

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 297 OF 2019

Dated: 07 February, 2024

Present: Hon`ble Mr. Sandesh Kumar Sharma, Technical Member
Hon`ble Mr. Virender Bhat, Judicial Member

In the matter of:

JINDAL INDIA THERMAL POWER LIMITED

(Through its Authorized Signatory)

Plot No. 2, 2nd Floor,

Nelson Mandela Road,

Vasant Kunj, New Delhi-110070

... Appellant

Versus

1. ODISHA ELECTRICITY REGULATORY COMMISSION

(Through its Director)

Plot No. 4, Chunokoli,

Shailashree Vihar,

Chandrasekharapur, Bhubaneswar-751021

2. GRID CORPORATION OF ODISHA LIMITED

(Through its Chairman-cum-Managing Director)

Power House Square, Janpath,

Bhubaneshwar-751020,

Dist.- Khurda, Odisha

3. STATE OF ODISHA

(Through its Commissioner-cum Secretary)

Energy Department, Govt. of Odisha,

New Capital Secretariat Building,

Bhubaneshwar – 751001, Odisha

... Respondent(s)

Counsel for the Appellant(s) : Sajan Poovayya, Sr. Adv.
Matrugupta Mishra
Sikha Ohri
Shourya Malhotra
Omar Waziri
Pratiksha Chaturvedi
Samyak Mishra

Counsel for the Respondent(s) : G. Umapathy, Sr. Adv
Rutwik Panda
Anshu Malik for Res. 1

Arijit Maitra for Res. 2

Arunav Patnaik
Shikhar Saha
Anandini Kumar for Res.3

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. In this appeal, appellant *Jindal India Thermal Power Limited* has impugned the order dated 04.06.2019 of the 1st respondent *Odisha Electricity Regulatory Commission* (OERC) passed in case nos. 1/2017 and 64/2017 vide which the Commission, while approving the Power Purchase Agreement (PPA) dated 05.01.2011 as well as supplementary PPA dated 23.07.2013, inserted certain new clauses in the PPA which are stated to have been never accepted / agreed by the appellant herein, at any stage including the proceedings before the Commission.

2. During the hearing of the appeal, it transpired that the cases were heard by a Bench of the Commission comprising of three Members including the Chairperson, whereas the impugned order has been signed by only two Members. This is for the reason that while the order was reserved on 24.04.2018, before the order could be prepared and signed on

04.06.2019, i.e. after a gap of more than a year, one of the Members of the Commission had already retired.

3. Accordingly, a preliminary legal objection was raised on behalf of the appellant that the impugned order having been signed by only two Members of the Bench which had heard the case is not sustainable and the appropriate course for the Commission, upon superannuation of one of the Members of the Bench, was to hear the case *de novo*.

4. In view of the same, we thought it appropriate to hear the parties at first on the said preliminary legal objection raised by the appellant and to adjudicate upon the same. Hence, we have heard the learned counsels for the parties extensively on this aspect of the case. The learned counsels have referred to various judgments in support of their submissions, which would be dealt with in detail herein below, and have also taken us through the relevant provisions of the Electricity Act, 2003, as well as the Odisha Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 dated 21.05.2004 issued by the 1st Respondent OERC for conduct of its proceedings and discharge of its functions (hereinafter referred to as “OERC Regulations”).

5. On behalf of the appellant, the learned senior counsel Mr. Sajan Poovayya, submitted vehemently that the impugned order is *non est* and void *ab initio* as it has been passed in blatant violation of settled principles of law which is “one who hears must decide”. It is argued that the said principle has been upheld by the Hon’ble Supreme Court in the case of *Gullapalli Nageswara Rao and Ors. V. Andhra Pradesh State Road Transport Corporation and Anr.*, AIR 1959 SC 308, as well as in the case of

Rasiklal Manikchand Dhariwal and Anr. V. M.S.S Food Products, (2012) 2 SCC 196. The learned counsel also cited the judgments of this Tribunal in *Global Energy Pvt. Ltd. V. KERC*, Appeal No.233 of 2016, *Damodar Valley Corporation v. CERC*, 2019 SCC Online APTEL 40, and *Jindal India Thermal Power Limited v. CERC and Anr.* Appeal No.82 of 2018, to canvas that this Tribunal also has consistently set aside the orders as being *non est* and void, which had been signed by only two members when the matters had been heard by the three Members of the respective Commissions. Referring to Regulation 20 (1) of the Regulation dated 21.05.2004 issued by the OERC, the learned senior counsel argued that the use of word “shall” makes it evident that the orders of the Commission have to be signed by all those members who had heard the matter. He urged this Tribunal to set aside the impugned order on this very score and remand the matter back to the Commission for afresh consideration.

6. Mr. G. Umapathy, learned senior counsel appearing on behalf of the 1st Respondent i.e. Commission, supported the impugned order stating that no legal infirmity can be found in the same. He argued that Regulation 8(1) of the Regulations made by the Commission for conduct of its proceedings clearly laydown that the coram for the meeting of the Commission shall ordinarily be two and in some cases matters may be heard by a signal Member also, and therefore, impugned order in this case which has been signed by two Members is valid and legal even though the matter was heard by three Members. It is his submission that the Regulations 76 and 77 provide inherent powers to the Commission to proceed in a matter like the situation arisen in the present case. He also referred to Section 93 of the Electricity Act, 2003, to argue that no act or proceedings of the

Appropriate Commission can be questioned or invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Commission. He argued that the vacancy created in this case upon retirement of one of the Members of the Commission, who also heard the matter, does not invalidate the impugned order signed by other two Members of the Commission. He cited the judgment of this Tribunal dated 11.08.2011 in *Faridabad Industries Association & Ors. V. Haryana Electricity Regulatory Commission* Appeal No.204 of 2010, and *Amausi Industries Association v. Uttar Pradesh Electricity Regulatory Commission*, in which this Tribunal had upheld the order of the Commission which had been passed in similar situation as in the present case i.e. the matter was heard by three Members of the Commission whereas the order was signed by only two Members as the third Member had retired by then. While doing so, this Tribunal had relied upon Section 93 of the Electricity Act, 2003. Invoking the *doctrine of necessity* as explained by the Hon'ble Supreme Court in *Election Commission of India v. Dr. Subramaniam Swamy*, (1996) 4 SCC 104 117, the learned senior counsel submitted that upon retirement of the one of the Members of the Commission which had heard the matter in the instant case, it had become necessary for remaining two Members to sign the order and therefore, no legal infirmity can be found in the impugned order.

7. The learned counsel for respondent no.2, Mr. Arijit Maitra, also supported the impugned order stating that it suffices the coram requirement in terms of Regulation 8(1)(b) of the Regulations issued by the Commission for conduct of its business. He further pointed out that in terms of Section 92 of the Electricity Act, the matters coming up before the Appropriate

Commission shall have to be decided by majority of votes of the Members present and voting, and therefore, since the impugned order in the present case has been signed by majority Members of the Commission which had heard the matter, it cannot be said to be void or unsustainable. In this regard, reliance is placed upon the judgment of the Hon'ble Supreme Court in *Ishwar Chandra v. Satyanarain Sinha*, (1972) 3 SCC 383. The learned counsel also cited the judgments of this Tribunal in *Faridabad Industries Association v. Haryana Electricity Regulatory Commission*, 2011 SCC OnLine APTEL 127 and *Amausi Industries Association v. Uttar Pradesh Electricity Regulatory Commission*, 2013 SCC OnLine APTEL 138 : [2013] APTEL 151, which have already been noted hereinabove. Invoking the *doctrine of stare decisis* the learned counsel submitted that since these two judgments of this Tribunal have been holding the field for a long time, the legal issues settled therein should not be unsettled now without there being any compelling reasons for the same. He argued that in the subsequent judgment in *Damodar Valley Corporation* case (supra) relied upon by the appellant's counsel, this Tribunal has not considered the previous judgments in *Faridabad Industries* case as well as *Amausi Industries* case, and therefore, the legal issue settled in these two judgments cannot be unsettled merely by relying upon the judgment in *Damodar Valley Corporation* case.

8. We have considered the rival submissions of the learned counsels and have perused the impugned order. We have also gone through the relevant provisions of the Electricity Act, 2003, as well as the Regulations dated 21.05.2004 framed by the 1st Respondent OERC for conduct of its proceedings and discharge of its functions.

9. Before proceeding to deal with the submissions of the learned counsels, we find it apposite to reproduce the relevant provisions of the Electricity Act, 2003: -

“92. Proceedings of Appropriate Commission.–(1) *The Appropriate Commission shall meet at the head office or any other place at such time as the Chairperson may direct, and shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meetings) as it may specify.*

(2) The Chairperson, or if he is unable to attend a meeting of the Appropriate Commission, any other Member nominated by the Chairperson in this behalf and, in the absence of such nomination or where there is no Chairperson, any Member chosen by the Members present from amongst themselves, shall preside at the meeting.

(3) All questions which come up before any meeting of the Appropriate Commission shall be decided by a majority of votes of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) Save as otherwise provided in sub-section (3), every Member shall have one vote.

(5) All orders and decisions of the Appropriate Commission shall be authenticated by its Secretary or any other officer of

the Commission duly authorised by the Chairperson in this behalf.

93. Vacancies, etc., not to invalidate proceedings.—*No act or proceedings of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission.”*

10. Similarly, we also find it appropriate to note here the relevant provisions of the Regulation dated 21.05.2004 issued by the 1st Respondent OERC. The same are as under:-

“8. Proceedings before the Commission:-

(1) (a) The Commission may from time to time hold such proceedings as it may considers to be appropriate in the discharge of its functions under the Central Act and the State Act.

(b) Subject to the provisions of the Act, Rules and Regulations framed thereunder, the quorum for meeting of the Commission shall ordinarily be two but the Commission may determine by order in writing, the matters which can be heard by a single Member.

(c) The Commission may appoint by order in writing any of its Members as Adjudicating Officer under Section 143 of the Act or under Section 27 of the Energy Conservation Act, 2001.

(2) The Commission may appoint an Officer or any other person whom the Commission considers it to be appropriate to participate and assist the Commission in the proceedings.

(3) All matters which the Commission is required under the Central Act and the State Act to undertake and discharge through hearings shall be done through hearing in the manner specified under the said Acts and in these Regulations.

(4) Except where the Commission may provide otherwise for reasons to be recorded in writing, all matters affecting the rights or interests of the licensee or any other person or class of persons shall be undertaken and discharged through hearing in the manner specified in these Regulations.

(5) The Commission may hold hearings in matters other than those specified in clauses (3) and (4) above if the Commission considers it to be appropriate.

(6) The Commission may hold consultations with the parties or any one or more of them before deciding on the initiation of a proceeding in any matter.

20. Orders of the Commission:-

(1) The Commission shall pass orders on the petition and the Chairperson and the Members of the Commission, who heard the matter, shall sign the orders.

(2) The reasons given by the Commission in support of the orders, including those by the dissenting member, if any, shall form a part of the order and shall be available for inspection and supply of copies in accordance with these Regulations.

(3) The Commission shall have the powers to pass such interim orders in any proceeding, hearing or matter before the Commission, as the Commission may consider it to be appropriate.

(4) All orders and decisions issued or communicated by the Commission shall be certified under the signature of the Secretary or an Officer empowered in this behalf by the Chairperson and bear the official seal of the Commission.

(5) All final orders of the Commission shall be communicated to the parties in the proceeding under the signature of the Secretary or an Officer empowered in this behalf by the Chairperson or the Secretary.

76. Saving of inherent power of the Commission:-

(1) Nothing in these regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission.

(2) Nothing shall bar the Commission from adopting a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing deems it necessary or expedient.

(3) Nothing in these regulations shall, expressly or impliedly, bar the Commission to deal with any matter or exercise any power under the Central Act and the State Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit.”

11. A bare perusal of the above noted Regulation 20(1) would reveal that it is mandatory on the part of the Chairperson and the Members of the Commission who hear the matter, to vote on the decision to be taken therein and to sign the order. There was an occasion for this Tribunal to consider similarly worded Regulation 31(2) of the Karnataka Electricity Regulatory Commission in Appeal No.233/2016 *Global Energy Pvt. Ltd. V. KERC*, and it was held as under:-

“10. We must now analyse Section 92 and Regulation 31 because they are central to the issue involved in this case. Section 92(1) states that the Appropriate Commission shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meetings) as it may specify. Rules of procedure specified by the State Commission in this regard are found in the said

Regulations which is evident from their title. They are called KERC (General and Conduct of Proceedings) Regulations 2000. Regulation 31 to which we shall soon advert requires the Members who heard the matter and voted on the decision to sign the orders. Section 92 (3) states that all questions which come up before any meeting of the Appropriate Commission shall be decided by a majority of votes of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence the person presiding shall have a second or casting vote. Thus the decision has to be by majority of the Members present and voting. Section 92 (4) states that save as otherwise expressly provided in subsection (3) every Member shall have one vote. It is urged that Regulation 31 does not state that all the three Members of the State Commission who heard the matter should remain present for taking a decision on the matter and sign the order and in case the order is signed only by two Members it is non est. Therefore, impugned order signed by only two Members is valid. We are not in agreement with the learned counsel. Such a view, in our opinion would be against the basic principle of judicial decision making that those who hear must decide the matter. Section 92 and Regulation 31 will have to be construed in a manner which will not obviate the above mentioned fundamental principle. We shall now turn to Regulation 31.

11. Regulation 31 speaks about orders of the Commission. It lays down a strict procedure. It is clear and unambiguous and puts certain restraint on the Members obviously to secure that all orders of the Commission meet with the accepted principles underlying judicial decision-making. Regulation 31 (1) states that no Member shall exercise his vote on a decision unless he was present during all substantial hearings of the Commission on the matter. This provision forbids a Member who has not participated in hearings and not applied his mind to the issue involved from voting. Regulation 31 (2) is more explicit. It states that the Commission shall pass orders on the petition in writing and the Members of the Commission who heard the matter and voted on the decision will sign the orders. Regulation 31 (3) states that the reasons given by the Commission in support of the orders, including those by a dissenting Member shall form part of the order and shall be available for inspection and supply of copies in accordance with these Regulations. Thus those who hear the matter have a joint responsibility to conclude it. Only they can vote on the decision as having participated in the substantial hearings, it is obvious that they have applied their mind to the matter. The Commission has to pass orders in writing and those who heard the matter and voted on the decision will sign the orders. Thus the responsibility to sign the orders is fixed. As per Regulation 31 (3), the orders have to be reasoned orders. The reasons form part of the order. Regulation 31 (3) takes care of a situation

where a Member dissents. In that event the dissenting Member has to give reasons for his dissent and these reasons shall form part of the order. Section 31(3) requires that the reasons given by the Members shall be available for inspection and supply of copies in accordance with the said regulations. It is clear from Regulation 31 that signing of order by those who heard the matter and voted on the decision is a must. Even a dissenting Member must give reasons for his dissent and sign the reasons for the dissent. They form part of the order. No Member can avoid the responsibility of signing the order. It is implicit in Regulation 31 that all those who heard the matter must be present in the meeting. This is in tune with the principle that all those who heard the matter must sign the order. The order may be unanimous or there may be a dissenting voice. But the requirement is that all the Members who heard the matter have to sign the order. The conclusion is that an order which is not signed by all the Members who heard the matter will be non est.

(Emphasis supplied)

12. Thus, this Tribunal came to the conclusion that an order which is not signed by all the Members who had heard the matter will be *non est*. This Tribunal in Para 17 of the said judgment held that the judgment of the Supreme Court in *Ishwar Chandra* case (Supra) has no application to the issue under consideration for the reason that the Supreme Court in that case was dealing with a situation where there was no rule or regulation or any other provision for fixing the coram, whereas Regulation 31(2) issued

by KERC (which is akin to Regulation 20(1) issued by OERC in the instant case) clearly require that the Members of the Commission who heard the matter and voted on the decision shall sign the orders. Ultimately, it was held in Para 18 of the judgment as under:-

“18. In our opinion the judgments of the Supreme Court referred to by us, make it clear that the work of the Commission which is of a quasi-judicial nature is one of joint responsibility of all Members. The Commission as a body should sit together and the order of the Commission has to be the result of the joint deliberations of all Members of the Commission acting in a joint capacity. All Members of the Commission who heard the matter should sign the order. If the order is not signed by all Members who heard the matter it will be invalid as it will not be order of the Commission. This is in line with the fundamental proposition that a person who hears must decide and divided responsibility is destructive of the concept of judicial hearing. If a Member dissents he must give reasons for the dissent and that shall form part of the order.”

13. The said judgment in *Global Energy* case has been cited with approval by this Tribunal in the subsequent judgment in the case of *Damodar Valley Corporation v. CERC*, 2019 SCC Online APTEL 40. In that case also, the matter had been heard by a Bench consisting of four Members of the Commission out of whom one Member subsequently retired and the order was signed only by three Members. While declining

to apply Section 93 of the Electricity Act, 2003, this Tribunal held that such an order is not sustainable in the eyes of law.

14. Coming to the judgments of this Tribunal in *Faridabad Industries Association* case (supra) and *Amausi Industries Association* case (supra) upon which much reliance has been placed on behalf of the respondents to justify the impugned order. In *Faridabad Industries Association* case also, the issue was whether the impugned order signed by two Members upon retirement of the third Member, when the petition was heard by all the three Members, is legally valid. This Tribunal has referred to Section 93 of the Electricity Act and held the impugned order as valid. In the case of *Amausi Industries Association* case (supra) also, the tariff petition was heard by all the three Members of the State Commission and the order reserved. However, the appointment of the Chairman was, later on, set aside by the decision of the Allahabad High Court, which was subsequently stayed by the Hon'ble Supreme Court, but ultimately the appeal was dismissed by the Supreme Court on 19.10.2012. On the very same date the tariff order was signed by other two Members of the Commission and was issued. This order was held legally valid by this Tribunal while placing reliance upon the above noted earlier judgments in *Faridabad Industries Association* case.

15. Thus, we have two contrary views of this Tribunal on the issue under consideration. One view comes out from the perusal of the judgments in *Faridabad Industries Association* case and *Amausi Industries Association* case to the effect that upon demitting of the office by one of the three Members of the Commission who had heard the matter, by reason of retirement etc., the order signed by remaining two Members of the

Commission is valid and sustainable. Contrary view coming out from the perusal of the subsequent two judgments of this Tribunal in *Global Energy* case and *Damodar Valley Corporation* case, is that such an order is not legally sustainable and is *non est* in the eyes of law. It is an established principle that when there are two contrary and mutually inconsistent judgments of two coordinate benches of a court / tribunal on a particular issue, the judgment which has been delivered later in point of time holds the field. Even otherwise also, we feel unable to endorse the view taken by this Tribunal in *Faridabad Industries Association* case and *Amausi Industries Association* case.

16. Regulation 20(1) refers to the orders to be passed by the State Commission and lays down very strictly that the Chairperson as well as Members of the Commission who heard the matter, shall sign the orders. Regulation 20(2) goes further to provide that the reasons given by the Commission in support of the orders, including those by a dissenting Member, shall form part of the order and shall be available for inspection and supply of copies in accordance with these Regulation. Therefore, it is mandatory that all the Members of the Commission who hear the matter shall sign the order thereby concluding the proceedings of the case before the Commission. Even the opinion of a dissenting Member shall have to form part of the final order of the Commission. No member has the option of avoiding to sign the order. It is must for all the Members of the Commission who heard the matter, to sign the order. The order may be unanimous or there may be a dissenting opinion also but the requirement is that even the dissenting Member shall also sign the order. What can be deduced from the meaningful perusal of Regulation 20 is that Members of

the Commission who hear the case shall sit together and the final order has to be a result of their joint deliberations acting in a joint capacity. If, for any reason whatsoever, one of these Members is not available for the deliberations and the final order is prepared and signed by only remaining Members of the Commission, it would not be valid and proper order of the Commission. Such an order would be in violation of the legal proposition enunciated by the Hon'ble Supreme Court in the case of *Gullapalli Nageswara Rao and Ors. V. Andhra Pradesh State Road Transport Corporation and Anr.*, and reiterated in *Rasid Javed v. State of U.P.* that a person who hears must decide and the divided responsibility is destructive of the concept of judicial hearing.

17. It is, thus, clear that incorrect interpretation of law in *Faridabad Industries* case and *Amausi Industries* case was corrected by this Tribunal in its subsequent decisions in *Global Energy* case and *Damodar Valley Corporation* case. Since the law laid down in previous two judgments of this Tribunal has already been unsettled in the later two judgments and rightly so, the doctrine of "*stare decisis*" espoused by the learned counsel for the respondents has no application.

18. The argument that the opinion of the third Member in the present case, who retired before the order could be signed, would not have been material at all for the reason that the impugned order is signed by the majority of the Members of the Commission who had heard the matter, is devoid of any force. It is for the reason that even the dissenting opinion by a Member shall have to form part of the final order of the Commission in view of the above noted Regulation 20(2) and shall have to be available for

inspection etc. Further, such an order cannot be treated to be outcome of joint deliberations of all the Members of the Commission who heard the matter. It is often seen that Members of a Commission/Tribunal, come to the joint deliberations over a matter with their own view which they put forward before the other Members and sometimes even the majority of the Members having a contrary view get convinced with the reasoning put forward by the Member in minority and the minority view becomes the final order of the Commission/Tribunal. In the instant case also, the third Member of the Commission, if consulted during joint deliberations (had he been still in service at the time of preparation of order) he may have convinced the remaining two Members, who have signed the impugned order, to take a contrary view. This actually is the advantage of having joint deliberations between the Members of the Commission at the time of preparing of final order of the Commission.

19. What Section 92(3) of the Electricity Act provides is that decision of the majority of the Members who had heard the matter shall be the final order of the Commission and in the event of equality of vote on a matter, the Chairperson or in his absence the Member presiding shall have a second or casting vote. It would be fallacious to say that this legal provision is applicable to the situation arising in the instant case and would validate an order of the Commission signed by only two Members when the matter was heard by three Members. Such a view, in our opinion, would be against the basic principle of judicial decision making that those who hear must decide the matter. Section 92 shall have to be construed in a manner which would not render the Regulation 20(1) of the OERC Regulations otiose. It is a settled principle of law that Regulations notified are binding

on the regulated entities till such time they are amended or set aside by the appropriate forum, therefore, in the instant case, the OERC Regulations are binding on the State Commission also.

20. Reference made by the learned counsel for the respondents to Section 93 of the Electricity Act also is absolutely misplaced. The Section has already been produced in Para 9 hereinabove. Bare perusal of the said legal provision would clearly reveal that the “vacancy” and “defect in the constitution of the Commission” mentioned in the same relate to the time when the matter was being heard by the Commission i.e. at the time of constituting the Bench to hear the matter. As per the said Section 93, if there had been any vacancy in the Commission at the time of hearing the matter or there had been any other defect in the constitution of the Commission to hear a matter, the same cannot be made a ground to question the order passed by such Bench of the Commission. Manifestly, this cannot be made applicable to a situation where there was no vacancy or defect in the constitution of the Commission at the time of hearing the matter but vacancy arose subsequent to the completion of hearing of the matter.

21. So far as the *doctrine of necessity*, invoked by the learned senior counsel appearing for 1st Respondent, is concerned it also has no application to the case at hand. The doctrine is applicable to the situation explained by the Hon'ble Supreme Court in *Election Commission of India* case (supra) where there is imputation of implied bias to a Member of Bench hearing the matter but there is no other alternative and the matter has to be heard and decided by the concerned Bench. This is amply clear

from Para 15 and 16 of the said judgment, which are reproduced hereunder:-

“15. The next question then is if the Chief Election Commissioner, for reason of possible bias, is disqualified from expressing an opinion, how should the Election Commission conduct itself? As pointed out earlier Shri Sanghi, the learned counsel for the appellant, has very frankly and with his usual fairness stated that the Chief Election Commissioner preferred this appeal only because he genuinely believed that the scheme of Article 324 did not conceive of a decision by majority, but if the Court comes to the conclusion that a decision can be reached without the Chief Election Commissioner participating in decision-making in the special circumstances of the case, the latter is not at all keen or anxious to hear and adjudicate upon the matter at issue before the Election Commission. We are quite conscious of the high office the Chief Election Commissioner occupies. Ordinarily we would be loath to uphold the submission of bias but having regard to the wide ramification the opinion of the Election Commissioner would have on the future of Ms. J.Jayalalitha, we think that the opinion, whatever it be, should not be vulnerable. The participation of the Chief Election Commissioner in the backdrop of the findings recorded by the learned Single Judge as well as the Division Bench of the High Court would certainly permit an argument of prejudice, should the opinion be adverse to Ms. J.Jayalalitha. Therefore, apart from the legal aspect, even

prudence demands that the Chief Election Commissioner should recuse himself from expressing any opinion in the matter. However, the situation is not so simple, it is indeed complex, in that, what would happen if the two Election Commissioners do not agree and there is a conflict of opinion between them? That would lead to a stalemate situation and the Governor would find it difficult to take a decision based on any such opinion. In such a situation, can the doctrine of necessity be invoked in favour of the Chief Election Commissioner?

16. We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit therefrom. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may

develop. In such cases the doctrine of necessity comes into play. If the choice is between allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief Election Commissioner to participate, if not the doctrine of necessity may have to be invoked.”

22. Thus, the respondent is precluded to invoke the said doctrine of necessity in this case for the reason that the matter could have been heard afresh by a newly constituted Bench of the Commission subsequent to the retirement of one of the members who had earlier heard it.

23. Hence, we find the impugned order of the Commission unsustainable, legally invalid and *non est*.

24. We clarify and reiterate the legal principle that where one of the Members of the Commission who hear a matter, demits office by reason of superannuation, death etc. before passing of the final order, it is not permissible for the remaining Member/Members of the Commission to sign the order. In such a situation, the matter shall be heard *de novo* and final order be passed / signed accordingly.

25. The appeal is hereby allowed. The matter is remanded to the Commission i.e. 1st Respondent, with the direction to hear and decide the same *de novo*.

26. The Registry of this Tribunal is directed to transmit a copy of this judgment to the Electricity Regulatory Commissions in all the States/UTs for their information and guidance.

Pronounced in the open court on this seventh day of February, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

√
REPORTABLE / ~~NON-REPORTABLE~~

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