IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 257 OF 2015

Dated: 21st March, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

M/s Jaiprakash Power Ventures Ltd.
Sector 128, Noida,
Uttar Pradesh – 201 304. … Appellant(s)

VERSUS

1. **Madhya Pradesh Electricity Regulatory Commission**
5th Floor, Metro Plaza,
Arera Colony, Bittan market,
Bhopal – 462 016 ... Respondent No.1

2. **M. P. Power Management Co. Ltd.**
Shakti Bhawan, Rampur, Jabalpur
Madhya Pradesh ... Respondent No.2

3. **M. P. Poorv Kshetra Vidyut Vitran Co. Ltd.,**
Shakti Bhyawan, Rampur, Jabalpur
Madhya Pradesh – 482 008. ... Respondent No.3

4. **M. P. Madhya Kshetra Vidyut Vitran Co. Ltd.**
Bijli Nagar Colony, Nishtha Parisar,
Govindpura, Bhopal
Madhya Pradesh – 462 023. ... Respondent No.4

5. **M. P. Paschim Kshetra Vidyut Vitran Co. Ltd.**
G.P.H. Compound, Polo Ground,
Indore, Madhya Pradesh - 452015 ... Respondent No.5

Counsel on record for the Appellant(s)	:	Sakya Singha Chaudhuri Avijeet Lala Astha Sharma Shreya Dubey Nameeta Singh Karan Jaiswal Aryaman Singh Ravish Kumar Aparna Tiwari Shriya Gambhir Shreevidya Nargolka
Counsel on record for the Respondent(s)	:	Parinay Deep Shah Mandakini Ghosh for Res.1 Alok Shankar Kumarjeet Ray for Res.2

J U D G M E N T

(PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CAIRPERSON)

I. INTRODUCTION:

The relief sought in this Appeal is to set aside the order passed by MPERC in Petition No. 37 of 2015 dated 12.08.2015; to declare that the additional levy payable by the Appellant to the fuel supply company is a statutory charge forming part of the landed cost of coal, and is thus liable to be reimbursed as part of energy (variable) charges; and to direct Respondent Nos. 2 to 5 to pay energy charges to the Appellant after having considered and including the Additional Levy as part of the landed cost of coal towards the invoices raised by the Appellant with interest.

The Appellant-JPVL is a power-generating company which procured coal from the Madhya Pradesh State Mineral Corporation Limited

("**MPSMCL**"), a State Government entity up to 31st March 2015. The power plant was set up by them in view of the conditions imposed by MPSMCL for selection of a JV Partner, to utilize the coal mined from the Amelia (North) coal mine. On 05.01.2011, the Appellant and the 2nd Respondent entered into the first long term PPA to supply 30% of the installed capacity from its 2x660 MW thermal power plant ("Project") at the tariff determined by MPERC. On 06.09.2011, the Appellant entered into the second long term PPA with the 2nd Respondent for supply of 7.5% of the net power from the Project at a variable cost to be determined by MPERC (collectively **PPAs**).

The Appellant filed Petition No.37 of 2015, under Regulation 41 of the MPERC (Terms & Conditions for determination of Generation Tariff) Regulations read with Section 86(1)(b) of the Electricity Act, 2003 seeking a declaration from MPERC that the "Additional Levy" raised on them by the fuel supply company, for supply of coal to their 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.), pursuant to the directions of the Supreme Court, in its Order in W.P.(Criminal) No.120 of 2012 dated 24.09.2014, is recoverable as variable (fuel) charges from the procurers, and to allow recovery of such additional levy from the Respondents.

As shall be elaborated hereinafter, MPERC, by the Impugned Order in Petition No. 37 of 2015 dated 12.08.2015, disallowed pass through of 'Additional Levy', as part of the generation tariff, holding that Additional Levy cannot be passed through as tariff and be borne by consumers of the State as (i) the Supreme Court, in its judgment in Writ Petition (Criminal) No. 120 of 2012 dated 24.09.2014, held that only beneficiaries of the flawed allotment process, i.e. the allottees would suffer the consequences of cancellation of coal block allotments; and (ii) Additional Levy cannot form part of the landed cost of coal under Regulation 41 of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations.

II. IMPUGNED ORDER PASSED BY MPERC: ITS CONTENTS:

In the impugned order dated 12.08.2015, the MPERC noted the submissions urged on behalf of the Petitioner-Appellant that, pursuant to the order of the Supreme Court, in W.P.(Criminal) No.120 of 2012 dated 25th August, 2014, coal invoices were subsequently raised by the coal suppliers including Rs. 295/-per MT + 5% VAT which was classified as "Additional Levy"; the Petitioner-Appellant has since paid Rs.46.61 Crores (Rs.22.33 Crores against demand letter dated 01-01-2015 of MPSMCL and Rs.24.28 Crores as payment against MPSMCL invoices raised from December 12th, 2014 upto 31st March, 2015; it is entitled to recover the energy charges worked out inter-alia on the basis of the landed cost of coal in accordance with the formula provided in the Tariff Regulations from the beneficiaries including the Respondents; this amount has been determined by the Commission in the tariff order of 26.09.2014 based on the details provided by MPSMCL; however, MPSMCL is now demanding the Additional Levy imposed by the Supreme Court; this amount has to be treated as part of the fuel price adjustment provided in Regulation 41.2 of the Tariff Regulations for change in landed cost of coal; the Petitioner is liable to pay the invoices raised by MPSMCL for supply of coal, and has the right to pass on such cost as cost of fuel (energy charges); the Petitioner-Appellant has been raising supplementary invoices for recovery of impact of "Additional Cess"; up to 11th April, 2015, the total amount of supplementary invoices has shot up to Rs.18.76 Crores; MPPMCL, vide their letter dated 22nd April, 2015, after keeping the aforesaid bills in abeyance for long, categorically refused to make payment of the same contending that (i) the Supreme Court judgment does not provide for pass through of the Additional Levy; (ii) the judgment indicates that the Additional Levy has to be borne by the beneficiaries of the flawed coal block allocation process i.e. the prior allottees of the coal blocks; and (iii) the CERC tariff

regulations do not provide for recovery of Additional Levy/ penalty as part of energy charges; MPSMCL is not justified in refusing payment of such bills, since Article 10.7.1 of the PPA dated January 5th, 2011 and Article 10.6.1 of PPA dated September 6th, 2011 render Supplementary Bills conclusive for the purpose of making payment as MPSMCL has not disputed these bills within 10/7 days of receiving them; moreover, MPSMCL did not follow the procedures spelt out in Article 10.7.2 of PPA dated January 5th, 2011 and Article 10.6.2 of PPA dated September 6th, 2011 for disputing the amount towards Additional Levy; and therefore, it is not open to the Respondents to deny payment of such amount at this stage.

The appellant further contended that the contention of MPSMCL, that the judgment of the Supreme Court does not provide for pass through of additional levy, is without merit; the judgment is on the limited aspect of the process of allotment of coal block and levy of additional levy to compensate the loss to the state exchequer; the Supreme Court itself categorically observed that the judgment does not deal with individual cases; the order of the Supreme Court does not prohibit pass through of additional levy; therefore incidence of such levy, and the recovery thereof, would be guided by the procurement arrangement and extant laws relating to recovery of energy charges applicable to power generating companies that had been supplied coal from the coal blocks; once additional levy has been invoiced as part of the fuel cost by the coal supplier i.e. MPSMCL, and is recovered by it, the same is entitled to be passed on by the petitioner- appellant as energy charges in terms of the PPA and the Tariff Regulations; reliance placed by MPSMCL on the CERC tariff regulations is ill-founded; and, in any case, the judgment clearly indicates that additional levy is not a penalty.

On examination of the contents of the petition and the documents annexed with it, the Commission observed: (1) the appellant-petitioner raised supplementary invoices on MPSMCL for recovery of the impact of "Additional Levy" of Rs. 295 per metric ton imposed by the Supreme Court of India in its order dated 24th September' 2014 in Writ Petition (CRL.) No. 120 of 2012; (2) in response to the above, MPSMCL refused to make payment of the aforesaid supplementary invoices (raised by the petitioner) on the following grounds: (a) the judgement does not speak of pass through of the Additional levy" to the power procurers; (b) in Para 27 of the Supreme Court judgment, the intention of the Court, as who has to suffer the "Additional levy", is sufficiently clear; the judgement has dealt with the process of allotment of coal blocks, and has found it to be illegal and arbitrary; the Court has intended that the beneficiaries of the flawed process, i.e. respective allottees of relevant coal blocks and not procurers/general public, 'must suffer the consequences', in the form of additional levy (c) CERC Tariff Regulations does not lay down or even suggest that the landed cost of coal includes additional levy or penalty of any kind.

On the first question whether "Additional levy" of Rs. 295 per metric ton can be loaded on the end consumers of electricity in the State who were not the beneficiaries of the flawed process, in terms of Para 27 of the order (dated 24th September' 2014) passed by the Supreme Court, the MPERC observed that It was clear from the judgement that "Additional Levy" is also termed as compensatory payment; there is no mention in the said judgement to recover/ pass on this "Additional Levy" or Compensatory payment from/to anyone like the electricity consumers of the Distribution Companies in the State, who are other than the beneficiaries of the flawed process in terms of Para 27 of the judgement of the Supreme Court; the grounds, on which the petitioner-appellant had requested the Commission to "declare that the Energy (Variable) Charges inclusive of the "Additional

Levy" of Rs..295/-per MT + 5% VAT as part of the landed cost of coal", were misplaced.

On the second question whether Regulation 41 of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations provide for allowing such "Additional levy" (imposed by the Supreme Court in its order) to pass on to the electricity consumers of the Distribution Companies in the State through energy charges being determined for the Independent Power producers using coal from the beneficiaries of the flawed process in terms of Para 27 of the order (dated 24th September' 2014) passed by the Supreme Court, the MPERC observed that, in view of the observations with respect to the first question , the second question was beyond the scope of the Regulations notified by the Commission; the MPERC (Terms & Conditions for determination of Generation Tariff) Regulations,2012 do not provide for onward recovery of such "Additional levy" or compensatory payment from the electricity consumers of the Distribution Companies in the State; as per Regulation 41, it should be ensured that, for computing energy charges, quantity of coal as dispatched by the Coal Supply Company is taken after accounting for permissible transit and handling losses alone; the said Regulations provide that the landed cost of coal shall include price of coal corresponding to the grade and quality of coal including the royalty, taxes and duties as applicable; these Regulations do not provide for inclusion of such 'Additional Levy' as decided in the afore-mentioned judgment of the Supreme Court; the grounds in the subject petition, for pass through of "Additional levy" (in terms of the aforesaid order passed by the Supreme Court of India) in the energy charges determined by the Commission for the petitioner's power plant, did not form any case to be dealt with by the Commission; and, thus, the subject petition was not maintainable and hence disposed of.

III. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were made by Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, Ms. Mandakini Ghosh, Learned Counsel for the MPERC, and Sri Alok Shankar, Learned Counsel for the second respondent. It is convenient to examine the rival submissions under different heads.

IV. JUDGEMENTS OF THE SUPREME COURT IN M.L. SHARMA- I & II: ITS SCOPE:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the appellant, would submit that, by its Judgment in "***Manohar Lal Sharma v. Principal Secretary*: *(2014) 9 SCC 516,* (Manohar Lal Sharma-I),** the Supreme Court cancelled the coal block allotted to MPSMCL, on account of the arbitrary process followed by the Central Government; in ***Manohar Lal Sharma v. Principal Secretary (2)*: *(2014) 9 SCC 614***, **(Manohar Lal Sharma -II)** the Supreme Court, based on the assumed loss of the Union of India, levied a compensatory amount of Rs 295/- per metric tonne on the coal extracted by the allottee companies; the order of the Supreme Court does not indicate anything about any illegal gain by the allottees; the issue before the Supreme Court was with regards the allotment process of coal mines; there was no issue as to whether the compensatory levy imposed on the allottees should be a pass through or not; at any rate, the Supreme Court did not direct that the additional levy should not be a pass-through, especially in the light of the fact that it was termed as compensatory and not penal; this is further clear from the fact that, while the same was levied as a loss to the Central Government, there was no finding regarding any specific benefit to the allottee; this is further accentuated by the fact that the coal supply in the present case is to a power company, and the tariff is regulated; the reasoning of MPERC, that the Judgment of the Supreme Court does not allow pass-through, is on a misreading of para 27 & 40 of **M.L.SHARMA-II**; Para 27 of the said judgement should be read with para 26; in para 26,

counsel for the allottees raised two contentions; on a plain reading of para 27 (the very next paragraph), it is clear that the Supreme Court was addressing the second contention of the allottees, raised in para 26 namely, the appointment of a committee to consider each individual case for cancellation; it was in this context that the Supreme Court held in para 27 that appointment of a committee would amount to nullifying their judgment; the Supreme Court remarked that the beneficiaries of the flawed process have to bear the consequences, with regard to cancellation of the coal blocks, and not in relation to additional levy; and, on this ground, the reasoning of MPERC is required to be set aside.

Ms. Mandakini Ghosh, Learned Counsel for MPERC, would submit that, in order to determine whether Additional Levy can be passed through as tariff, one needs to first identify –(i) the beneficiaries of the flawed process of allotment under the judgments of the Supreme Court dated 25.08.2016 and 24.09.2014; and (ii) then determine the nature of Additional Levy; from a reading of the CAG Report, the judgments of the Supreme Court, the tariff orders of MPERC and the Coal Mines Special Provisions Act, 2015, it is clear that the original allottees of the coal mines/mining lease holders were the beneficiaries of the flawed process of allotment of coal blocks; despite obtaining the coal block for free, the original allottees/mining lease holders sold the coal mined from those blocks to consumers in the State at CIL prices; the difference in higher CIL prices, and the cheaper cost of mining coal from the captive coal mines, was retained by the allottees; there was a loss caused both to the national exchequer and the consumers; neither benefitted from the captive coal mines being allotted for free to the allottees; the loss caused to the national exchequer was due to the benefit retained by the allottees of the coal mines; the benefit retained by the private parties has been captured in the CAG Report; in April 2012, the Comptroller and Auditor General of India prepared Report No. 7 on the “Allocation of Coal Block Augmentation of Coal Production” (**CAG Report**);

the CAG Report at page 23 records the note placed by the Secretary, Ministry of Coal that, since there was a substantial difference in the price of coal supplied by CIL and that produced through captive mining, there was a windfall gain to the person allotted a captive coal mine; at page 41- 44, the CAG has calculated the financial gains to private parties due to allotment of coal blocks; at page 44, the CAG records that the Ministry of Coal itself had acknowledged that there was gain to the allottees of coal blocks; the CAG Report concludes that there is a strict need for a regulatory monitoring mechanism, so that benefits of cheap coal is passed on to the consumers; at page 43, the CAG Report quantified the financial gain that accrued to private parties in respect of the allocated coal mines as on 31.03.2011 as Rs. 185,591.34 crores, i.e Rs. 295/MT; the entire basis for computation of financial gain, accruing to private parties, was the inflated and expensive sale price of coal being charged by the allottees of the captive coal mine; the cost price of CIL OC Coal mine worked out to Rs. 583/- which is the benchmark cost; after adding financing cost of Rs. 150/- (as per MOC), the money in the hands of the allottee was Rs. 295/MT; and this benefit of Rs. 295/- was retained by the allottees, and was not shared with the govt. or the consumers.

Learned Counsel would further submit that the Supreme Court, by its order dated 25.08.2014, cancelled allocation of captive coal mines from 1993 onwards, which were allocated through the government dispensation route and the screening committee route, as being arbitrary, legally flawed and impermissible under the CMN Act; the Supreme Court held that, though captive coal mines were allotted to State PSUs, they in turn had entered into joint venture arrangements with private companies, and had handed over mining rights to the latter; resultantly, the winning and mining of coal mines had gone into the hands of private companies for commercial use; and similarly, in the present case, the Amelia (North) Coal Block which was allocated through the government dispensation route to MPSMCL, was

being mined/operated by MPJML, the JV company of the parent of Appellant and MPSMCL.

Learned Counsel would also submit that the Supreme Court, in Writ Petition (CRL) No. 120 of 2012 & batch dated 24.09.2014, decided the consequences of the illegal and arbitrary allotment of coal blocks through the screening committee route and the Government dispensation route post 1993; the Supreme Court cancelled the allotment of coal blocks made through both the screening committee route and the Government dispensation route (including allotment of Amelia (N) to MPSMCL); further, additional levy of Rs. 295 per metric tonne was imposed on the allottees who were the beneficiaries of the flawed process; this levy was to compensate the exchequer for the loss caused by the illegal and flawed allotment process; on a combined reading of paras 27, 33 and 40, it is clear that 'Additional Levy' of Rs. 295 per metric tonne was only levied on the allottees who were allotted the captive coal block; the allottees were beneficiaries of the grant of state largesse, and hence must bear the consequences of enabling an illegal process, and consuming the benefits accruing out of the same; the 'consequences' of the flawed process is not restricted to suffering cancellation of the coal blocks, but also compensating the exchequer for the financial gains which have accrued to the allottees, and which have not been passed on to the consumers and the government; on a holistic reading of the CAG Report, and the Supreme Court judgments, additional levy is to be recovered from the allottees of the coal block; the allottees have retained the benefit of a flawed and illegal process to the extent of Rs. 295/MT of coal; this needed to be paid back to the government by the allottees; in the event, additional levy is now passed through to the consumers, it will be the consumers who will be suffering the consequence of the flawed process of allotment, and not the allottees; and such pass through would amount to blessing a process declared as illegal by the Supreme Court.

According to the Learned Counsel, the Supreme Court also noted that it was difficult to arrive at any mathematically acceptable figure quantifying the loss sustained by the national exchequer due to illegal allotment of coal blocks; it, however, proceeded to adopt Rs. 295/MT as compensatory payment to be suffered/borne by the beneficiaries of the flawed process of allotment; in fact, at page 42, the CAG itself admits that it had taken into account the currently available audited figures of CIL as reference values in order to arrive at the financial gain to allottees on indicative basis; since Rs. 295/MT is indicative, it is possible that the gain to allottees could be more or less; since the Supreme Court declined to consider individual cases, while determining the consequences of illegality of the allotment process, it may not be correct for any other forum to determine whether allottees have gained to the extent of Rs. 295/MT; in any event, such a case-by-case analysis to determine the costs associated with mining of coal cannot be undertaken by an authority established and exercising jurisdiction under the Electricity Act, 2003; resultantly, one has to accept that allottees have retained the benefit of coal cost to the extent of Rs. 295/MT by charging coal prices higher than the cost of coal production from their own captive coal mines; accordingly, this benefit had to be paid back to the national exchequer by the allottees; and, hence, additional levy cannot be recovered from the consumers.

Sri Alok Shankar, Learned Counsel for the 2nd Respondent, would submit that the Appellant has, in the instant Appeal, submitted that (a) the Supreme Court Order quashing allocation of coal mines did not attribute any wrongful action on behalf of the users of the mine, and did not term the additional levy as a 'penalty'; accordingly there is no reason to deny pass through of the same as part of energy charges; and (b) since neither the Appellant nor any of its affiliate companies were mine owners, and the appellant was merely a user of the coal produced from the mine allocated to Madhya Pradesh State Mining Corporation Limited ("**MPSMCL**") under the

Government Dispensation route, the liability to bear additional levy cannot be imposed on the generating company.

On the scope of the **ML Sharma Judgments** of the Supreme Court, and on the question as to who is liable to compensate, Learned Counsel would submit that the Amelia (North) coal mine was allocated to MPSMCL, under the Government Dispensation route; on 27.01.2006; MPSMCL, in turn, formed a joint venture ie Madhya Pradesh Jaypee Minerals Ltd. (MPJML) with Jaiprakash Associates Limited (one of the promoters of the Appellant having 49% holding) and MPSMCL (having 51% holding); the Supreme Court took note of the CAG Report's quantification of financial benefits accruing to private parties due to the illegal, non-transparent and arbitrary allocation process; in **ML Sharma- I (2014) 9 SCC 516)**, the Supreme Court concluded that allocation of coal blocks, made both through the Screening Committee Route and the Government Dispensation Route, were illegal (Para 166); it further held that the consequence of such illegal allocation needed further consideration; in **ML Sharma-II (2014) 9 SCC 614)**, the Supreme Court held that the beneficiaries of a fatally flawed process must suffer the consequences thereof (Para 24); therefore, the question whether or not additional levy can be treated as part of the landed cost of coal, in terms of extant tariff regulations, is not the relevant consideration; and the question that requires consideration by this Tribunal is which entity(s) is the 'beneficiary of the flawed process', and is thus liable to pay additional levy in terms of the Supreme Court Judgements.

Learned Counsel would further submit that the Comptroller and Auditor General of India ("**CAG**") report, which is the basis for determining the amount of additional levy to be imposed, calculated the benefit that tentatively accrued to the allottees of the captive coal blocks; and the 'beneficiaries of the flawed process' are those entities who have derived financial benefits from the allocation of captive coal blocks

Before examining the rival submissions under this head, it is useful to note the contents of the judgements of the Supreme Court in **M.L. Sharma-I & II,** the CAG report, and the Coal Mines (special provisions) Act, 2015.

A. JUDGEMENT OF THE SUPREME COURT IN MANOHAR LAL SHARMA -I: (2014) 9 SCC 516: ITS CONTENTS:

Allocation of Coal Blocks, made during the period 1993-2010, was the subject matter of a group of Writ Petitions filed, in the nature of Public Interest Litigation, before the Supreme Court in **Manohar Lal Sharma vs. Principal Secretary and Others** [(2014) 9 SCC 516]. A challenge was also made therein to the legality of allocation to the State/State PSUs through the Screening Committee route as well as the Government Dispensation Route. The Screening Committee had recommended allocation of coal blocks to 29 State Government PSUs, and 72 PSUs were recommended for allocation through the Government Dispensation route. The question which arose for consideration before the Supreme Court was whether commercial mining operation could be carried on by the State or State PSUs.

In its order, in **Manohar Lal Sharma -I: (2014) 9 SCC 516,** the Supreme Court observed that Section 3 of the Coal Mines (Nationalisation) Act 1973 (the "CMN Act" for short) did not allow State Governments/State PSUs to mine coal for commercial use; it was by way of the 2001 circular that State Government companies or undertakings were permitted to carry on mining of coking and non-coking coal reserves, though the legislative policy in the CMN Act did not so permit; the recommendations for allocation by the Screening Committee to the State PSUs, as also allocation made to the State PSUs through the Government dispensation route, were in violation of the provisions of the CMN Act, as amended from time to time; the State PSUs, besides having been allocated coal mines for commercial purposes, had also been allowed to form joint venture companies (i.e. 51% shareholding of the State PSUs and 49% of the private company); however,

in the joint venture agreements between the State PSUs and the private companies, mining operations had been given to the private company; this modus operandi defeated the legislative policy in the CMN Act, and winning and mining of coal mines had resultantly gone into the hands of private companies for commercial use; allocation of coal blocks to the State PSUs which ultimately, on getting mining leases, may enable them to win or mine coal commercially was clearly in breach of the provisions of the CMN Act.

The Supreme Court further observed that the entire allocation of coal block as per the recommendation made by the Screening Committee from 14-07-1993 in 36 meetings, and the allocation through the Government Dispensation route, suffered from the vice of arbitrariness and legal flaws; the Screening Committee had never been consistent; it had not been transparent; there was no proper application of mind; it had acted on no material in many cases; relevant factors had seldom been its guiding factor; there was no transparency, and guidelines had seldom guided it; on many occasions, guidelines had been honoured more in their breach; there as no objective criteria, and no criteria for evaluation of the comparative merits; the approach had been ad hoc and casual; there was no fair and transparent procedure; all this had resulted in unfair distribution of national wealth; common good and public interest had, thus, suffered heavily; and, hence, the allocation of coal blocks, based on the recommendations made in all the 36 meetings of the Screening Committee, was illegal.

The Supreme Court also observed that allocation of coal blocks, through the Government Dispensation Route, was also illegal, since it was impermissible as per the scheme of the CMN Act; no State Government or public sector undertakings of the State Governments were eligible for mining coal for commercial use; since allocation of coal was permissible only to those categories under Sections 3(3) and (4), the joint venture arrangement with ineligible firms was also impermissible; there was no question of any

consortium/leader/association in allocation; the allocations made, both under the Screening Committee Route and the Government Dispensation Route, were arbitrary and illegal; and in respect of coal blocks, where competitive bidding was held for the lowest tariff for generation of power by Ultra Mega Power Projects, the benefit of the coal block had been passed on to the public. The Supreme Court directed that the coal blocks, allocated for Ultra Mega Power Projects, would only be used for such projects, and no diversion of coal for commercial exploitation would be permitted.

On the consequences of allocation made, both under the Screening Committee Route and the Government Dispensation Route being declared arbitrary and illegal, the Supreme Court observed that the matter required further hearing.

B. CAG REPORT FOR YEAR ENDED MARCH 2012: ITS CONTENTS:

The Report of the Comptroller and Auditor General of India ("CAG" for short), on allocation of coal blocks and augmentation of coal production for the year ended March 2012, was prepared for submission to the President of India under Article 151 of the Constitution of India. Para 4.1 of the said Report relates to allocation procedure for captive coal blocks, and the CAG observed thereunder that the Screening Committee had recommended allocation of coal blocks to a particular allottee/allottees, out of all the applicants for that coal block by way of minutes of the meeting of the Screening Committee; however, there was nothing on record in the said minutes, or in other documents, of any comparative evaluation of the applicants for a coal block which was relied upon by the Screening Committee; the minutes of the Screening Committee did not indicate how each one of the applicants, for a particular coal block, was evaluated; and thus a transparent method for allocation of coal blocks was not followed by the Screening Committee.

Para 4.2 of the CAG Report related to evolution of policy on competitive bidding of coal blocks and, thereunder, the CAG observed that, as of June 2004, 39 coal blocks stood allocated; since July 2004, 142 coal blocks were allocated to various Governments and private parties following the existing process of allocation which lacked transparency, objectivity and competition; they were not in agreement with the Ministry's contentions that, pending amendment to the MMDR Act, it had proceeded to allocate coal blocks on the advice of the ECC and, after amendment of the MMDR Act, rules for auction by competitive bidding of coal mines were notified only on 02.02.2012 after inter-ministerial consultations. The CAG observed that the Ministry of Law and Justice had itself mentioned on 28.07.2006 that a competitive route should be adopted through administrative arrangements; it was left to the Ministry of Coal to take action for introduction of competitive bidding through administrative instructions; and amendment in the Act was advised by the Ministry of Law and Justice on the request of the Ministry of Coal that the process may be given legal footing.

Para 4.3 of the CAG report relates to financial gains to the private parties. Thereunder, it is observed by the CAG that delay in introduction of a process of competitive bidding had rendered the existing process beneficial to a large number of private companies, as had been observed by the then Secretary (Coal) in July 2004 itself; they had attempted to estimate the financial impact, of the benefit to the coal block allottees, restricting itself to private parties; the methodology adopted, for estimating the benefit passed on to the allottees, was (a) captive coal blocks allocated to private parties could be mined either as Opencast (OC) mines, Underground (UG) mines or Mixed mines; (b) out of the 75 private allottees, 57 allottees were allotted blocks with OC/Mixed mines; the financial impact of the benefit to the private allottees had been estimated confining to Opencast (OC)/OC reserve of Mixed mines only; (c) average per tonne cost of production of all grades of coal produced in open cast mines of CIL and its subsidiaries

pertaining to the year 2010-11 as per final Cost Sheet had been considered, (d) sale price had been taken on average basis of all grades of coal produced in OC mines of CIL for the year 2010-11 as per Final Cost Sheet; (e) as per the Ministry of Coal, the Financing Cost ranged from Rs.100 to Rs.150 per tonne over and above CIL's cost of extraction; therefore, an additional financing cost of Rs.150 per tonne had been considered; they had taken the currently available audited figures (sale price, cost price, financing cost) of Coal India Limited (since CIL accounts for majority of coal production in the country) as reference values in order to arrive at the financial gain to allottees on indicative basis; and, based on the above method, financial gain of Rs.185,591.34 crores to private parties, in respect of 57 OC/Mixed mines as on 31 March, 2011, had been calculated and summarized in the form of a table.

The table furnished thereafter gives particulars of the kind of mines; extractable reserves of open cast mines; the average sale price of all grades of CIL OC mines for 2010-11 (Rs. Per tonne); Average cost price of all grades of CIL OC mines for 2010-11 (Rs. Per tonne); Financing cost as stated by MOC (Rs. Per tonne), and net gain (Rs. Per tonne). While the average sale price of all grades of Coal, for OC mines and mixed mines allocated to private parties and mixed mines allocated to private parties, was concerned, the average sale price of CIL was taken as Rs.1028.42 per tonne; the average cost price of all grades of CIL OC Mines was taken as Rs.583.01 per tonne; the financing cost was taken as Rs. 150 per tonne; and thereby the net gain was arrived at as Rs.295.41 per tonne. It is this sum of Rs.295.41 per tonne which the allottees of coal blocks were directed to pay to the Public Exchequer. The CAG concluded holding that it was of the strong opinion that there was a need for strict regulatory and monitoring mechanism to ensure that the benefit of cheaper coal is passed on to the consumers.

It is this report of the CAG which was taken into consideration by the Supreme Court, in **Manohar Lal Sharma -II: (2014) 9 SCC 614,** to direct the illegal allottees of coal blocks to pay Rs.295/-, per metric tonne of coal extracted, as an additional levy. In short, Rs.295/- per metric tonne was computed as the illegal benefit which the beneficiaries, of arbitrary allotment of coal blocks, had received, and which they were called upon to pay back to the Public Exchequer.

C. JUDGEMENT OF SUPREME COURT IN MANOHAR LAL SHARMA -II: (2014) 9 SCC 614:

Subsequently, in **Manohar Lal Sharma vs. Principal Secretary and Others:** (2014) 9 SCC 614, the Supreme Court considered the consequences of the allocation, made under the Screening Committee Route and the Government Dispensation Route, having been declared arbitrary and illegal in its earlier order. The Supreme Court noted that the Union of India had filed an affidavit on 08.09.2014 that coal was actually being mined from 40 coal blocks listed in Annexure I to the affidavit; the list included two coal blocks allotted to ultra mega power projects which had not been disturbed in the judgment; and, in addition to these 40 coal blocks, six more coal blocks were ready for extraction of coal in 2014-2015 as per Annexure II.

The Supreme Court observed that, from the affidavit, it was clear that 40 coal blocks were already producing coal and six coal blocks were in a position to produce coal immediately; and the question was whether allotment of these coal blocks should be cancelled or not; the learned Attorney General had stated that two consequences flowed from the judgment - the first was that allotment of coal blocks should be cancelled, and the second was that 46 coal blocks be left undisturbed (subject to conditions), and the allotment of the remaining coal blocks should be cancelled; Coal India Limited (CIL), a public sector undertaking, could take

over and continue extraction of coal from these 44 coal blocks without adversely affecting the rights of those employed therein; CIL would require some time to take over the coal blocks and manage its affairs for continuing the mining process; even if allotment of the 44 coal blocks was cancelled, the Central Government would ensure that coal production did not stop; all the allottees of coal blocks should be directed to pay an additional levy of Rs.295/- per metric tonne of extracted coal from the date of extraction as per the Report of the Comptroller and Auditor General (CAG) dealing with the financial loss caused to the exchequer by the illegal and arbitrary allotment; the figure of Rs.295/- per metric tonne of coal extracted as additional levy (based on the Report of the Comptroller and Auditor General) had been calculated on the basis of open cast mines and mixed mines, while underground mines were not taken into calculation; allottees, supplying coal to the power sector, should be mandated to enter into power purchase agreements (PPAs) with the State utility or distribution company (as the case may be), so that the benefit was passed on to the consumers; a first information report had been lodged by the Central Bureau of Investigation (CBI) with respect to six coal blocks; and a final decision, with regard to any alleged criminality or otherwise in the allotment of six other coal blocks, was pending consideration.

The Supreme Court then summarised the suggestions of the learned Attorney General as (1) all coal block allotments (except those mentioned in the judgment) may be cancelled; (2) alternatively, (a) extraction of coal from the 40 functional and 6 “ready” coal blocks may be permitted, and the remaining coal blocks be cancelled, (b) allottees of all 46 coal blocks be directed to pay an additional levy of Rs.295/- per metric tonne of coal extracted from the date of extraction, and (c) allottees of coal blocks, for the power sector, be also directed to enter into PPAs with the State utility or distribution company as the case may be.

The Supreme Court then observed that there were two categories of coal blocks allotment, the first category was allotment other than those mentioned in Annexures 1 and 2; the second category was the 46 coal blocks mentioned in Annexures 1 and 2 that could possibly be saved from cancellation on imposition of certain terms and conditions; as far as the first category of coal block allotments were concerned, they must be cancelled (except those mentioned in the judgment), as such allocations were illegal and arbitrary; the allottees had not yet entered into any mining lease and they had not yet commenced production; while the 46 coal blocks were also illegal and arbitrary, they were also liable to be cancelled; however, allotment of three coal blocks to ultra mega power projects and to Steel Authority of India had not been disturbed as they did not have any joint venture.

In the light of the submission of the learned Attorney General that. on cancellation of the coal block allotment, CIL would require some breathing time to manage its affairs, the Supreme Court observed that, although it had quashed allotment of 42 out of the 46 coal blocks, the cancellation would take effect only after six months i.e. with effect from 31.03.2015; this period of six months was being given since it was submitted that CIL would need some time to adjust to the changed situation; this period would also give adequate time to the coal block allottees to adjust and manage their affairs.

The Supreme Court accepted the submission of the learned Attorney General that allottees, of the 42 coal blocks, must pay Rs.295/- per metric tonne of coal extracted as an additional levy; this compensatory amount was based on the assessment made by CAG; it may well be that the cost of extraction of coal, from an underground mine, had not been taken into consideration by CAG but, in matters of this nature, it was difficult to arrive at any mathematically acceptable figure quantifying the loss sustained; the estimated loss of Rs.295/- per metric tonne of coal was, therefore, accepted

for the purposes of these cases; the compensatory payment on this basis should be made within a period of three months, and in any case on or before 31-12-2014; and the coal extracted hereafter till 31-03-2015 would also attract the additional levy of Rs.295 per metric tonne.

The 40 coal blocks, referred to in Annexure I, included Amelia North at Sl.No. 39.

D. THE COAL MINES (SPECIAL PROVISIONS) ACT, 2015: ITS PROVISIONS:

The Coal Mines (Special Provisions) Act, 2015 (the "2015 Act" for short), which came into force on 21.10.2014, provides for allocation of coal mines and vesting of the right, title and interest in and over the land and mine infrastructure together with mining leases to successful bidders and allottees with a view to ensure continuity in coal mining operations and production of coal, and for promoting optimum utilisation of coal resources consistent with the requirement of the country in national interest and for matters connected therewith or incidental thereto. The preamble, thereafter states that the Supreme Court, vide judgment dated 25th August, 2014 read with its order dated 24th September, 2014, had cancelled allocation of coal blocks, and had issued directions with regard to such coal blocks; the Central Government, in pursuance of the said directions, had to take immediate action to implement the said order; it was expedient in public interest for the Central Government to take immediate action to allocate coal mines to successful bidders and allottees keeping in view the energy security of the country, and to minimise any impact on core sectors such as steel, cement and power utilities, which were vital for the development of the nation; Parliament was competent to legislate, under Entry 54 of List I of the Seventh Schedule to the Constitution, for regulation of mines and mineral development to the extent to which such regulation and development, under

the control of the Union, was declared by Parliament by law to be expedient in the public interest.

Section 2 of the 2015 Act declares that it is expedient, in the public interest, that the Union should take action for the development of Schedule I coal mines, and extraction of coal on a continuous basis for optimum utilisation. Section 3(1)(a) defines *"additional levy"* to mean, as determined by the Supreme Court in Writ Petition (Criminal) No. 120 of 2012, as two hundred and ninety-five rupees per metric tonne of coal extracted. Section 3(1)(n) defines *"prior allottee"* to mean prior allottee of Schedule I coal mines as listed therein who had been allotted coal mines between 1993 and the 31st day of March, 2011, whose allotments have been cancelled pursuant to the judgment of the Supreme Court dated 25th August, 2014 and its order dated 24th September, 2014, including those allotments which may have been de-allocated prior to and during the pendency of Writ Petition (Criminal) No.120 of 2012. The explanation thereunder states that, in case a mining lease has been executed in favour of a third party subsequent to such allocation of Scheduled I coal mines, then the third party shall be deemed to be the prior allottee.

Section 3(1)(p) of the 2015 Act defines *"Schedule I coal mines"* to mean (i) all coal mines and coal blocks the allocation of which was cancelled by the judgment dated 25th August, 2014 and order dated 24th September, 2014 passed in Writ Petition (Criminal) No.120 of 2012, including those allotments which may have been de-allocated prior to and during the pendency of the said Writ Petition; (ii) all coal bearing land acquired by the prior allottee and lands, in or adjacent to the coal mines, used for coal mining operations acquired by the prior allottee; and (iii) any existing mine infrastructure as defined in clause (j). Section 3(1)(q) defines *"Schedule II coal mines"* to mean the forty-two Schedule I coal mines listed

in Schedule II which are the coal mines in relation to which the order of the Supreme Court dated 24th day of September, 2014 was made.

Chapter II of the 2015 Act relates to auction and allotment. Section 4(1) stipulates that, subject to the provisions of Section 5, Schedule I coal mines shall be allocated by way of public auction in accordance with such rules, and on the payment of such fees which shall not exceed five crore rupees, as may be prescribed. Section 4(4) stipulates that a prior allottee shall be eligible to participate in the auction process subject to payment of the additional levy within such period as may be prescribed and, if the prior allottee has not paid such levy, then the prior allottee, its promoter or any of the companies of such prior allottee shall not be eligible to bid either by itself or by way of a joint venture. Section 4(5) stipulates that any prior allottee, who is convicted for an offence relating to coal block allocation and sentenced with imprisonment for more than three years, shall not be eligible to participate in the auction.

Chapter III of the 2015 Act relates to treatment of rights and obligations of prior allottees. Section 14(1), thereunder, stipulates that, notwithstanding anything contained in any other law for the time being in force, no proceedings, orders of attachment, distress, receivership, execution or the like, suits for recovery of money, enforcement of security or guarantee (except as otherwise provided for under this Act), prior to the date of commencement of this Act, shall lie or be proceeded further with, and no remedies shall be available against the successful bidder or allottee as the case may be, or against the land and mine infrastructure in respect of Schedule I coal mines. Section 14(5) stipulates that the additional levy, imposed against the prior allottees of Schedule II coal mines, shall continue to remain the liability of such prior allottees, and such additional levy shall be collected by the Central Government in such manner as may be prescribed.

Chapter VI of the 2015 Act is the miscellaneous chapter, and Section 22 thereunder stipulates that, if a prior allottee of a Schedule II coal mine fails to deposit the additional levy with the Central Government within the specified time, then such additional levy shall be realised as arrears of land revenue.

In so far as the present Appeal is concerned, he Amelia (North) coal block, which was allotted to the Madhya Pradesh State Mining Corporation, is listed at Serial No. 114 of Schedule - I, and at Serial No. 19 of Schedule-II, of the 2015 Act.

In this context, it is also relevant to note that the second Respondent informed the Appellant, by its letter dated 22.04.2015, that the Supreme Court, in their judgment dated 24.09.2014, had imposed additional levy of Rs. 295 per metric tonne, of coal extracted from the date of extraction, on the earlier allottees of 42 coal blocks already producing coal; although the judgment did not speak of pass-through of this additional levy to the power procurers, it had been noticed that, after the judgment, the Appellant had been continuously including Rs. 295/MT in the base price of the coal which, in turn, considerably increased the landed price of coal used for calculation of energy charges of power procured by the second Respondent; in Para 27 of the judgment, the intention of the Court was made clear as to who had to suffer the additional levy; the judgment had dealt with the process of allotment of coal blocks, and had found it to be illegal and arbitrary; the Court had intended that the beneficiaries of the flawed process, ie the respective allottees of relevant coal blocks, and not procurers/general public, must suffer the consequences in the form of additional levy; Chapter 7 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014, deals with fuel cost as a component of electricity generation tariff, and stipulates that the landed cost for the fuel for the month shall include the price of fuel corresponding to the grade and quality of fuel

inclusive of royalty, taxes and duties as applicable, transportation cost by rail/road or any other means for the purpose of computation of Energy Charges; the definition does not lay down or even suggest that the landed cost of fuel included the additional levy or penalty of any kind; therefore, the additional levy of Rs. 295/- per MT of extracted coal cannot be permitted to be a part of the landed cost of coal, and a pass through in relevant electricity generation tariff; hence, the landed price of coal on calculation of Energy charges in weekly/monthly bills shall not include additional levy @ Rs. 295/MT; and any claims raised by the appellant in this regard, earlier or in future, would not be entertained.

E. ANALYSIS:

On a combined reading of the CAG report and the judgments of the Supreme Court in **Manohar Lal Sharma – I and II,** it is evident that the illegal allottees (beneficiaries of the illegal allocation of coal mines), have been held to have derived a monetary benefit of Rs.295/- per metric tonne in view of the illegal allotment of coal mines in their favour by the Central Government. It is this undue and illegal benefit which they had derived, (and as the said amount was the loss caused to the public exchequer which the CAG report quantified as Rs.1,85,591.34 Crores ie Rupees One Lakh Eighty Five thousand Five hundred and Ninety One crores and Thirty Four Lakhs), that the illegal allottees were directed to pay to the Public Exchequer. It is clear that the directions issued by the Supreme Court, in **Manohar Lal Sharma – I and II,** was not only to compensate the public exchequer for the loss suffered as a result of the illegal allotment of coal blocks, but also to deprive the beneficiaries of the gains they made as a result of such illegal allotment.

In this context it is also relevant to note that, with respect to coal blocks, where competitive bidding was held for the lowest tariff for generation of power by two Ultra Mega Power Projects, the Supreme Court,

in **Manohar Lal Sharma-I**, after holding that the benefit of the coal blocks had been passed on to the public, directed that the coal blocks, allocated for Ultra Mega Power Projects, would only be used for such projects, and no diversion of coal for commercial exploitation would be permitted. Subsequently, in **Manohar Lal Sharma-II**, the Supreme Court noted that, from out of the 40 coal blocks, the two coal blocks allotted to ultra mega power projects had not been disturbed in the judgment as they did not have any joint venture.

While it is no doubt true that the question whether or not the additional levy of Rs. 295/- per metric tonne, (which was imposed and recovered from the beneficiaries of the illegal allotment), should a pass-through did not directly arise for consideration before the Supreme Court in **Manohar Lal Sharma – I and II**, what is of significance and necessitates consideration is the consequence of permitting such a pass-through. Acceding to the Appellant's contention that the said additional levy, imposed on the beneficiary of the illegal allotment (MPSMCL in the present case), should be permitted as a pass-through would only result in the said beneficiaries continuing to retain the illegal gains they made, as a result of the illegal allocation of coal blocks in their favour, of Rs.295/- per metric tonne. Permitting pass-through of this additional levy would enable the beneficiary of the illegal allotment of coal blocks to recover the amount paid by them earlier to the public exchequer which, in turn, would mean that they would continue to retain the illegal benefit, of Rs.295/- per metric tonne, which they had gained as a result of the illegal allocation of coal blocks in their favour earlier. Permitting a pass-through would, therefore, fall foul of the judgements of the Supreme Court in **Manohar Lal Sharma – I and II,** whereby the illegal benefit which they had gained of Rs.295 per metric tonne, was sought to be denied to them by way of recovery in the form of additional levy.

Unlike the appellant herein, the benefit of the coal blocks had been passed on to the public by two Ultra Mega Power Projects. It is for this reason that allotment of coal blocks, in favour of these two Ultra Mega Power Projects, was not cancelled and the Supreme Court, in **Manohar Lal Sharma-I**, had only directed that the coal blocks, allocated for these two Ultra Mega Power Projects, shall only be used for such projects, and no diversion of coal or commercial exploitation would be permitted. It is evidently to avoid recurrence of such problems in future, that it was suggested before the Supreme Court, in **Manohar Lal Sharma-II**, by the learned Attorney General that allottees, supplying coal to the power sector, should be mandated to enter into power purchase agreements (PPAs) with the State utility or distribution company, so that the benefit was passed on to the consumers.

The very fact that the Supreme Court was aware that the benefit of the coal blocks had been passed on to the public by two Ultra Mega Power Projects, and it is for this reason that their allotment was not cancelled, goes to show that in cases such as the present, where the coal block allocation was cancelled, the Supreme Court was conscious that they had not passed on the benefit of the coal blocks to the consumers, and had retained the benefits.

As is evident from its preamble, the 2015 Act was enacted pursuant to the judgments of the Supreme Court in **M.L. Sharma-I and II**. The 2015 Act provides for recovery of Rs. 295/-, per metric tonne of coal extracted, as determined by the Supreme Court in Writ Petition (Criminal) No. 120 of 2012. It is clear therefore that the Additional levy (as defined in Section 3(1)(a)) is not a tax or duty but represents the sum determined by the Supreme Court. This amount is to be recovered from the beneficiaries of the illegal allotment of coal blocks, which allotment was cancelled pursuant to the judgment of the Supreme Court dated 25th August, 2014 and its order

dated 24th September, 2014. The nomenclature given to these beneficiaries, in Section 3(1)(n), is *"prior allottee".* To ensure payment of the additional levy, by the beneficiaries of the illegal allotment of coal blocks, restrictions were placed on their participation in the fresh auction for allocation of coal blocks, and they were barred from participation if they failed to pay the additional levy within time (Section 4(4)). Irrespective of whether or not they participated in the fresh auction, the liability to pay the additional levy continues to remain that of these beneficiaries ie prior allottees (Section 14(5)). Recovery of additional levy, as arrears of land revenue, is also provided (Section 22) in order to ensure compliance with the directions of the Supreme court in **M.L. Sharma-II**.

That the 2015 Act does not contain a charging Section also goes to show that the additional levy, which the beneficiaries of the illegal allotment of coal blocks were directed to pay, is not an independent statutory imposition for it to be permitted as a pass through to the consumers of the Appellant, but is the sum determined by the Supreme Court as representing the loss suffered by the public exchequer, as a result of the illegal gains made by the beneficiaries of the illegal allotment of coal blocks, to be recovered from them. The additional levy, sought to be recovered from the illegal allottees of coal blocks, was in compliance with the directions of the Supreme Court in its judgements in **M.L. Sharma I & II**, and not in terms of any Statute. As it is not a statutory tax/duty/levy it is un-necessary for us to examine whether the said additional levy is compensatory in nature or penal in character. What the Supreme Court found was that the Public Exchequer had been deprived, meaning thereby that the illegal allottees of coal blocks had benefitted, to the tune of Rs.295/- per metric tonne. It is this illegal benefit which was sought to be denied to them, by directing payment by them, of Rs.295/- per metric tonne to the public exchequer.

Both paragraphs 26 and 27 of the Judgment in WP Criminal No. 120/2012 dated 24.09.2014, (as referred to in their written submissions by the learned Senior Counsel appearing on behalf of the Appellant) form part of Para 24 of the judgment in **Manohar Lal Sharma-II**. While examining whether a committee should be appointed, to consider each individual case to determine whether the coal allotment should be cancelled or not, the Supreme Court agreed with the learned Attorney General and observed that the Judgment did not deal with any individual case; it dealt only with the process of allotment of coal blocks which was found to be illegal and arbitrary; the process of allotment could not be re-opened collaterally through the appointment of a committee; this would virtually amount to nullifying the judgement; the process was a continuous thread that ran through all the allotments; since it was fatally flawed, the beneficiaries of the flawed process must suffer the consequences thereof; appointment of a committee would really amount to permitting a body to examine the correctness of the judgment, and this was clearly impermissible.

While negating the request for appointment of a committee to consider each individual case, and holding that the judgement dealt with the process of allotment of coal blocks and found it to be illegal and arbitrary, the Supreme Court held that, since the process of allotment was fatally flawed, the beneficiaries of the flawed process must suffer the consequences. The consequences, which the beneficiaries of the flawed process had to suffer, was payment by them of Rs.295/- per metric tonne to the public exchequer.

Para 40 of the judgement relied on behalf of the Appellant in their written submissions corresponds to Para 38 of the judgement in **Manohar Lal Sharma – II,** wherein also the Supreme Court observed that the compensatory amount of Rs.295/- per metric tonne of coal, extracted as an additional levy, was based on the assessment made by the CAG; while the cost of extraction of coal from an underground mine had not been taken into

consideration by the CAG, but in matters of this nature, it was difficult to arrive at any mathematically acceptable figure quantifying the loss sustained. The estimated loss of Rs.295/- per metric tonne of coal was therefore accepted for the purpose of these cases; and the compensatory payment, on this basis, was directed to be made within three months.

It is settled law that judgements of courts should be read as a whole, and not as statutes. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. The observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. (**Bharat Petroleum Corpn. Ltd. V. N.R. Vairamani, (2004) 8 SCC 579; London Graving Dock Co. Ltd. V. Horton: (1951) 2 All ER 1 (HL); Rajbir Singh Dalal (Dr.) v. Chaudhari Devi Lal University, (2008) 9 SCC 284).** A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision to impute a different meaning to the observations (**Haryana Financial Corpn. V. Jagdamba Oil Mills [(2002) 3 SCC 496**).

It is clear from the judgements of the Supreme Court, in **Manohar Lal Sharma – I and II,** that the beneficiaries of the flawed process of allotment of coal blocks (which included MPSMCL) must suffer the consequences of the flawed process of allotment of coal blocks, and it is in such circumstances that, they were called upon to pay to the public exchequer the additional levy of Rs.295/- per metric tonne.

V. REGULATION 41 OF THE 2012 REGULATIONS:

Sri B. P. Patil, Learned Senior Counsel appearing on behalf of the appellant, would submit that, based on the judgments of the Supreme Court, an Ordinance was promulgated followed by an Act; the said amount of Rs 295/- was paid by MPSMCL to the Union of India; the same Additional Levy

of Rs 295/- per MT was charged on the appellant for the supplies made to them in line with the FSA/CSA dated 17.12.2013; in terms of the Coal Supply Agreement ("**CSA**") and the PPA read with Regulation 41, the appellant made the said payment of additional levy to MPSMCL; MPERC erred in reading Regulation 41 to not cover additional levy; Regulation 41 is an inclusive definition, and additional levy has been imposed consequent not only to the Supreme Court judgment, but upon notification of the Ordinance and the Act; the same is covered by Regulation 41; a catena of decisions provide the interpretation of an inclusive definition; the appellant's claim is consistent with the contract and the regulations; and the reasoning of MPERC, being contrary to the Regulations, is required to be set aside.

Ms. Mandakini Ghosh, Learned Counsel for MPERC, would submit that additional levy cannot form part of the landed cost of coal, and be passed through as tariff under Regulation 41 of the Generation Tariff Regulations; additional levy is not meant to be borne/suffered by any other entity other than the allottees/mining leaseholders; in the event additional levy is passed on to the consumers, as the price of coal under Regulation 41, it will be in violation of the Supreme Court judgment dated 24.09.2014 which holds that only beneficiaries, i.e. allottees are to suffer the Additional Levy; the nature of additional levy has recently been decided by the Supreme Court, in **BLA Industries v. UOI, Writ Petition (C) No. 63 of 2015**; on a combined reading of paras 14, 21 & 22 of the aforementioned judgment of the Supreme Court, additional levy has been recognized to be a penalty which is a compensatory payment; and penalty cannot form part of the landed cost of coal, and be passed on as tariff under Regulation 41 of the Generation Tariff Regulations.

Learned Counsel would further submit that Parliament issued the Coal Mines (Special Provisions) Act, 2015; since the statute has been issued to implement the Supreme Court judgments, there is no charging section in the

statute; Section 3(1)(n) of the Coal Mines Act defines the term prior allottee; the Explanation to Section 3(1)(n) of the Coal Mines Act clarifies that, in the event a mining lease has been executed in favour of a third party, then the third party shall be deemed to be the prior allottee; a plain reading of Sections 3(1)(n) and 4(4) of the Coal Mines Act clarifies that the additional levy must be paid by the allottee; and the statute, which recognizes 'additional levy', makes no provision for pass through of such amount to anybody else other than the allottee, and the registered lease holder of the mine.

Sri Alok Shankar, Learned Counsel for the 2nd Respondent, would submit that the Appellant has, in the instant Appeal, submitted that (a) the definition of landed cost of coal is an inclusive definition and, since the appellant operates in a cost-plus regime of tariff, all costs incurred by it must be considered while determining the energy charges in terms of the extant Tariff Regulations; (b) the Tariff Regulations provides recovery of energy charges determination in accordance with a formula, and the Appellant was thus entitled to bill the same without any positive declaration from MPERC; and (c) since additional levy is part of the coal cost and has subsequently been recognised as a statutory levy, it must be passed through in the energy charges determined in accordance with the extant Regulations.

Learned Counsel would submit that additional levy was imposed by **M L Sharma-II** Judgement; the actual payment of additional levy was a pre-condition for participation in the auction under the Coal Mines (Special Provisions) Act, 2015 ("**2015 Act**"); since, there was no charging section in the 2015 Act, the additional levy cannot be termed to be a levy under the 2015 Act; in any event, the provisions of the 2015 Act would not change the finding of the Supreme Court Judgment that the 'beneficiary of the flawed process' must compensate for the loss caused to the public exchequer; neither MPPMCL nor the consumers in the State of Madhya Pradesh can be

said to have been the beneficiary of the flawed process; in the event additional levy is treated as part of the landed cost of coal, then the same shall amount to unjust enrichment and place a double burden on the consumers; and, in any event, the total power supplied to MPPMCL is proportionate to 37.5% of the installed capacity and, therefore, in no circumstance can the entire cost be billed to MPPMCL.

A. REGULATION 41 OF THE 2012 TARIFF REGULATIONS:

The Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) (Revision-II) Regulations, (hereinafter referred to as "2012 Tariff Regulations"), came into force from 01.03.2013 and was to remain in force for the period up to 31.03.2016. Regulation 41 of the 2012 Tariff Regulations relates to Energy Charges (Variable charges). Regulation 41.1 and 41.2 read as under:-

> *"41.1 The energy (variable) charges shall cover main fuel costs and shall be payable for the total energy scheduled to be supplied to such Beneficiary during the calendar month on ex-power plant basis, at the specified variable charge rate (with fuel price adjustment).*
>
> *41.2 Energy (variable) Charges in Rupees per kWh on ex-power plant basis shall be determined to three decimal places as per the following formula:*
>
> *(i) For coal fired stations*
>
> *ECR = (GHR – SFC x CVSF) x LPPF x 100 / {CVPF x (100 – AUX)}*
>
> *Where,*
>
> *AUX= Normative Auxiliary Energy Consumption in percentage.*
>
> *ECR = Energy Charge Rate, in Rupees per kWh sent out.*
>
> *GHR = Gross Station Heat Rate, in kCal per kWh.*
>
> *SFC = Specific Fuel Oil Consumption, in ml/kWh*
>
> *CVSF = Calorific value of Secondary Fuel, in kCal/ml.*
>
> *LPPF =Weighted average Landed price of Primary Fuel, in Rupees per kg, per liter or per standard cubic meter, as applicable, during the month.*

CVPF = Gross Calorific Value of Primary Fuel as fired, in kCal per kg, per liter or per standard cubic meter.

Provided that Generating Company shall provide details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, liquid fuel etc., details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal with details of the variation in energy charges billed to the beneficiaries along with the bills of the respective month:

Provided further that a copy of the bills and details of parameters of actual GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, liquid fuel etc., details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal shall also be displayed on the website of the Generating Company. The details should be available on its website for a period of a quarter on monthly basis."

Regulation 41.4 of the 2012 Tariff Regulations relates to the landed cost of coal and reads thus:-

"41.4 The landed cost of coal shall include price of coal corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable, transportation cost by rail/road or any other means, and, for the purpose of computation of Energy Charges, shall be arrived at after considering normative transit and handling losses as percentage of the quantity of coal despatched by the Coal Supply Company during the month as given below:
Pit head generating stations : 0.2%
Non-Pit head generating stations : 0.8%"

The 2012 Tariff Regulations, framed by the MPERC, came into force from 01.03.2013 long before the judgment of the Supreme Court in **Manohar Lal Sharma – 1 and 2** which were passed on 25.08.2014 and

24.09.2014 respectively. It is evident, therefore, that, when the 2012 Tariff Regulations were made and brought into force, the MPERC could not have visualised that the Supreme Court would, one and half years later, determine Rs.295/- per metric tonne as the additional levy to be recovered from the beneficiaries of illegal allotment of coal mine blocks.

Regulation 41 of the 2012 Tariff Regulations relates to energy charges which would, undoubtedly, include the cost of coal procured. Para 41.4 of the 2012 Regulations, on which reliance is placed on behalf of the Appellant, stipulates that the landed coal shall include the price of coal corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable. The submission, urged on behalf of the Appellant, is that the additional levy is in the nature of a duty and forms part of the landed cost of coal which the Appellant had paid to MPSMCL. The word *"include"* is found at two places in Regulation 41.4. Firstly, the price of coal corresponding to the relative grade and quality would form part of the landed cost of coal and secondly, the applicable royalty, taxes and duties would form part of the price of coal, and, in turn, form part of the landed cost.

B. 'INCLUDES': ITS SCOPE:

Use of the word 'includes' conveys an extensive meaning. The word "include" is generally used in order to enlarge the meaning of words or phrases occurring in the statute and, when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import but also those things which the provision declares that they shall include. **(*ESI Corpn.* v. *High Land Coffee Works*, (1991) 3 SCC 617**; ***Oswal Fats & Oils Ltd.* v. *Commr. (Admn.)*, (2010) 4 SCC 728; Municipal Corpn. of Greater Bombay v. Indian Oil Corpn. Ltd., 1991 Supp (2) SCC 18 : AIR 1991 SC 686; Associated Indem Mechanical (P) Ltd. v. W.B. Small Industries Development Corpn. Ltd., (2007) 3 SCC 607; *CTO* v. *Rajasthan***

Taxchem Ltd.*, (2007) 3 SCC 124; P. Kasilingam v. P.S.G. College of Technology, 1995 Supp (2) SCC 348).** The word "include", a word of extension, is used when it seeks to expand and enlarge the meaning of the words or phrases occurring in a statutory provision. **(Forest Range Officer v. P. Mohammed Ali, 1993 Supp (3) SCC 627; *Doypack Systems (P) Ltd.* v. *Union of India*, (1988) 2 SCC 299; *CTO* v. *Rajasthan Taxchem Ltd.*, (2007) 3 SCC 124).** It gives extension and expansion to the meaning and import of the preceding words or expressions. In using the word "includes", the legislature does not intend to restrict the definition. it makes the definition enumerative, but not exhaustive. The term defined will retain its ordinary meaning but its scope would be extended to bring within it matters which its ordinary meaning may or may not comprise. (Mamta Surgical Cotton Industries* v. *Commr. (Anti-Evasion)*, (2014) 4 SCC 87).**

The word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions used. It may be equivalent to "mean and include" and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to those words or expressions. **(*Oswal Fats & Oils Ltd.* v. *Commr. (Admn.)*, (2010) 4 SCC 728).** The word "includes" is also used in the normal standard sense, to mean "comprises" or "consists of" or "means and includes", depending on the context. **(*D.P. Namboodripad* v. *Union of India*, (2007) 4 SCC 502).**

Accepting the Appellant's contention that the additional levy of Rs.295 per metric tonne, which MPSMCL was directed to pay to the public exchequer, should be treated as part of the landed cost of coal for determination of the Appellant's tariff, and to form part of the energy charges which the Appellant is entitled to claim from the distribution licensees with whom it has entered into PPAs, would render the judgments of the Supreme

Court, in **Manohar Lal Sharma – I and II** redundant. MPSMCL is said to have raised an invoice on the Appellant for payment of the additional levy of Rs.295/- per metric tonne which the Appellant claims to have paid to them, and which they claim to be entitled to recover from the 2nd Respondent in terms of Regulation 41.4 of the 2012 Regulations. Accepting this submission, urged on behalf of the appellant, would mean that MPSMCL has recovered the additional levy paid by it to the Central Government, and has thereby retained the illegal benefit of Rs. 295/- per metric tonne which they had derived as a result of the illegal allocation of coal blocks in their favour.

Permitting additional levy as a pass through would result in not only enabling the beneficiary of the illegal allotment of the coal blocks in retaining their illegal gains, but would also result in unjustifiably burdening the distribution licensees or their consumers for not fault of theirs. It would also negate the directions issued by the Supreme Court, in **Manohar Lal Sharma – I and II** in larger public interest, which is to deny the beneficiaries, of the illegal allotment of coal blocks, of the illegal gains they had made consequent to such illegal allotment.

As noted hereinabove, the 2012 Regulations came into force on 01.03.2013, nearly a year and half before the Judgment of the Supreme Court in **Manohar Lal Sharma – 1 & II** (judgements dated 25.08.2014 and 24.09.2014). These Regulations cannot, therefore, be understood as having visualised and provided for the additional levy determined by the Supreme Court, of Rs.295/- per metric tonne, to recover the loss sustained by the Public Exchequer as a result of the illegal allotment of coal blocks. The royalty, taxes and duties, referred to in Regulation 41.4, must be understood as statutory taxes/duties/levies. Regulation 41.4 does not bring within its ambit the additional levy determined by the Supreme Court of Rs.295/- per metric tonne, which sum was directed to be recovered from the beneficiaries

of the illegal allocation of coal mines. Reliance placed on behalf of the Appellant, on Regulation 41 of the 2012 Tariff Regulations, is misplaced.

As MPSMCL is not a party to either the proceedings before the MPERC or before this Tribunal, we refrain from expressing any opinion regarding the Appellant's right to recover the said amount from MPSMCL. Suffice it to observe that the order now passed by us shall not disable the Appellant from taking such steps as are available to them in law, if they choose to recover the amount paid by them to MPSMCL with respect to the additional levy of Rs.295/- per metric tonne.

VI. IS FAILURE TO DISPUTE THE AMOUNT WITHIN 10 DAYS FATAL?

Sri B. P. Patil, Learned Senior Counsel appearing on behalf of the appellant, would submit that the appellant claimed Rs. 295/- per tonne, paid by them to MPSMCL, from the 2nd Respondent-MPPMCL (up to the extent of their scheduled power to MPPMCL) as part of the landed cost of coal under Clause 10.2(ii) of the PPA; MPPMCL did not dispute the claim within the period of 10 days as mandated under clause 10.7.1 of the PPA dated 05.01.2011; not having disputed the invoice, its right to challenge stood foreclosed; despite foreclosure of the right, the amounts due and payable by the 2nd Respondent were not received by the appellant, aggrieved by which they approached MPERC for adjudication of the dispute, and declaration of their entitlement to the said amount; as per Clause 10.7 of the PPA, which has been duly approved by the MPERC, MPPMCL, not having raised any dispute as to the supplementary invoice within 10 days, its right is foreclosed (refer: **Food Corpn. of India v. Chandu Construction, (2007) 4 SCC 697- Para-12; Haryana Power Purchase Centre v. Sasan Power Ltd. and Others, 2023 SCC OnLine SC 577 – Para 91);** MPERC erred in failing to consider the same; the appellant raised invoices for energy charges based on actual cost, wherein the appellant was allowed to do billing in line with Regulation 41.2 of MPERC Tariff Regulation, 2012 which

were duly accepted by MPPMCL; it was for MPPMCL to raise timely dispute; if this Tribunal is satisfied that the 2nd respondent had defaulted in raising a dispute, it must be held that it cannot form the basis to put the appellant to loss; and, if MPERC was of the view that this amount ought not to be a pass-through for any reason to the end consumers, it can take appropriate remedial measures qua the R-2 DISCOM, and not subject the appellant to loss.

Sri Alok Shankar, Learned Counsel for the 2nd Respondent, would submit that the Appellant has, in the instant Appeal, submitted that MPPMCL is entitled to dispute an invoice only in terms of the provisions of the PPA; since MPPMCL has failed to object to the invoice in terms of the PPA, the invoices raised by the Appellant are payable; the aforementioned submissions are baseless; and accepting the said submission would frustrate the order of the Supreme Court cancelling allocation of coal blocks, and imposing additional levy to recover the benefits derived from an illegal process for allocation of coal blocks.

On the PPA provision for disputing an Invoice, Sri Alok Shanker, Learned Counsel, would submit that the PPA is a commercial agreement between the parties thereto; as per the law laid down by the Supreme Court, commercial agreements have to be read as a whole and must be interpreted as any prudent person of business would interpret it; all the provisions of the PPA, i.e. not just the provisions relating to the dispute, but also those relating to determination of tariff, raising of invoice would have to be read together; in the event, a bill is raised unilaterally without complying with the provisions of the tariff order and/ or the tariff order(s) issued by MPERC, the invoice cannot be termed as binding merely because the procurer failed to dispute it within the period prescribed under the PPA; the Provisional Tariff order determined the landed cost of coal to be taken into account by the Appellant; the Appellant could not have applied any other

cost without prior adjudication by MPERC; the very fact that a petition was filed, praying for pass through of additional levy as landed cost of coal, is evidence of the fact that the revision of landed cost of coal could not have been made suo-motu; while there is no dispute that the energy charge should be determined as per the formula specified in the Tariff Regulations, when coal is being procured from a captive mine the landed cost of coal would not change; once the landed cost of coal is determined in a tariff order, and a rate other than the determined rate is applied in an invoice, the invoice is not in accordance with the applicable law and contract, and thus cannot be termed to be binding.

A. PPA: RELEVANT CLAUSES:

The first Power Purchase Agreement was executed between the Appellant and MP Power Trading Company Limited, for procurement of power on a regulated tariff basis, on 05.01.2011. Clause 10.7 thereof relates to the disputed bill, and clauses 10.7.1 to 10.7.7 thereunder read thus:-

> *"10.7.1. If a Party does not dispute a Monthly Bill or a Supplementary Bill raised by the other Party within ten (10) days of receiving it, such bill shall be taken as conclusive for payment of the Bill amount.*
>
> *10.7.2. If a Party disputes the amount payable under a Monthly Bill or a Supplementary Bill, as the case may be, that Party shall, within ten (10) days of receiving such bill, issue a notice (the "Bill Dispute Notice") to the invoicing Party setting out:*
>
> *(i) the details of the disputed amount;*
>
> *(ii) its estimate of what the correct amount should be; and*
>
> *(iii) all written material in support of its claim.*
>
> *10.7.3. If the invoicing Party agrees to the claim raised in the Bill Discom Notice issued pursuant to Article 10.7.2, the invoicing Party shall revise such bill within fifteen (15) days of receiving such notice*

and make a refund to the disputing Party within fifteen (15) days of receiving such notice."

B. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT:

In **Food Corpn. of India v. Chandu Construction, (2007) 4 SCC 697,** (on which reliance is placed on behalf of the appellant), the Supreme Court referred to its earlier judgement in **Alopi Parshad & Sons Ltd. v. Union of India: AIR 1960 SC 588,** wherein it was held that the Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity; in the codified law of contracts in India there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof; and, similarly, in **Naihati Jute Mills Ltd. v. Khyaliram Jagannath: AIR 1968 SC 522,** it was held that, where there is an express term, the court cannot find, on construction of the contract, an implied term inconsistent with such express term.

In **Haryana Power Purchase Centre v. Sasan Power Ltd., (2024) 1 SCC 247,** (on which also reliance is placed on behalf of the appellant), the Supreme Court held that the provisions of the RFP must be viewed from the perspective of it placing on alert the bidders about the imponderables which are inevitably involved in the pricing process; this meant that, having regard to Clause 1.4 of the RFP, no bidder could possibly claim that the contents of WAPCOS Report must be treated as sacrosanct and infallible, and that it should not be taken without a generous pinch of salt as it stands; at least this was the message which is writ large in the said clause; and he, who acted disregarding the caveat about the report, acted at his own peril.

As noted hereinabove, the 1st of the two PPAs was entered into between the Appellant and the 2nd Respondent-MPPMCL on 05.01.2011 long prior to the judgement of the Supreme Court in **Manohar Lal Sharma – I and II**. Clause 10.7 of the said PPA relates to the Disputed Bill. Clause 10.7.1, thereunder, stipulates that, if a party does not dispute a monthly bill or a supplementary bill raised by the other party within ten (10) days of receiving it, such bill shall be taken as conclusive for payment of the bill amount.

While it is true that a party to a contract cannot ignore the express covenants of the said contract, it is also a well-recognised principle of construction of a contract that it must be read as a whole, and as mutually explanatory, in order to ascertain the true meaning of its several clauses. The words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible. (***North Eastern Railway Co.*** **v.** ***Lord Hastings*** **[1900 AC 260: (1900-03) All ER Rep 199 (HL);** ***Bank of India v. K. Mohandas*****, (2009) 5 SCC 313;** ***South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd.*****, (2020) 5 SCC 164).** In construing a contract, the terms and conditions thereof are to be read as a whole. A contract must be construed keeping in view the intention of the parties. ***(Ishikawajma-Harima Heavy Industries Ltd. v. Director of Income Tax*****, (2007) 3 SCC 481).**

It is necessary for us, therefore, to also take note of the other provisions of the PPA. Clause 10.2 of the said PPA relates to monthly billing, and stipulates that the tariff under the Agreement shall be billed by the company (the Appellant), and shall be paid by the procurer (the 2nd Respondent) in accordance with the following provisions: (i) the company shall submit the bill to the procurer, which shall include : (a) availability and energy account for the relevant month as per SEA/REA for the monthly bill;

(b) the company's computation of various components of the monthly tariff in accordance with Article 10.1.1; and (c) supporting data, documents and calculations in accordance with the Agreement. Article 10.2(ii) stipulates that the monthly bill for the energy supplied to procurer shall be in accordance with the provisions of the Agreement; if for certain reasons some of the charges which otherwise are in accordance with the Agreement, cannot be included in the main monthly bill, such charges shall be billed as soon as possible through supplementary bill(s). Clause 10.3 relates to payment of monthly bills, and under Clause 10.3.1 the procurer shall pay the amount payable under monthly bill by the due date to such account of the company, as shall have been previously notified by the company to the procurer in accordance with Article 10.3.3. As is clear from Article 10.2(ii), the monthly bill for the energy supplied to the procurer shall be in accordance with the provisions of the PPA.

As noted hereinabove, the PPA was executed on 05.01.2011 and could not have contemplated the additional levy of Rs.295/- per metric tonne determined three and half years later by the Supreme Court in its judgements dated 25.08.2014 and 24.09.2014 in **Manohar Lal Sharma – I and II**, (as the loss caused to the public exchequer to be recovered from the beneficiaries of the illegal allotment of coal blocks), as falling within the ambit of the PPAs. What Clause 10.7.1 contemplates is the monthly bill referred to in Article 10.2, more particularly in terms of Article 10.2(ii). It is only with respect to such monthly bills is Article 10.7.1 of the PPA attracted, disabling the 2nd Respondent from disputing the contents of the said monthly bill, if it does not dispute it within 10 days of its receipt.

Article 10.7.1 of the PPA does not contemplate any amount claimed by the Appellant extraneous to the provisions of the PPA. As the additional levy, to be paid in terms of the directions of the Supreme Court, is not contemplated under the PPA, the submission urged on behalf of the

Appellant that, even if the said amount is not permitted as a pass-through, its liability should be fastened on the 2nd Respondent, since it did not dispute the bill raised by the Appellant within time, does not merit acceptance.

VII. IS THE ORDER OF MPERC SOUGHT TO BE SUPPLEMENTED IN APPEAL?

Sri B. P. Patil, Learned Senior Counsel appearing on behalf of the appellant, would submit that MPERC is seeking to raise an additional defence at the appellate stage to justify its unsustainable Order, and to change its reason for sustaining the order, which is impermissible (**K.K. Bhalla v. State of M.P. (2006) 3 SCC 581,- Para 58; Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405-Para 8);** MPERC has sought to make out a case in Appeal, which has no bearing on the impugned order; and the order should speak for itself and the same cannot be substantiated in Appeal by MPERC as it is exercising its adjudicatory power, and not regulatory power.

A. STATUTORY ORDERS: ITS SCOPE:

Public orders, publicly made in exercise of a statutory authority, cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind; or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. (***Bangalore Development Authority*** **v.** ***R. Hanumaiah*****: 2005) 12 SCC 508;** ***Hindustan Petroleum Corpn. Ltd.*** **v.** ***Darius Shapur Chenai*****; (2005) 7 SCC 627;** ***Commr. of Police*** **v.** ***Gordhandas Bhanji:*** **AIR 1952 SC 16; and** ***K.K. Bhalla v. State of M.P.*****, (2006) 3 SCC 581)**

In **Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405,** the Supreme Court observed that when a statutory functionary makes

an order based on certain grounds, its validity must be judged by the reasons so mentioned, and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out; and Orders are not like old wine becoming better as they grow older.

B. IS THE ORDER OF MPERC SOUGHT TO BE SUPPLEMENTED IN APPEAL?

It is true that the law declared by the Supreme Court, in **Mohinder Singh Gill** and **K.K Bhalla,** is that the contents of statutory orders cannot be supplemented by way of an affidavit later. The Appeal before the Supreme Court, in **Mohinder Singh Gill vs. Chief Election Commission of India (1978 1 SCC 405),** arose on a presidential reference to a Constitution Bench of the Supreme Court under Article 143 of the Constitution. In **K.K. Bhalla vs. State of M. P. & Ors: (2006) 3 SCC 581**, the Appeal before the Supreme Court arose against the judgement of the Madhya Pradesh High Court passed in two Writ Petitions filed in public interest questioning allotment of land in favour of the proprietor of Dainik Bhaskar newspaper. In **Syed Yakoob vs. K. S. Radhakrishnan & Ors. (AIR 1964 SC 477**), the Supreme Court held that the writ jurisdiction (under Article 226 ie exercise of the power of judicial review) can be exercised for correcting errors of jurisdiction committed by courts or tribunals i.e. in cases where the orders passed by the inferior courts or tribunals are without jurisdiction or is in excess of it or is as a result of failure to exercise jurisdiction, or where inferior courts/tribunals, while exercising the jurisdiction conferred on it, act illegally or in violation of principles of natural justice; and, as the writ jurisdiction is a supervisory jurisdiction, the court exercising it is not entitled to act as an appellate court.

The observations, made in the context of exercise of the power of judicial review, cannot be extrapolated to a statutory first appeal under the Electricity Act. Under Section 111(1), an appeal lies to this Tribunal against an order made by the appropriate Commission. The power conferred on this Tribunal, under Section 111(3) of the Electricity Act, is to confirm, modify or set aside the order appealed against. This Tribunal, while exercising appellate jurisdiction under Section 111 of the Electricity Act, hears appeals against orders of the Commissions (both Central and State) both on facts and law. The scope of enquiry in such proceedings is far wider than in judicial review proceedings.

Besides adjudication of disputes, and exercising the power to make regulations, the Commissions also discharge regulatory functions. More often than not in appeals, preferred against tariff orders passed under Section 62 read with 64 of the Electricity Act, the only Respondent is the Commission and, in case they are held not entitled to appear and put forth their submissions, this Tribunal may well be deprived of the valuable assistance necessary to adjudicate such a lis. It is un-necessary for us, in the present proceedings, to examine whether the Commission can put-forth grounds other than those which formed part of the order passed by it, for it is always open to this Tribunal to take note of the material placed on record before the Commission which, in this case, would include both the judgements of the Supreme Court in **Manohar Lal Sharma – I and II**. Since reference is made in the judgement of the Supreme Court, in **Manohar Lal Sharma – II**, to the CAG report, and the additional levy of Rs.295 per metric tonne has been determined relying on the contents of the CAG report, we see no justification in not considering the contents of the CAG report to understand the nature of the additional levy determined by the Supreme Court, which sum was directed to be recovered from the beneficiaries of illegal allocation of coal blocks.

VIII. IS THE ADDITIONAL LEVY, OF RS. 295 PER MT, PENAL IN CHARACTER?

Sri B. P. Patil, Learned Senior Counsel appearing on behalf of the appellant, would submit that, in the impugned order, MPERC has observed that the additional levy is compensatory in nature, having admitted earlier that the same was statutory in nature; MPERC is now seeking to claim additional levy to be penal, which is not only contrary to its own reasoning, but also the order of the Supreme Court in **M.L.SHARMA-II,** and hence the same is unsustainable; additional levy was imposed on the allottee as the government collects all levy from the allottee, e.g. royalty, VAT, GST, excise duty, etc., which further passes on such amounts to the beneficiary; the fact that the allottee has been asked to pay additional levy does not make the same penal or specific to the allottee; and, unless the amount paid by them is reimbursed, the appellant would be subjected to enormous loss for no fault on its part.

The submission urged on behalf of the appellant, that the additional levy is not penal in character, is made only because penalty, if any, imposed is not permitted as a pass-through under the Regulations. We may not be required to delve into whether or not the additional levy directed to be recovered from the beneficiaries of the illegal allocation of coal blocks, in terms of the judgements of the Supreme Court in **Manohar Lal Sharma – I** and **II,** is penal in character, since the additional levy of Rs.295 per metric tonne was directed to be recovered from the beneficiaries of the illegal allocation of coal blocks, as it was found, on the basis of CAG report, that the benefit they derived thereby was Rs.295 per metric tonne.

The very object, for which the Supreme Court directed that the beneficiaries, of the illegal allotment of coal blocks, should pay the additional levy was evidently to deny these beneficiaries the illegal benefit they had derived as a result of the illegal allotment of coal blocks. Since the premise

on which the judgements of the Supreme Court is based is that MPSMCL had derived an illegal benefit of Rs.295 per metric tonne, permitting the Appellant, which claims to have paid this amount of Rs.295 per metric tonne to MPSMCL, in turn to pass it through to the 2nd Respondent, would result in MPSMCL recovering the additional levy, paid by them to the public exchequer, from the consumers at large, and thereby retaining the illegal benefit of Rs.295 per metric tonne, which the Supreme Court had, by the afore-said judgements, sought to deny them. As the Supreme Court directed that the additional levy should be recovered from the beneficiaries of the illegal allotment of coal blocks, and such a direction was issued to enable the public exchequer to recoup the loss it had suffered and to deny the beneficiaries of the illegal gain they made as a result, it matters little whether the additional levy was penal in character or compensatory in nature.

IX. ARE NEW DOCUMENTS SOUGHT TO BE RELIED UPON BY MPERC AT THE APPELLATE STAGE?

Sri B. P. Patil, Learned Senior Counsel appearing on behalf of the appellant, would submit that MPERC has sought to rely on new documents, e.g. CAG report, to claim that the appellant has benefitted; Para 4.3 of the CAG report makes it clear that the observations of CAG were limited to captive coal blocks allocated to private parties; and it has specifically excluded mines allocated to State Government companies (i.e., MPSMCL).

As noted herein above, the Supreme Court in **Manohar Lal Sharma – II** has relied on the CAG report to conclude that the beneficiaries, of the illegal allocation of coal blocks, had benefited by Rs.295/- per metric tonne. Since the manner in which this sum of Rs.295 per metric tonne was determined by the Supreme Court can only be understood from the CAG report, we see no reason not to take into consideration the said CAG report, as reference thereto is necessary for us to understand as to how the

beneficiaries of the illegal allocation of coal blocks had benefited for a like sum.

It is clear from the judgement of the Supreme Court, in **Manohar Lal Sharma – I,** that it was by way of the 2001 circular that State Government companies or undertakings were permitted to carry on mining of coking and non-coking coal reserves; the State PSUs, besides having been allocated coal mines for commercial purposes, had also been allowed to form joint venture companies (i.e. 51% shareholding of the State PSUs and 49% of the private company); in the joint venture agreements between the State PSUs and the private companies, mining operations had been given to the private company; and, by this modus operandi, winning and mining of coal mines had gone into the hands of private companies for commercial use. While MPSMCL may well be a State PSU, it does appear that they have entered into a joint venture with a private company which was then entrusted with mining operations. The Judgement of the Supreme Court is applicable to all entities, which were illegally allotted coal blocks, be it State PSUs or Private Entities. The directions of the Supreme Court, to pay Rs.295/- per metric tonne to the public exchequer, was issued to all beneficiaries of illegal allotment of coal blocks, one among whom was MPSMCL.

X. WOULD THE APPELLANT BENEFIT TWICE AS A RESULT OF THE ADDITIONAL LEVY BEING PERMITTED AS A PASS THROUGH?

Sri B. P. Patil, Learned Senior Counsel appearing on behalf of the appellant, would submit that, as the actual figures have been taken into account to determine the tariff, the claim of the Respondents that the appellant had benefitted twice over is an assumption which is not forthcoming from the material placed on record; if the Supreme Court had found fault with the allottee, it would have penalised the allottee, and would not have directed for compensatory payment on the basis of assumed loss

to the Union of India, that too after having noted that it was the Union of India that was at fault in not allocating the mines through the bidding process (para 33 of **M.L.SHARMA-2);** the only issue involved in this case is of additional levy, whether the same can be a pass-through bearing in mind Regulation 41; and, therefore, all the claims and issues that are being raised of additional profit cannot be considered.

Ms. Mandakini Ghosh, Learned Counsel for the MPERC, would submit that additional levy of Rs. 295/- per MT has already been recovered from consumers of the State by the appellant as part of generation tariff; any further pass through will be a double recovery; MPERC determined the provisional tariff for the Appellant on 26.09.2014; the landed cost of coal, allowed in the tariff order, was based on coal sourced from Amelia (N) coal mine; the cost of coal was allowed on the basis of CIL notification; the basic sale price of coal was Rs. 1368.10/MT and landed cost of coal was Rs, 2094.03/MT; on 24.05.2017, MPERC determined the final tariff for the Appellant from the date of their commissioning in September 2014 till 31.03.2015; at that time, MPERC determined the basic sale price of coal on actuals @ Rs. 1670.67, and landed price of coal @ Rs. 2668.60/MT; since MPERC is not the coal regulator, and cannot determine the actual cost of coal production, it had to accept the cost of coal on actuals as provided; the appellant has thus recovered Rs. 1670.67/MT of coal which is more than the sale price of coal @ Rs. 1028.24/MT as considered under the CAG report to arrive at the benefit of Rs. 295/MT of coal retained by private companies; the allottee of the coal block has recovered Rs. 295/MT already from the consumers of the State; hence, any further pass through of Rs. 295/MT will be a double burden on the consumers and unjust enrichment of the allottees; and, therefore, additional levy may not be passed on to the consumers of the State.

The contention, urged on behalf of the beneficiaries of the illegal allocation of coal blocks, that each individual case should be examined and all of them cannot be treated on par with each other in determining the benefit which they received as a result of the illegal allocation of coal blocks, was rejected by the Supreme Court, and all of them were uniformly imposed the additional levy of Rs.295 per metric tonne. The judgements of the Supreme Court, in **Manohar Lal Sharma – I** and **II**, is binding and it is impermissible for this Tribunal to undertake a fresh exercise of determining the actual benefit which MPSMCL had received as a result of such illegal allotment. As we must proceed on the basis that MPSMCL had benefited by a sum of Rs.295 per metric tonne, on the sale of coal to others such as the Appellant herein, permitting the very same amount as a pass-through would result in MPSMCL recovering the amount paid by them earlier to the public exchequer. This, in turn, would mean that MPSMCL would thereby retain the illegal benefit which they derived as a result of the illegal allocation of coal blocks in their favour, and the burden thereof being illegally fastened either on the distribution licensees or the consumers at large.

In the light of the Judgements of the Supreme Court, in **Manohar Lal Sharma – I** and **II,** this Tribunal cannot examine the merits of the Appellant's claim or to undertake a fresh exercise of determining the actual cost of coal during the said period. We must, following the judgements of the Supreme Court in **Manohar Lal Sharma – I** and **II,** proceed on the basis that MPSMCL had benefitted to a tune of Rs.295 per metric tonne as a result of the illegal allocation of coal blocks in their favour.

XI. SUBMISSIONS ON MERITS:

Sri B. P. Patil, Learned Senior Counsel appearing on behalf of the appellant, would submit that MPSMCL has pointed out, in its letter dated 19.12.2014 (handed over during hearing), that the coal cost of MPSMCL raised on the appellant was based on actual cost; the pithead cost was

more as the mine had a significantly higher stripping ratio than that of CIL; these costs were approved by MPERC in the Final Tariff order dated 24.05.2017; the 2nd Respondent-MPPMCL has argued that coal price was artificially increased due to an arrangement between MPSMCL and Jaiprakash Associates Limited ("**JAL/MDO**"), wherein separate margins have been charged by JAL and MPJML (JV of MPSMCL and JAL), and a facilitation fee has been charged by MPSMCL; no plea has been raised to support such arguments and cannot be considered in the absence of pleadings; separate functions have been specified for MPSMCL, MPJML and JAL under the JV agreement; Article 12 of the JV Agreement categorically provided for the amount of facilitation fee payable by the JVC to MPSMCL*; v*ide the First Amendment to the JV Agreement, the JV Company became a State Government company, in conformity with the Coal Mines (Nationalisation) Act, 1973, and JAL was consequently made the MDO (The first amendment dated 20.12.2009 to the JV agreement, pursuant to Ministry of Coal, GOI letter no. 38039/40/2007-CA-I dated 01.04.2009, modified the preamble & Article 3.5, 4.7, 5.5(b), 5.5(c) of the JV agreement); MDO agreement and the Coal Supply agreement (draft of which was approved by the Madhya Pradesh Cabinet) was duly produced before MPERC along with the basis of coal cost computation; the appellant claimed price of coal based on MPSMCL invoices which was approved/ accepted by MPERC in Petition No. 72 of 2015 for determination of the final tariff, without any objection, after deducting Rs. 295/-; MPPMCL has not challenged the said order, meaning thereby that all arrangements of Pricing (MDO+JVC+MPSMCL) were acceptable to MPERC and MPPMCL as well; neither MPERC nor the DISCOM, which are aware of the JV Agreement and the Coal Supply Agreement, have taken any exception to any of the clauses contained therein; and the contention that the Appellant had paid the additional levy without protest to benefit its own group companies is

baseless, as the amount was paid to MPSMCL, against the additional levy paid by it to the Central Government.

Sri Alok Shankar, Learned Counsel for the 2nd Respondent, would submit that, in order to identify who is the 'beneficiary of the flawed process', a perusal of the relationship between MPSMCL the original allottee of the Amelia North Coal Block, Jaiprakash Associates Limited ("**JAL**"), Madhya Pradesh Jaypee Minerals Limited ("**MPJML**") and the Appellant, as evidenced by the terms and conditions of the bid documents and the Joint Venture Agreement and amendments thereto, is required to be undertaken; the Amelia (North) coal mine was allocated to MPSMCL, under the Government Dispensation route; on 27.01.2006; MPSMCL in turn formed a joint venture company, MPJML, with JAL (one of the promoters of the Appellant having 49% holding) and MPSMCL (having 51% holding); on 17.12.2013, the Appellant signed a Coal Supply Agreement/Fuel Supply Agreement with MPSMCL for supply of 2.5 MTPA coal from Amelia North Coal Block; coal production from Amelia (North) Coal Mine commenced in December, 2013; a perusal of the agreements, executed between MPSMCL, JAL and MPJML, would demonstrate that (a) JAL was the successful bidder in the bids invited by MPSMCL for developing the Amelia Coal block; JAL was responsible for developing the mine and a power plant to utilise the coal produced from the Amelia North Coal Block; (b) JAL was appointed the Mine Developer-cum-Operator ("MDO"), and was responsible for finance and the entire operation of MPJML including, but limited to issuance of shares to MPSMCL without any cost to MPSMCL; (c) MPSMCL, in addition to receiving free equity, was entitled to a facilitation fee according to the grade of coal produced (20% in the instant case); (d) JAL as MDO and MPJML were both entitled to a margin of 10% on the cost; a review of the Provisional Tariff order of JPVL (Order dated 26.09.2014 in Petition No. 03 of 2014) would show that the entire cost incurred by MPJML, including margins of MDO and MPJML and facilitation fee payable to MPSMCL, were

considered while determining the landed cost of coal; the CIL notified cost of coal was taken as the base cost and additional charges including the above mentioned margins, all expenses incurred by MPJML, were passed on in determination of energy charge; all the three entitles i.e. MPSMCL, JAL and MPJML made cash gains for every Metric Tonne of coal produced from Amelia North and supplied to the Appellant; in the event the Appellant had chosen not to get coal through linkage from Coal India subsidiaries, the cost of coal would have been substantially lower; MPSMCL, JAL, MPJML and the appellant have together derived direct financial benefit from the allocation of the Amelia North coal block; since the entire financial obligation, in terms of the Bid Documents and the Joint Venture Agreement, was assumed by JAL (which is the parent company of the Appellant), the Appellant decided to pay the demand of additional levy raised by MPSMCL without protest; in terms of the Bid Documents and the Joint Venture Agreement, in the event of failure of the Appellant to pay the amounts due under the head of 'additional levy', the liability to discharge the same would have fallen on JAL; merely because the appellant decided to pay the amounts due in terms of additional levy, it is not entitled to a pass through of the same as landed cost of coal; since MPSMCL, JAL, MPJML and the appellant have together derived direct financial benefit, and MPPMCL and the consumers of electricity in the State of Madhya Pradesh have paid for such financial benefit, it is only the former who can be termed to be the 'beneficiary of the flawed process', and thus liable to pay the additional levy, passing on the same to MPPMCL; and thus the consumers would suffer double penalty, and the Supreme Court orders would be frustrated thereby.

We see no reason to undertake an examination of the cost incurred by MPSMCL for production of coal, or to determine whether the invoices, raised by them on the Appellant, were based on actual cost, for MPSMCL must, in view of the judgements of the Supreme Court in **Manohar Lal Sharma – I** and **II**, be presumed to have illegally gained Rs.295/- per metric

tonne as a result of the illegal allotment of coal blocks in their favour. It matters little, therefore, as to whether the illegal gains made by MPSMCL is more or less than Rs.295/- per metric tonne, as the judgements of the Supreme Court, in **Manohar Lal Sharma – I** and **II,** require this Tribunal to proceed on the basis that the illegal gains made by the beneficiaries of illegal allotment of coal blocks, and the resultant loss to the public exchequer, was Rs.295/- per metric tonne.

As we have held that the Appellant is not entitled for a pass-through of this sum of Rs.295/- per metric tonne, we may not be required to consider whether the Appellant had paid the additional levy to MPSMCL without protest in order to benefit its own group of companies. Suffice it to hold that the submissions urged on merits, by the learned Senior Counsel and learned Counsel on either side under this head, are not being examined in these proceedings, as it is un-necessary for this Tribunal to delve into these aspects.

XII. APPELLATE PROCEEDINGS CANNOT BE EQUATED TO ORIGINAL PROCEEDINGS:

Sri B. P. Patil, Learned Senior Counsel appearing on behalf of the appellant, would submit that appellate proceeding cannot be converted into an original proceeding; and, though it is an extension of the original proceeding, appellate proceedings cannot be stretched to convert the same to original proceedings by allowing MPERC, as an adjudicator, to change its reasons besides supplementing the same at the appellate stage.

While the scope of a first appeal, under Section 111 of the Electricity Act, is akin to that of a first appeal under Section 96 of the Civil Procedure Code, and this Tribunal exercises appellate jurisdiction over orders of the regulatory Commissions both on facts and law, we have no reason to disagree with the submissions of Mr. Basava Prabhu Patil, learned Senior Counsel, that there nonetheless exists a distinction between an appellate

proceeding and an original proceeding. It must however be borne in mind that, unlike judicial review proceedings where the scope of inquiry is extremely limited, this Tribunal, while exercising jurisdiction under Section 111 of the Electricity Act, can re-appreciate the evidence on record to arrive at a conclusion different from that of the regulatory Commission. This Tribunal is also not disabled for reasons, other than those which weighed with the regulatory Commission in passing the impugned order, to arrive at the very same conclusion.

XIII. CONCLUSION:

Viewed from any angle, we are satisfied that the impugned order passed by the MPERC, in Petition No. 37 of 2015 dated 12.08.2015, disallowing pass through of 'Additional Levy', as part of the generation tariff, and in holding that Additional Levy cannot be passed through as tariff and be borne by consumers of the State, does not necessitate interference in appellate proceedings. The Appeal fails and is, accordingly, dismissed.

Pronounced in the open court on this the **21st** day of **March, 2024.**

(Seema Gupta) Technical Member	(Justice Ramesh Ranganathan) Chairperson

REPORTABLE / ~~NON-REPORTABLE~~