtracting anything from any other law which may be in force.

**58.** The expression “*any other law for the time being in force*” in Section 175 would cover laws which were in operation when the Electricity Act was enacted as well as laws made after the enforcement of Electricity Act (**Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416**). The term “*in derogation of*”, used in Section 175, would mean “*in abrogation or repeal of*” (**KSL & Industries Ltd. v. Arihant Threads Ltd., (2015) 1 SCC 166**) ie the Electricity Act will not in any way nullify or annul or impair the effect of the provisions of any other enactment. The effect of Section 175 would be that in addition to the provisions of the Electricity Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back on the provisions of any other Act also

**(Transcore v. Union of India, (2008) 1 SCC 125).** The effect of Section 175 would ensure that the provisions of the other enactment are not ousted as a consequence of the operation of the Electricity Act. **(Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416).**

**59.** Section 175 of the Electricity Act should be read along with Section 174 and not in isolation, with Section 174 of the Electricity Act, 2003 being held to be the principal provision and Section 175 accessory or subordinate thereto. Section 174 would prevail over Section 175 in matters where there is any conflict (but no further), and the inconsistency, referred to in Section 174, may be express or implied. **(Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755).**

**60.** The legislative intent is for the Electricity Act to co-exist along with the other enactment and, save inconsistency, not to annul or detract from its provisions. **(KSL & Industries Ltd. v. Arihant Threads Ltd., (2015) 1 SCC 166).** As long as the provisions of the other Act are not inconsistent with the provisions of the Electricity Act, both the Acts would complement each other. **(Mathew Varghese v. M. Amritha Kumar, (2014) 5 SCC 610).**

**61.** It is only if there is an inconsistency between the other Act with its provisions, that the Electricity Act will, in view of Section 174, prevail **(Forum for People's Collective Efforts v. State of W.B., (2021) 8 SCC 599)**, and the other Act would yield. Both Sections 174 and 175 can be read harmoniously holding that when there is any express or implied conflict, between the provisions of the Electricity Act, 2003 and the other Act, the provisions of the Electricity Act, 2003 will prevail, but when there is no conflict, express or implied, both the Acts should be read together. **(Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755).**

**62.** Reliance placed on behalf of the second Respondent (MCD), on the Section 175 of the Electricity Act, is also of no avail. On a conjoint reading of Sections 174 and 175, it is clear that, save inconsistency with its provisions, the provisions of any other law may also apply in addition to the provisions of the Electricity Act. In the present case Section 175 would not come to the aid of the 2<sup>nd</sup> Respondent-MCD since, admittedly, there is no other law which provides for the manner in which a petition should be filed seeking adoption of tariff by the State Regulatory Commissions, and by whom.

**63.** Accepting this submission, urged on behalf of the 2<sup>nd</sup> Respondent-MCD, would mean that any person, other than a licensee or a generating company, even if he is completely unconnected with the process, can file a petition under Section 63 seeking adoption of tariff. Such an interpretation of Section 63 read with Section 86(1)(b) would result in absurd consequences, as it would result in a stranger being conferred a right to file a petition before the State Commission seeking adoption of tariff quoted in a bidding process by an unconnected party, compelling an unwilling distribution licensee to pay such tariff.

## **VI. DERC REGULATIONS 2001: ITS APPLICABILITY:**

**64.** While Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the appellant, would rely on Regulation 27 of the DERC Comprehensive (Conduct of Business) Regulation, 2001 in support of his submission that it is only a petition filed by a licensee, seeking adoption of tariff under Section 63, which can be entertained by the DERC, Mrs. Swapna Seshadri, Learned Counsel for the 2<sup>nd</sup> Respondent-MCD, would contend that, since the Regulations relied upon by the Appellant were made prior

to the Electricity Act, 2003 having come into force, they have no application thereafter. Our attention has, however, not been drawn by the Learned Counsel to any other Regulations relating to manner in which a petition should be filed before the DERC.

**65.** It is true that the Delhi Electricity Regulatory Commission Comprehensive (Conduct of Business) Regulations, 2001 were made prior to the Electricity Act, 2003 coming into force. The aforesaid Regulation were made by the DERC in the exercise of the powers conferred on it by Section 61(2)(a) of the Delhi Reforms Act which reads as under:-

*“61. (1) .....*

*(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-*

*(a) the administration of the affairs of the Commission including the discharging of its functions, the exercise of its administrative, quasi-judicial and judicial powers including arbitration and procedure, summoning and holding of the meetings of the Commission, the times at which such meetings shall be held, the conduct of business thereof and the manner in which copies of decision , directions and orders of the Commission shall be made available;”*

**66.** Regulation 27(ii) of the DERC Comprehensive (Conduct of Business) Regulation, 2001, stipulates that neither the Board nor the utilities for transmission (intra-state transmission), distribution and supply of power shall charge any tariff without prior approval of the Commission. The proviso thereto stipulates that the existing tariff being charged by



generating companies shall continue to be charged after the date of effect of these regulations for such period as may be specified by a notification without prejudice to the powers of the Commission to take up any matter relating to tariff falling within the scope of Section 11 of the Act.

**67.** Regulation 27(iii) provides that any transmission or distribution utility, henceforth proposing to enter into a contract to procure and purchase power, including the price at which power may be purchased, from any Generating Company, Generating Station or from any other source for transmission, distribution and supply in the State, shall take approval from the Commission, before entering into such contract.

**68.** Regulation 27(3) disables any person, apart from the transmission or distribution utility, from seeking approval of the Commission to procure and purchase power. If these Regulations continue to govern, even post enactment of the Electricity Act, 2003, then the DERC was clearly disabled thereby from entertaining any petition filed by the 2<sup>nd</sup> Respondent-Municipal Corporation of Delhi. Even if, as is now contended before us by Mrs. Swapna Seshadri, Learned Counsel for the 2<sup>nd</sup> Respondent-MCD, the said regulations are no longer in force, it would only mean that there is no stipulated procedure for filing a petition seeking adoption of tariff before the DERC, and nothing more. That does not, however, mean that any stranger can file a petition before the DERC asking it to adopt the tariff, or to ask it to direct a distribution licensee to enter into a Power Purchase Agreement with a generating company.

**69.** A bare perusal of the order of the Commission would itself show that the distribution licensees were unwilling to procure power from the generating company at the bid price. The impugned order records the submission of TDPL that a petition had been filed contesting the authority

of the MCD to issue a Request for Proposal (RFP), as the MCD was not a licensee, within the meaning of the Electricity Act, 2003; the MCD had no authority, under the extant statutory framework, to issue RFP in relation to procurement of power, as the MCD was not a licensee under the terms of the Act; the RFS and draft PPA had been issued contrary to the provisions of the Act; as MCD did not have any valid license under Section 14 of the Act to undertake trading in electricity, the notice inviting tender has been issued by MCD exceeding its authority and the same was in violation of the objects and provisions of the Act. It is evident therefore that distribution licensee, having questioned the very action of the MCD in inviting bids, were unwilling to procure power at the bid price. In fact, they also contended before the Commission that the levelized tariff of Rs. 7.38/kWh, calculated in terms of the tender issued by the MCD, is very high, making the same economically unviable for the distribution companies; since the cost of power procurement along with transmission of electricity comprises around 80% of the Annual Revenue Requirement, the high cost of tariff will cause grave cash flow impact on them, considering especially that Power Purchase Cost Adjustment Charges (PPAC) was fixed belatedly on quarterly basis; and the high cost on account of the tariff, in effect, will adversely affect their consumers and would entail additional PPAC impact.

## **VII. ARE THE BONAFIDES OF THE APPELLANT SUSPECT:**

**70.** Mrs. Swapna Seshadri, Learned Counsel for the 2<sup>nd</sup> Respondent, would also submit that the *bona fides* of the Appellant are suspect; it is at their behest, and on their invoking its jurisdiction, that an order was passed by the National Green Tribunal (NGT), against the 2<sup>nd</sup> Respondent-MCD, requiring them to comply with the applicable rules which obligated them to

dispose of municipal waste, including by establishing a generation plant; and, having approached the NGT and after an order was passed, the Appellant now seeks to disable the 2<sup>nd</sup> Respondent-MCD from ensuring compliance with the order of the NGT and the applicable Rules.

**71.** Relying on the order of the National Green Tribunal (NGT), Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would contend to the contrary, and submit that the mere fact that the jurisdiction of the NGT had been invoked, does not disable it from questioning the jurisdiction of the DERC to entertain a petition, filed by the 2<sup>nd</sup> Respondent-MCD, seeking adoption of tariff under Section 63 of the Act.

**72.** In its Order in O.A. No. 841 of 2022 dated 22.11.2022, the National Green Tribunal, Principal Bench, New Delhi (NGT) observed that the grievance in the application was against the proposed Waste to Energy (WTE) project at Narela-Bawana, Delhi; it was stated that the same violates environmental parameters as per Solid Waste Management Rules, 2016 and earlier orders of the National Green Tribunal, particularly the order dated 11.10.2022 in O.A. No. 300/2012 In re: News item published in News 18 dated 26.04.2022 titled “Delhi: Massive Fire at Bhalswa Dump Yard, Fourth This Year; 13 Fire Tenders on Spot”; according to the applicant, the MCD had not been able to take adequate action for compliance of SWM Rules, 2016 for scientific handling of the waste generated in Delhi; resultantly, huge amount of waste had accumulated, and had not been remediated within the laid down timelines; vide order dated 11.10.2022 in O.A. No. 300/2012 (supra), the NGT had directed remedial action; directions of the NGT required that current waste was not added to the said dumpsites to ensure uninterrupted remediation of the dumpsites; however, fresh waste was still being dumped at Bhawana dumpsite; no engineered Sanitary Landfill has been set up, as

required; RFP document dated 15.07.2022 had been prepared to set up WTE plant at Narela-Bawana; the terms laid down therein were not compliant with SWM Rules, 2016; and another parcel of land had been identified at Sultanpur Dabas for landfill site, and the bidder for WTE had been allowed to dispose of inert at Bawana dumpsite in violation of para 38 of order of the NGT dated 11.10.2022.

**73.** The NGT further observed that, while there was no doubt that the Rules had to be strictly followed in setting up WTE, it had already issued appropriate directions on the subject, vide order dated 11.10.2022 in O.A. No. 300/2022; MCD had to ensure compliance of the Rules; they had to take necessary precautions to ensure that no leachate goes from the Bhawana site to the adjacent drain, and the same is not blocked; all other statutory norms were to be followed; directions in the order dated 11.10.2022, with regard to preventing current waste being dumped at Bhawana, were to be complied with; and segregated inert waste was to be utilized. The application was accordingly disposed of.

**74.** There is nothing in the aforesaid order of the NGT which obligated the 2<sup>nd</sup> Respondent MCD to invite bids from Generators quoting the tariff at which they would be willing to supply electricity to the Distribution licensees in Delhi. In the light of Section 174 of the Electricity Act, even if there is anything contrary thereto in the SWM Rules, 2016, it is the procedure prescribed under Section 63 and Section 86(1)(b) of Electricity Act which would necessitate adherence to. In any event, since the jurisdiction of the DERC to entertain, and adjudicate upon, a petition filed by the 2<sup>nd</sup> Respondent-MCD seeking adoption of tariff under Section 63 of the Electricity Act is in issue, the bonafides or otherwise of the Appellant is of no consequence.

## **VIII. CONCLUSION:**

**75.** Since the jurisdiction of the DERC, to entertain a petition filed by the 2<sup>nd</sup> Respondent-MCD is alone being examined in the present proceedings, we see no reason to undertake an enquiry as to whether or not the MCD was justified in inviting bids for power procurement by the distribution licensee, more so in the light of their submission that other local bodies have undertaken such an exercise. As we are satisfied that the DERC lacked jurisdiction to entertain and adjudicate upon a petition filed by the second Respondent-MCD, (which is neither a distribution licensee nor a generating company), seeking adoption of tariff under Section 63 of the Electricity Act, the Orders, impugned in both these Appeals must be, and are accordingly, set aside solely on the ground of absence of jurisdiction. Needless to state that the Order now passed by us shall not disable those entities, entitled to invoke the jurisdiction of the State Commission in terms of the provisions of the Electricity Act, from filing a petition before the DERC for adoption of tariff under Section 63 of the Electricity Act.

**76.** The Appeals and the I.As therein stand disposed of.

Pronounced in the open court on this the **31<sup>st</sup> day of August, 2023.**

**(Sandesh Kumar Sharma)**  
**Technical Member**

**(Justice Ramesh Ranganathan)**  
**Chairperson**

REPORTABLE / NON-REPORTABLE

*mk/tpd*