IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 372 OF 2022

Dated: 21st March, 2024

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

In the matter of:

CESC Limited
Through its Executive Director
(Generation)
Chowringhee Square,
Kolkata – 700001
West Bengal. … Appellant(s)

VERSUS

1. **West Bengal Electricity Regulatory Commission**
(Through its Secretary)
Plot No. AH/5, Premises No. MAR 16-1111,
Action Area – 1A, New Town, Rajarhat,
Kolkata, West Bengal ... Respondent No.1

Counsel on record for the Appellant(s) : Sanjeev K. Kapoor
Divya Chaturvedi
Saransh Shaw
Srishti Rai

Counsel on record for the Respondent(s) : Mandakini Ghosh for Res.1

J U D G M E N T

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

I. INTRODUCTION:

The reliefs sought by the Appellant, in the present appeal, is to set aside the Impugned Order passed by West Bengal Electricity Regulatory Commission (the "WBERC" for short) in Case No. OA-211/15-16 dated 30.07.2022 to the extent assailed in the instant Appeal; to allow recovery of the additional levy amounting to INR 896,73,10,585/- (INR Eight Hundred Ninety- Six Crore Seventy Three Lakh Ten Thousand Five Hundred and Eighty Five) from consumers to the Appellant; and to allow carrying cost on the deferred recovery of the aforesaid amount of Additional Levy prayed for by the Appellant.

The Appellant is an Electricity Distribution Licensee in Kolkata. It had established a 2x250 MW Budge Budge Thermal Generating Station for generation of electricity required for distribution and supply to the consumers in its area of licence. In view of the inability of Eastern Coalfields Limited ("**ECL**") to supply linkage coal at notified prices of Coal India Limited ("**CIL**"), upon recommendation of the Government of West Bengal, and the direction of the Union Government, the Appellant sought allotment of a captive coal block. The Sarisatolli Coal Block was allotted to the Appellant for captive coal mining and use by its generating stations embedded in the distribution business, and consequent supply to the distribution business. The Appellant has been mining and using the extracted coal since FY 2002-03 from the aforesaid coal block.

The Appellant had filed the Petition, in Case No. OA-211/15-16, before the WBERC, claiming pass through, in the distribution and retail supply tariff, of the additional levy paid by them of Rs. 295/- per metric tonne (ie a total sum of Rs. 896,73,10,585/- for FY 2002-03 to FY 2013-14). The WBERC, by its order in Case No. OA-211/15-16 dated 30.07.2022, disallowed the appellant's claim, for recovery of additional levy from the consumers of the State of West Bengal as

part of their retail supply tariff, as (i) such levy was only payable by the prior allottee, i.e. the Appellant; (ii) such levy was only payable by the beneficiaries of the flawed process of allotment, i.e. the Appellant, and not the consumers; and (iii) consumers had already paid for the additional levy.

II. IMPUGNED ORDER PASSED BY THE WBERC: ITS CONTENTS IN BRIEF:

The petition, in Case No: Oa-211/15-16, was filed by the Appellant herein seeking an appropriate recovery plan for reimbursement of the statutory liability of additional levy paid for the period up to the financial year 2013 – 2014, which formed part of the demand raised under the Coal Mines (Special Provisions) Act, 2015. The Appellant prayed for the following reliefs in its petition: (a) to invoke the powers conferred upon it under the Regulations, and to admit the present Petition; (b) to permit an appropriate recovery plan spread over the next three years through any suitable mechanism for reimbursement of additional cost towards increased fuel expenditure incurred by them due to the Additional Levy equivalent to and amounting to Rs.896,73,10,585/- that had already been paid on account of coal procured for the period up to 2013-14 and formed part of the demand raised; or any other appropriate recovery plan as may be decided by the Commission; and (c) to allow carrying cost on the deferred recovery of the aforesaid amount prayed for in prayer (b) above.

In the impugned order, the WBERC noted the appellant's submissions regarding the factual context in which the Sarisatolli coal block, allotted to the appellant as the "Prior Allottee", was cancelled. It noted that the Appellant, as a Supply Licensee under Section 3 of the Indian Electricity Act, 1910, had been undertaking supply of Electricity in Kolkata; for its electricity requirements, the Appellant set-up up a new generating station (2x250 MW)

at Budge Budge, South 24 Parganas**;** when the Budge Budge TPP came into existence. Coal at notified price was not made available for the said proposed station; the linkage coal offered for Budge Budge TPP was on `cost plus' basis, which would have been at a significant mark-up over the notified Coal India Limited **("CIL")** prices; therefore, the Central Government had advised the appellant to develop a captive coal block which would be linked to the licensed activities of the appellant to ensure cheap and reliable power to their consumers; this was accepted, and the appellant registered its intent to develop a captive mine at its own cost in order to obtain coal for Budge Budge TPP; on 07.05.1996, the Central Government granted captive mining permission for the power stations of the appellant, and a separate special purpose vehicle ("SPV"), i.e., ICML was formed by the appellant for developing and operating the captive coal mine allotted to them; on 03.10.2002, a mining lease was granted by the Government of West Bengal in the name of ICML; coal production from the Sarisatolli coal block started from FY 2002-03; since then, all useable coal extracted from this coal block was being supplied to the embedded generating stations of the appellant; even though ICML was incorporated as an SPV, and was granted the mining lease for extraction of the coal from the Sarisatolli coal block, coal from Sarisatolli coal block was specified as an end use for supply of coal on an exclusive basis to the appellant, and its associated companies for generation of thermal power; and the coal extracted from the Sarisatolli coal block has been utilized for generation of power from the appellant's thermal power plant to supply to the consumers in their distribution license area.

The WBERC framed the following two issues for consideration: (i) what was the nature of the Additional Levy as determined by the Hon'ble Supreme Court on 24.09.2014, in WP (Civil) No. 463 of 2012?; (ii) whether Additional Levy could be recovered from the appellant's consumers as part of its tariff?

On Issue I, the WBERC observed that the Supreme Court had directed all the allottees of operating coal mines to pay an "Additional Levy" of Rs. 295/- per metric ton of coal in accordance with the CAG Report; taking note of the Supreme Court order dated 24.09.2014, the Appellate Tribunal for Electricity, in its judgment dated 9.11.2020 in Appeal No. 257 of 2015, had held the Additional Levy to be in the nature of `penalty'; the Commission was bound by the said judgment; hence, Additional Levy was not a liability in the nature of cess/levy/royalty, but was a `penalty' payable by the Prior Allottees; and, hence. the nature of Additional Levy was a `penalty'.

On Issue No.2, the WBERC observed that the prevalent Tariff Regulations provided for inclusion of statutory levies in allowable tariff; the Tariff Regulations provided for allowable adjustment in case some elements of the Aggregate Revenue Requirement **('ARR')** had to be re-determined due to the order of any appropriate Court of Law; thus, in the same spirit, the Commission may also direct pass through of any amount which has been paid by the licensee on account of statutory compliance/Additional Levy; the Tariff Regulations also allowed staggering of recovery, as prayed for by the licensee, or otherwise; the appellant had contended that Additional Levy, being a statutory levy, should form part of the landed cost of coal; Additional Levy was a 'penalty', and there was no provision in the Tariff Regulations, 2011 which allowed penalties to be included as part of generation/distribution tariff; hence, in accordance with the judgment of the Supreme Court dated 24.09.2014, and the judgment of the Tribunal dated 9.11.2020, it should be held that Additional Levy was not recoverable as a statutory levy under the Tariff Regulations, 2011; the Coal Mines Act which recognized the `Additional Levy' made no provision for the passing through of such amount to anybody else other than the prior allottee/ registered lease holder of the coal mine (as provided in the Explanation to Section 3(n)); on a combined

reading of the provisions of the Coal Mines Act, it was seen that, under Section 14(5) of the Coal Mines Act, the liability of Additional Levy could not be allowed to be recovered from the consumers of the appellant; post cancellation of the Sarisatolli coal block, the appellant, without any challenge. undertook the liabilities of a `Prior Allottee' and paid the Additional Levy (even though it only held 26% of ICML, the registered lease holder of the Sarisatolli Coal block); it again participated in the competitive bidding process for auctioning of the Sarisatolli coal mine, and emerged as the Allottee/successful bidder under the Coal Mines Act; the Sarisatolli coal mine was allotted to the appellant; Section 14(5) provided that any Additional Levy imposed against the Prior Allottee shall continue to remain the liability of such Prior Allottee; therefore, such liability cannot be passed on to the Allottee/successful bidder pursuant to the transparent bidding method of auctioning of coal block; the consumers of the licensee had already paid higher cost for the fuel, and that was the ratio of the Supreme Court; and thus any such claims fell on the ground of disentitlement of double benefit. The Petition was held to be devoid of merit, and was accordingly dismissed.

III. RIVAL SUBMISSIONS:

Elaborate submissions, both oral and written, have been put forth by Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, and Ms. Mandakini Ghosh, Learned Counsel for the WBERC. It is convenient to examine the rival contentions, urged by Learned Senior Counsel and Learned Counsel appearing on either side, under different heads.

IV. ORDER IN R.P.NO.1 OF 2021 DATED 13.07.2023: ITS EFFECT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that, by the impugned Order, WBERC rejected the claim of the

Appellant primarily following the decision of this Tribunal in **"Jaiprakash Power Ventures Limited -v- MPERC"** (Order in Appeal No. 257 of 2015 dated 09.11.2020), construing additional levy as a penalty imposed on the Coal Block Allottees; and the above reasoning in the Impugned Order no longer survives as the review petition (being R.P. No. 1 of 2021) filed by Jaiprakash Ventures was allowed by this Tribunal vide judgment dated 13.07.2023.

A. ORDER IN REVIEW PETITION NO.1 OF 2021: ITS CONTENTS:

Review Petition No. 1 of 2021 was filed by Jayaprakash Power Ventures Ltd, against the Madhya Pradesh Electricity Regulatory Commission and others, aggrieved by the order passed by this Tribunal in Appeal No. 257 of 2015 dated 09.1.2020 dismissing the Appeal, and upholding the order of the Madhya Pradesh Electricity Regulatory Commission in Petition No. 37 of 2015 dated 12.08.2015.

In its order, in R.P. No. 1 of 2021 dated 13.07.2023, this Tribunal observed that the Order, passed in Appeal No. 257 of 2015 dated 09.11.2020, suffered from an error apparent on the face of the record, and necessitated being set aside; and, as the contentions of errors on the part of this Tribunal would require an examination on merits, these and other contentions, urged both on behalf of the Appellant-Review Petitionerand the Respondents, shall be examined on its merits when the Appeal, which stood restored to file, was heard on merits. The Order passed by this Tribunal, in Appeal No. 257 of 2015 dated 09.11.2020, was set aside, and Appeal No. 257 of 2015 stood restored to file to be heard afresh on merits without being influenced either by the Order under Review or the Order passed on 13.07.2023.

It is no doubt true that, in the impugned order passed by the WBERC, the Appellant's claim was rejected largely based on the earlier decision of this Tribunal in Appeal No. 257 of 2015 dated 09.11.2020. It is also true that RP No.

1 of 2021 filed by Jaiprakash Power Ventures Ltd (Appellant in Appeal No. 257 of 2015), against the order passed in Appeal No. 257 of 2015 dated 09.11.2020, was allowed by this Tribunal by its judgment dated 13.07.2023. As a consequence, of the order passed by this Tribunal on 13.07.2023, Appeal No. 257 of 2015 stood restored to file. Thereafter, Appeal No. 257 of 2015 and the present Appeal No. 372 of 2022 were taken up together, and heard one after the other.

No useful purpose would be served in setting aside the impugned order on this score, as it would only require the petition to be remanded to the WBERC for its consideration afresh without being influenced by this earlier order passed by this Tribunal in Appeal No. 257 of 2015 dated 09.11.2020. As Judgement is now being pronounced afresh in Appeal No. 257 of 2015, the WBERC would be bound by the order now passed by this Tribunal.

Realising this difficulty, and as it evidently does not seek an Order remanding the petition to the WBERC, the Appellant has, in this Appeal, also put forth its submissions on merits as well on other aspects. Since each of these submissions are being considered in the present judgement, the contentions under this head need not detain us any further, and we shall proceed to examine the other contentions urged by Learned Senior Counsel and Learned Counsel on either side.

V. JUDGEMENTS OF THE SUPREME COURT IN M.L. SHARMA – I & II:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that, by its judgment in **M.L. SHARMA VS PRINCIPAL SECRETARY: (2014) 9 SCC 516** (Judgement dated 25.08.2014) (**"M.L. Sharma-I"** for short), the Supreme Court cancelled the coal blocks allotted by the Central Government terming it to be an arbitrary and illegal allotment; thereafter, the Supreme Court passed judgment in **M.L. SHARMA VS PRINCIPAL SECRETARY: (2014) 9 SCC 614**

(Judgement dated 24.09.2014) (**"M.L. Sharma-II" for short**), wherein it arrived at Rs. 295 per metric tonne as the "Additional Levy", payable by the "Prior Allottees" to compensate the public exchequer; the judgement of the Supreme Court clearly shows that there was no wrong doing on the part of the Coal Block Allottees for which penalty can be said to have been imposed on them; in terms of the above, the Central Government demanded payment of the additional levy, and the Appellant had duly paid the said amount; and the appellant then participated in the e-reverse auction held for Sarisatolli Coal block, and submitted its bid in the said e-reverse auction, in a manner that ensured that the Coal block was re-allotted to it, with a view to maintain continuity of coal availability for its Budge Budge Station.

Ms. Mandakini Ghosh, Learned Counsel for the WBERC, would submit that the Supreme Court, by its order dated 25.08.2014, had held that allocation of captive coal mines from 1993 onwards, which were allocated through the Screening Committee route, were arbitrary, legally flawed and impermissible; the Sarisatolli coal mine was allotted to the Appellant during the 6th meeting of the Screening Committee; allotments were made, between the 1st and 21st meetings, without determining the merits of the allottees, and without ensuring that there was no unfair distribution of wealth in the hands of private companies; in its order in Writ Petition (CRL) No. 120 of 2012 & batch dated 26.09.2014, the Supreme Court considered the consequences of the illegal and arbitrary allotment of coal blocks through the screening committee route and the Government dispensation route; besides cancelling the allotment of coal blocks (including allotment of Sarisatolli to the Appellant), Additional Levy of Rs. 295/- per MT was also imposed on the allottees as they 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 of the Supreme Court order dated 26.09.2014, it was clear that 'Additional Levy' of Rs. 295 per metric tonne was only being 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; and the 'consequences' of the flawed process was not restricted to suffering cancellation of coal blocks, but also in compensating the exchequer for the financial gains which had accrued to the allottees, and which had not been passed on to the consumers and the government.

Ms. Mandakini Ghosh, Learned Counsel, would further submit that, on a holistic reading of the CAG Report and the Supreme Court judgments, additional levy was required to be recovered from the allottees as they had retained the benefit of a flawed and illegal process to the extent of Rs. 295/- per MT of coal; this was required to be re-paid to the government by the allottees; in case, the Additional Levy was now passed through to the consumers, it will be the consumers who would suffer the consequences of the flawed process of allotment, and not the allottees; such a pass through would amount to blessing a process which has been declared to be illegal by the Supreme Court.

Before examining the rival contentions under this head, it is useful to note the contents of the judgement of the Supreme Court in **M.L. Sharma – I,** the CAG Report and in **M.L. Sharma – II.**

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 Public Interest, 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. Among the questions, which arose for consideration before the Supreme Court, was whether commercial mining operations 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 blocks, 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 were no transparency, and guidelines had seldom guided it; on many occasions, guidelines had been honoured more in their breach; there was no objective criteria, and no criteria for evaluation of the comparative merits; the approach had been adhoc 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, 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 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.

A. 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 the 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, on 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 the 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 private parties. Thereunder, it was 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 it 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 an 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 a 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 31st 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 illegal 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: ITS CONTENTS:

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; and 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 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 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 Sarshatali coal block at Sl.No.20.

The afore-said judgments of the Supreme Court in **M.L. Sharma - I** and **II** related to a Public Interest Litigation wherein the validity of allocation of coal blocks, to various State owned enterprises/private entities, were questioned. The said allocation was found by the Supreme Court to be arbitrary and illegal, and were cancelled. Based on the CAG report, the Supreme Court determined the loss caused to the public exchequer, as a result of the illegal allotment of coal mine blocks to various entities by the Central Government, to be Rs. 295/- per metric tonne, and this sum totalling to Rs. 1,85,591.34 crores was directed to be recovered from the beneficiaries of such illegal allotment of coal blocks. It is not in dispute that the Appellant is one such beneficiary and, pursuant to the afore-said judgements of the Supreme Court, the Appellant has also paid Rs. 295/- per metric tonne, of coal extracted from the illegally allotted coal block, to the Central

Government. It is only thereafter that the appellant was permitted to participate in the re-auction for the Sarisatolli Coal Block in terms of the provisions of the 2015 Act and the directions of the Supreme Court in the aforesaid judgments.

A conjoint reading of the CAG report, and the judgments of the Supreme Court in **M.L. Sharma -I and II,** make it abundantly clear that, as a result of such illegal allotment, the public exchequer suffered a loss, and the beneficiaries of such illegal allotment derived a like benefit, of Rs. 295/- per metric tonne, which they were directed to repay to the Central Government. While the allotment by the Central Government was, no doubt, held to be arbitrary and illegal, it is only because the beneficiaries of such illegal allotment had made a corresponding gain of Rs. 295 per metric tonne where they directed to pay the said sum of Rs. 295/- per metric tonne to the public exchequer. The submission that the judgments of the Supreme Court, in **M.L. Sharma -I and II,** show no wrong doing on the part of the coal block allottees is only to be noted to be rejected for, if there was no wrong doing on their part, there was no necessity for the Supreme Court to direct them to pay Rs. 295 per metric tonne to the public exchequer, for the coal extracted by them from the illegally allotted coal mine block. As shall be detailed later in this judgement, it hardly matters whether the additional levy of Rs. 295/- per metric tonne is held to be in the nature of a penalty or to be compensatory in character, since the said amount was directed to repaid only because the benefit, which the beneficiaries had derived from the illegal allotment of coal blocks, was computed, on the basis of the CAG report, as Rs. 295/- per metric tonne. Permitting the additional levy of Rs. 295/- per metric tonne to be a pass through, would result in the Appellant recovering the additional levy paid by them, to the Central government, from the consumers at large.

Resultantly, it would be the consumers who, for no fault of theirs, would be paying for the illegal benefit which the Supreme Court, in **M.L. Sharma -I and II**, has found the beneficiaries, of the illegal allotment of coal blocks, to have gained.

Further, such beneficiaries would, as a result of having recovered the said amount from its consumers, retain the illegal benefit of Rs. 295/- per metric tonne, thereby defeating the directions of the Supreme Court in its judgments in **M.L. Sharma -I and II**.

VI. IS THE APPELLANT A PRIOR ALLOTTEE IN TERMS OF THE JUDGEMENTS IN M.L. SHARMA -I AND II, AND THE 2015 ACT?

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that, pursuant to the judgement passed by the Supreme Court in **"M.L. Sharma-II"**, the Coal Mines (Special Provisions) Act, 2015 ("the 2015 Act" for short) was notified; imposition of a statutory levy has been statutorily recognised and given effect by the 2015 Act; the term "additional levy" has been defined with reference to the said decision of the Supreme Court, and Section 4(4) of the Act make the prior allottee eligible to participate in the competitive bid only after payment of additional levy; Section 22 of the Act provides for recovery of additional levy as arrears of land revenue; there is clearly a compulsory extraction of money by the State; the High Court of Orissa, while deciding the issue of legality of a tax levied for compensatory purpose in **Mahanadi Coalfields Limited & Anr. vs. State of Orissa & Ors., AIR 1994 Ori 258 [Para 19]**, held that, if a tax is levied on the mineral, and not on the land, it can be passed on to the consumers; and this decision has been upheld in **State of Orissa vs Mahanadi Coal Fields Ltd: (1995) Supp 2 SCC 686.**

Sri M.G. Ramachandran, Learned Senior Counsel, would submit that, admittedly, the Appellant was recognized as a "Prior Allottee" under the Coal Block Cancellation Judgments as well as the 2015 Act; pertinently, (a) the Sarisatolli Coal Mine was allotted to the appellant only in 1993; (b) on cancellation of coal allotment, pursuant to the aforesaid judgment(s), the demand for payment of additional levy was raised on the appellant; (c) the appellant was recognized as the prior allottee under Schedules I and II of the 2015 Act; (d) Integrated Coal Mining Limited ("**ICML**") was only a Special Purpose Vehicle, created in accordance with the Government of India notification, with

all shares held by the corporate group as also the mining lease holder, where the Appellant at all times was required to hold at least 26% of the voting equity share capital, and exercise all managerial and other control and influence on ICML; (e) the entire coal was required to be supplied to the appellant and its associated companies (factually, all useable coal was supplied to embedded generating stations of the Appellant, supplying entire generated power to the distribution business); (f) payment of additional levy was made by the Appellant; (g) the appellant participated in the competitive bid process pursuant to paying the additional levy under Section 4(4) of the 2015 Act, and competitively bid to get the Sarisatolli block again as it was critical for its distribution and retail supply activities; and (h) the Coal block was again allotted to the Appellant; and, therefore, the additional levy paid by the Distribution Licensee-Appellant to the Central Government, is an admissible cost item for tariff determination, and hence recoverable in terms of the extant Regulations of the WBERC.

Ms. Mandakini Ghosh, Learned Counsel for the WBERC, would submit that the 2015 Act was enacted to implement the Supreme Court judgments; resultantly, there was no charging section in the Statute; Section 3(n) of the 2015 Act defines the term “prior allottee”; a plain reading of Sections 3(n) and 4(4) of the 2015 Act clarifies that the additional levy must be paid by the Prior Allottee, i.e. the Appellant; the Explanation to Section 3(n) of the 2015 Act further clarifies that, in certain cases, mining lease holders shall be deemed to be the prior allottees, i.e. ICML in the present case; and Section 14 (5) of the 2015 Act provides that any Additional Levy, imposed against the Prior Allottee, shall continue to remain the liability of such Prior Allottee.

Before examining the rival submissions under this head,- it is useful to take note of the provisions of the 2015 Act, to the extent relevant.

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

The 2015 Act, 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.

B. IS THE APPELLANT A PRIOR ALLOTTEE?

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 are placed on their participation in the fresh auction for allocation of coal blocks, and they are barred from participation if they fail to pay the additional levy within time (Section 4(4)). Irrespective of whether or not they participate 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 gain made by the beneficiaries of the illegal allotment of coal blocks, to be recovered from them.

Bearing these aspects in mind, let us now take note of the judgements relied on behalf of the appellant.

C. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT:

In **Mahanadi Coalfields Ltd. v. State of Orissa: AIR 1994 Ori 258,** (on which reliance is placed on behalf of the appellant), the constitutional validity of the Orissa Rural Employment, Education and Production Act, 1992 (the "1992 Act" for short) was challenged in a batch of writ applications. The petitioners were the Mahanadi Coalfields Ltd., a Government Company, with whom the land in question vested in accordance with Section 11 of the Coal Bearing Areas (Acquisition and Development) Act, 1957, and some consumers who had purchased coal, from the Mahanadi Coalfields Ltd, for their own consumption, as

well as some traders in coal. While all the petitioners assailed the constitutional validity of the 1992 Act, the consumers and traders, in addition, urged that, even if the Act was valid, the levy in question being on land, the said burden could not be passed on to the consumers and traders in fixation of the price of coal, since price of coal is fixed by the Government of India under the Colliery Control Order, 1945, which continued in force by virtue of Section 16 of the Essential Commodities Act.

On the question whether the taxation burden could be passed on to the consumer or trader in fixing the price of coal by the owner of the property, namely Mahanadi Coalfields, the Orissa High Court agreed with the submission that the levy on coal could be passed on to the consumer or trader, but if the levy was on the land, having no relation with the coal, then that levy could not be passed on to the consumer or trader, though it may be open to the Union Government to re-fix the prices of coal taking the aforesaid levy into account. On examining Note 11 of Table VI of the aforesaid Government notification fixing the price of coal, the Orissa High Court was of the view that Note 11 was susceptible of the only construction that the pit-head price fixed in Tables II, III and IV in respect of coal was exclusive of royalty, cess, tax and levy, if any, levied by the Government, local authorities, or other bodies on coal; by the notification in question, while the Government of India hac fixed the sale price of coal, it had authorised the seller or the owner of the coal to add the tax or royalty or cess on coal, if so levied by the Government or local authorities; but if the tax was really on ‘land’, or if the State Legislature levied a ‘tax on land’ which may have an indirect impact on the price of coal, that tax could not be passed on either to the consumer or trader by taking recourse to Note 11 of the Notification fixing the price of coal; in other words, what could be passed on to the consumer and trader was a direct tax on the mineral in question and not any tax or levy.

In view of their conclusion that the levy in question was on the mineral, and as the said levy was struck down, the Orissa High Court held that the question of passing on the burden did not arise; but if it was held that the tax was on 'land', then the burden could not be passed on to the consumer or trader. Section 3(2)(c) of the 1992 Act, as well as the Schedule levying tax on 'coal-bearing land', were struck down, and the consequential notices as well as the demand notices were also quashed.

In the appeal preferred against the aforesaid judgement of the Orissa High Court, the Supreme Court, in **State of Orissa v. Mahanadi Coalfields Ltd., 1995 Supp (2) SCC 686,** (on which reliance is also placed on behalf of the appellant), held that the 1992 Act purported to impose a tax on coal-bearing land and mineral-bearing land, which was fully covered by Parliamentary legislation — Mines and Mineral (Regulation and Development) Act, 1957; they concurred with the conclusion of the High Court of Orissa that Section 3(2)(*c*) of the 1992 Act as well as the Schedule attached thereto, levying tax on coal-bearing land, should be declared illegal and ultra vires. The consequential notices, the demand notices, and the certificate proceedings pending before any forum for the realisation of the dues under the 1992 Act were also illegal and infirm. The judgment of the High Court of Orissa was affirmed.

In the aforesaid judgements, both the Orissa High Court and the Supreme Court were called upon to examine the constitutional validity of the 1992 Act (a State Enactment) as it purported to impose a tax on coal-bearing land and mineral-bearing land, which was fully covered by Parliamentary legislation — Mines and Mineral (Regulation and Development) Act, 1957. In declaring that Section 3(2)(*c*) of the 1992 Act as well as the Schedule attached thereto, levying tax on coal-bearing land, were illegal and ultra vires, it was observed that what could be passed on to the consumer and trader was a direct tax on the mineral in question and not any tax or levy.

Unlike the 1992 Act, the constitutional validity of which arose for consideration before the Orissa High Court and the Supreme Court, the additional levy, in the present case, is not referrable to any Statute, but represents the sum determined by the Supreme Court as the loss caused to the public exchequer as a result of the illegal allocation of coal blocks, which loss was to be recouped from the beneficiaries of the illegal allotment. It is only because the monetary benefit, of the illegal allotment of the coal blocks, was held, by the Supreme Court, to have been gained, among others, by the Appellant also, that the Appellant, along with other beneficiaries of such illegal allotment, was called upon to pay Rs. 295/- per metric tonne, of the coal extracted from the illegally allotted coal block, to the public exchequer.

Reliance placed by the Appellant on the judgments of the Orissa High Court in **Mahanadi Coal Fields Ltd.**, which judgment was later affirmed by the Supreme Court, is therefore of no avail.

D. JUDGEMENTS OF THE SUPREME COURT, IN M.L. SHARMA -I AND II, ARE BINDING ON THIS TRIBUNAL:

In view of Article 141 of the Constitution, all courts/tribunals in India are bound to follow the decisions of the Supreme Court. Judicial discipline requires, and decorum known to law warrants, that the directions of the Supreme Court should be taken as binding and followed. In the hierarchical system of courts which exists, it is necessary for each lower tier to accept loyally the decisions of the higher tier. The judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted. (**Cassell & Co. v. Broome : [1972] 1 ALL ER 801 (HL); SMT. KAUSHALYA DEVI BOGRA (SMT) v. THE LAND ACQUISITION OFFICER, 1984 2 SCC 324).**

It is the duty of all subordinate Courts and statutory tribunals to follow the decision of the Supreme Court. A judgment of a statutory Tribunal which refuses to follow the decision and directions of the Supreme Court is a nullity. (**Narinder**

Singh v. Surjit Singh, (1984) 2 SCC 402); Kausalya Devi Bogra v. Land Acquisition Officer, (1984) 2 SCC 324; Municipal Corporation of Guntur, Guntur v. B. Syamala Kumari, 2006 SCC OnLine AP 838; Somprakash v. State of Uttarakhand, 2019 SCC OnLine Utt 648; Director of Settlements, A.P. v. M.R. Apparao, (2002) 4 SCC 638). It would also amount to judicial impropriety for the subordinate courts/tribunals to pass a judicial order which is clearly contrary to the judgements of the Supreme Court. Such judicial adventurism is not permitted (**Dwarikesh Sugar Industries Ltd vs Prem Heavy Engineering Work: (1997) 6 SCC 450)**. As the judgements of the Supreme Court, in **M.L. Sharma -I and II,** is binding on it, it is not open to this Tribunal to take a view different therefrom.

VII. ADDITIONAL LEVY: ITS SCOPE:

On the true nature and implication of the additional levy, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that the judgement in **"M.L. Sharma-II"** dated 24.09.2014: (2014) 9 SCC 614 has dealt with additional levy as the "financial loss caused to the exchequer by the illegal and arbitrary allotments"; the additional levy has been imposed to ***"…correct the wrong done by the Union of India",*** and to compensate the exchequer for the loss caused to it due to the incorrect method of allocation of coal blocks as practiced earlier by the Government; there is no finding or observation in the said judgement to the effect that there was any wrongdoing on the part of the coal block allottees, including the appellant herein; the said decision of the Supreme Court has, on a notional basis, considered the value realised on such coal block allotment to be short by Rs 295 per metric tonne, and therefore a benefit had been given to the coal allottees of the said value; in the case of regulated industry, such as electricity distribution (unlike other sectors such as steel, cement, merchant power plant, etc) by virtue of the electricity laws, such reduced realization of Rs 295/- per metric tonne does not automatically mean a gain to the coal allottees; such reduced value automatically gets passed through to the benefit of the

consumers at large in its entirety as a necessary legal consequence; the salient aspects are: (a) at all relevant times, the appellant was entitled in law, and was allowed a regulated tariff based on actual cost prudently incurred, and a reasonable return; the appellant was never entitled to the price of electricity based on market price recovery of coal; (b) the appellant did not and cannot be deemed to have gained or benefitted monetarily by virtue of the illegal or arbitrary coal block allotment; the notional benefit or deemed benefit of Rs 295 per metric tonne, as a result of the loss caused to exchequer, is not a valid inference that can be drawn in the case of the appellant functioning as a regulated entity; (c) CAG in its report had taken into account the 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 the final cost sheet; the total cost price and financing cost of approximately Rs. 733 /- was subtracted from the average sale price of Rs. 1028.42 to arrive at Rs.295 per metric tonne by the CAG; instead of Rs.733/- per MT, considered as the average cost of coal and financing cost (which did not include any royalty, cess, etc. as is clear from the extracts of the Annual Report of Coal India Limited for FY 2010-11), the basic price, during the period under consideration, for the appellant ranged only between Rs. 417/- MT to Rs. 700/- MT for the year 2002-03 to 2013-14, including the cost of coal extraction and financing charges (as approved by the WBERC, through its Regulations and Tariff Orders); the prudently determined and allowed cost, in the case of the appellant, can only be the value of coal block allocation, (and not a deemed enhancement by Rs. 295/- MT), and therefore there was no gain of Rs 295/- MT; determination of pass through of the coal price in the case of the appellant was entirely within the regulatory domain of WBERC; necessary prudence check was also done by the WBERC through its Regulations; thus, any additional gain of Rs. 295/- per metric tonne could not possibly have been built into the cost of generation of electricity supplied to the appellant's consumers during the period between 01.04.2002 to 31.03.2014; a comparison of the basic price of coal in the case of the appellant, and the average cost price and sale price considered by the CAG in its report, as well as excerpts from the annual statement of Coal India Limited, were placed before this

Tribunal during the hearing; (d) the appellant has acted fairly and has not and could not have retained the benefits, if any, notional or real, as a result of allotment of Sarisatolli coal block during the relevant period; the Appellant had secured the coal block, in the e-reverse auction after cancellation, at considerable financial loss to maintain continuity of coal availability; the alternative would have been to arrange imported coal, or e-auction coal which would have burdened the consumer with a significantly higher cost; (d) it would therefore be harsh, unjust, and inequitable to deprive the Appellant of the legitimate consequences under the Electricity Act, and the Regulations notified thereunder, by assumptions or presumptions of deemed gain or benefit when it is abundantly clear that there has been no such retained benefit or gain by the Appellant; in other words, such an action would amount to penalizing the appellant which was clearly not the intention of the Supreme Court, which was dealing with the limited aspect of compensatory payment to the exchequer; the Supreme Court, in **"M.L. Sharma-II": (2014) 9 SCC 614**, has not dealt with the aspect of retention of benefit by the allottee of coal blocks, and thereby making undue gain; a judgement is only an authority for what it actually decides, and cannot be quoted for a proposition that may seem to follow from it; there cannot be a presumption or assumption of gain to close the claim of the Appellant, without consideration of whether there is any retained gain; the indisputable factual aspects clearly negate such assumption; and more importantly, if the intention of the Supreme Court was not to allow the Coal Block Allottee to recover the Additional Levy in its business in accordance with the avenues provided for or otherwise available, the decision would have specifically stated so.

Ms. Mandakini Ghosh, Learned Counsel for the WBERC, would submit that the loss caused to the national exchequer was due to the benefit retained by the allottees of the coal mine; the benefit, retained by private parties, had been captured in the CAG Report; in April 2012, the Comptroller and Auditor General of India had prepared Report No. 7 on the "Allocation of Coal Block Augmentation of Coal Production"; the CAG Report at page 23 records the submissions of 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 of the said report, the CAG calculated the financial gains to private parties due to allotment of coal blocks; at page 44 of the Report, the CAG records that the Ministry of Coal itself had acknowledged that there was gain to the allottees of coal blocks; at page 43, the CAG Report has 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/- per 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 was worked out at Rs. 583/- which is the benchmark cost; after adding financing cost of Rs. 150/- (as per MOC), the money remaining in the hand of the allottee was computed as Rs. 295.41/- per metric tonne; and this amount of Rs. 295/- per MT was not passed on to the benefit of the consumers.

Ms. Mandakini Ghosh, Learned Counsel, would further submit that, as per the CAG Repot and the Supreme Court order dated 24.09.2014, Additional Levy of Rs. 295/- per MT has already been recovered from the consumers of the State by the Appellant as part of its retail tariff; hence, any further pass through of Additional Levy will be a double recovery; as an illustration, from 2008-09 onwards, the Respondent Commission has admitted the coal cost from Sarisatolli as claimed by the Appellant corresponding to F grade coal from ECL; similarly, in the MYT petition for 2011-12 to 2013-14, the Appellant claimed the coal price of ICML as per the CIL price of F Grade coal of ECL; the CAG Report computes the levy on the understanding that captive coal mining was cheaper than CIL cost; since CIL linked prices were recovered from consumers, the benefits have been retained by the Appellant which was required to be refunded to the government; the nature of Additional Levy has been recently 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 said judgment, 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 Tariff Regulations.

Ms. Mandakini Ghosh, Learned Counsel, would also 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 Supreme Court judgments dated 25.08.2014 and 24.09.2014; and (ii) then determine the nature of the additional levy; from a reading of the CAG Report, the judgments of the Supreme Court, 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, and only the allottees had to suffer the consequences of the flawed process of allotment; the consequences included payment of Rs. 295/- per MT of coal, from the date of extraction till 31.03.2015, as compensation to the national exchequer; despite obtaining the coal block for free, the original allottees/mining lease holders had sold the coal, mined from those blocks, to the consumers in the State at CIL prices; a reading of the tariff orders passed by the WBERC would reveal that the Appellant was granted cost of coal, extracted from Sarisatolli coal block, at CIL prices from the very beginning; the difference, between the higher CIL prices and the cheaper cost of mining coal from captive coal mines, was retained by the allottees; the benefits had been retained by the Appellant which had not been shared, and therefore there was a loss caused both to the national exchequer and to the consumers; neither had benefitted from the captive coal mines being allotted for free to the allottees; and this benefit, which had to be repaid by the Appellant to compensate the loss caused to the national exchequer, could not, in turn, be recovered from the consumers.

It is the submission of Ms. Mandakini Ghosh, Learned Counsel, that the Supreme Court held that a case-by-case analysis, regarding the amount of loss/gain to individual allottees due to illegal allotment of coal blocks, could not be conducted, and it was difficult to arrive at any mathematically acceptable figure quantifying the loss sustained by the national exchequer due to the illegal allotment of coal blocks; however, it proceeded to adopt Rs. 295/MT as compensatory payment to be suffered/borne by the beneficiaries of the flawed process of allotment; the CAG report itself admits that it has taken into account the *currently available audited figures of CIL as reference values in order to arrive at financial gain to allottees on indicative basis*; it was possible that the gain to allottees could be more or less; since the Supreme Court refused to consider individual cases, while determining the consequences of illegality of the allotment process, it may not be proper for any other forum to determine whether the allottees had 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 had retained the benefit of coal cost to the extent of Rs. 295/- per MT by charging higher coal prices, than the cost of coal production from their own captive coal mines which had to be compensated to the national exchequer by the allottees and no other person.

A. JUDGEMENT IN B.L.A. INDUSTRIES PRIVATE LIMITED: ITS SCOPE:

What arose for consideration before the Supreme Court, in **B.L.A. Industries Private Limited vs Union of India and another: (2022) SCC Online SC 1025,** was whether the petitioner therein, who was not even allocated a coal block, but was erroneously included in the schedule, could be called upon to pay the additional levy. The question as to whether the said additional levy was in the

nature of a compensation or as a measure of penalty, did not arise for consideration in the said Judgment, nor was this question examined therein. The submission of the Additional Solicitor General in **B.L.A. Industries Private Limited,** that the additional levy was in the nature of a penalty as well as compensation for the loss caused to the public exchequer, cannot be read as the opinion of the Court. Even otherwise, a stray observation in the Judgment of the Supreme Court, in **B.L.A. Industries Private Limited,** cannot be held to be a declaration of law on this issue, for it is well settled that a decision is available as a precedent only if it decides a question of law (**STATE OF PUNJAB AND OTHERS VS SURINDER KUMAR AND OTHERS, 1992 1 SCC 489)**, and cannot be relied upon in support of a proposition that it did not decide.(**MITTAL ENGINEERING WORKS(P) LTD VERSUS COLLECTOR OF CENTRAL EXCISE, MEERUT, 1997 1 SCC 203).** Reliance placed on **B.L.A. Industries Private Limited,** by Ms. Mandakini Ghosh, learned Counsel for the 1st Respondent Commission is therefore of no avail.

B. A FRESH EXERCISE OF DETERMINATION OF THE GAINS, IF ANY, MADE BY THE APPELLANT CANNOT BE UNDERTAKEN:

As has been rightly submitted by Sri M.G. Ramachandran, Learned Senior Counsel, the Supreme Court has imposed the additional levy to compensate, and recover the financial loss caused to, the public exchequer by the illegal and arbitrary allotment of coal mine blocks; and to correct the wrong done by the Central Government in making such illegal allotment. The financial loss caused to the public exchequer, as determined by the Supreme Court, corresponded to the benefit which the illegal allottees of the coal mine blocks had derived ie Rs. 295/- per metric tonne. It is also true that the Supreme Court had considered the gains which the beneficiaries had derived as a result of illegal allotments of the coal blocks on a notional basis, and had rejected the contention that each allotment should be examined on a case to case basis. As the judgment of the

Supreme Court binds us, we must proceed on the premise that the additional levy, computed on a notional basis at Rs. 295/- per metric tonne, was in fact the loss suffered by the public exchequer, and the gain derived by the beneficiaries, of the illegal allotment, such as the Appellant herein. If, as is contended before us on behalf of the Appellant, the beneficiaries of the illegal allotment, such as the Appellant, have not been held by the Supreme Court to have gained any amount, there was no justification in imposing the additional levy on them.

Further, such a contention cannot be urged before this Tribunal as it would amount to questioning the correctness of the judgment of the Supreme Court in **M.L. Sharma -I and II,** which is impermissible. Since the tariff of the Appellant (ie the amount it is entitled to charge its consumers) is determined by the WBERC in terms of its regulations, and after a prudence check, it is only such expenditure, permissible in terms of the Regulations, which are required to be passed through. That would not apply to the additional levy of Rs. 295 per metric tonne, since this amount has been determined, by the Supreme Court, to be the illegal benefit derived by the beneficiaries of the illegal allotment of the coal blocks, which amount they were directed to repay to the public exchequer to enable the loss caused, as a result of such illegal allotment, to be recouped. Computation of financial loss/gain, in the CAG report, has been accepted by the Supreme Court in its judgment in **M.L. Sharma -I and II.** It is, therefore, not open to the Appellant, in proceedings before this Tribunal, to contend that the computation made by the CAG is either erroneous or is not applicable to them. Accepting such a contention would result in this Tribunal reviewing the judgment of the Supreme Court in **M.L. Sharma- I and II,** which it cannot.

The submission, urged on behalf of the appellant, that the Supreme Court, in **"M.L. Sharma-II": (2014) 9 SCC 614**, has not dealt with the aspect of retention of benefit by the allottees of coal blocks, and thereby making undue gain, is only to be noted to be rejected. As the Supreme Court has determined the loss caused to the

public exchequer as Rs.295/- per metric tonne, this amount must be held to correspond to the illegal gains made by the beneficiaries of the illegal allotment of coal mines, as it is they who have been called upon to make payment of the said amount. As the Supreme Court has already determined the amount payable by the beneficiaries of the illegal allotment of coal blocks, it is impermissible for this Tribunal to examine afresh the material placed on record by the appellant or to now adjudicate whether the sum determined by the Supreme Court represents the actual gains made by the appellant, and whether or not they have retained such gains. It needs no reiteration that, permitting the quantified additional levy as a pass through would, in effect, result in the Appellant retaining the amount which the Supreme court has held to be an illegal benefit, and in making their consumers pay for the benefit which the beneficiaries of the illegal allotment had derived.

What the Supreme Court had directed to recover was the amount determined as the financial loss caused to the public exchequer, meaning thereby the financial gain made by the beneficiaries of the illegal allotment of coal mine blocks. Such a direction to recover cannot be construed as penalizing the Appellant, since what was sought to be recovered was only the gains they derived. No penalty has been imposed on them.

C. THE DIRECTIONS ISSUED BY THE SUPREME COURT, IN M.L. SHARMA -I AND II, ARE DIRECTLY APPLICABLE TO THE APPELLANT:

In examining whether a cited judgement of the Supreme Court constitutes a binding precedent, it must be borne in mind that a judgement is only an authority for what it actually decides, and cannot be quoted for a proposition that may seem to follow from it. Unlike a judicial precedent, which makes the law declared therein (or the ratio laid down therein), applicable to future cases unrelated on facts, the directions issued by the Supreme Court, in the judgements in **M.L. Sharma -I**

and II, were for recovery of the additional levy from beneficiaries, of the illegal allotment of the coal mine blocks, one among whom was the Appellant herein. Consequently, the said judgments are directly applicable to, and are binding on, the Appellant. Since the Supreme Court, in **M.L. Sharma - II,** has quantified the loss caused to the public exchequer, and consequently the gain which the beneficiaries of such illegal allotment had derived, as Rs. 295/- per metric tonne, it is impermissible for this Tribunal to undertake an inquiry afresh as to whether the Appellant had, in fact, benefited as a result of such illegal allotment and, if so, the amount which they had gained as a result. Undertaking such an exercise would amount to this Tribunal reviewing the judgements of the Supreme Court in **M.L. Sharma - I and II,** which is wholly impermissible.

VIII. ENTIRE EXTRACTED QUANTITY UTILIZED FOR GENERATION:

On the question of pass-through of additional levy in tariff, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that the entire quantity of useable coal, extracted from the Sarisatolli coal block since 2002-03, has been utilized by the Appellant for generation of power through its own embedded generating stations, and for supply of electricity to its consumers, at the regulated tariff; and the Appellant had not retained any monetary benefit or profit on the extraction of coal of Rs 295 per metric tonne or any other amount.

Questions such as whether the Appellant had utilized the entire extracted quantity for generation, and could not and did not retain any monetary benefit or profits on the extraction of coal much less at Rs. 295/- per metric tonne, cannot not be examined in the present proceedings since this sum of Rs. 295/- per metric tonne has been determined by the Supreme Court to be financial loss caused to the public exchequer as a result of the illegal allotment of coal mine blocks, meaning thereby that the illegal allottees of such coal mine blocks had derived financial benefit of an equivalent amount. As the Supreme Court has rejected the contention that each beneficiaries' case should be examined

independently, and has uniformly imposed this additional levy of Rs. 295/- per metric tonne on all the beneficiaries of illegal allotment of coal mine blocks, it is impermissible for this Tribunal to now examine whether or not the Appellant had retained the monetary benefit or profits on the coal extracted from the illegally allotted coal mine blocks, and whether they have in fact utilized the entire extracted quantity of coal for generation of electricity.

IX. 2011 TARIFF REGULATIONS: ITS SCOPE:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that, in terms of the WBERC (Terms and Conditions of Tariff) Regulations, 2011 (the "2011 Tariff Regulations" for short), all uncontrollable costs which have been prudently incurred, including all taxes/duties/levy/cess, etc along with carrying cost, is permissible pass-through in the tariff of the Appellant, except a penalty, which is not permissible to be made pass-through under the Tariff Regulations; the relevant regulations are: (i) Regulation 5.14.1 which allows the licensee to take into account any statutory fee or charge paid by it under the Regulations as expenses in the determination of tariff; (ii) Regulation 2.5.5 which allows for recovery of all uncontrollable factors during Annual Performance Review as pass through in the tariff; (iii) Table 2.5.5-1 treats taxes on income, duties, levies, cess, etc. as "uncontrollable" factor; (iv) Regulation 2.5.2.1 allows recovery of taxes on income, statutory fees, levies and charges; (v) Regulation 8.1(iii) read with Regulation 8.2(ii) of Schedule-I considers royalty, taxes and duties as part of fuel cost; (vi) Schedule-7B allows recovery of fuel related costs, including taxes, duties, cess and royalty and other charges, if any; (vii) Regulations 3.11.1, 3.11.2 & 5.6.5.4 allow for recovery through creation of Regulatory Asset and payment of carrying costs; and (viii) Regulations 5.14.1 and Schedule-7A provide for prior period expenses of the Utility to be recovered in the subsequent financial year, particularly when the liability gets crystallized; thus the Tariff Regulations, notified by the WBERC, allow .pass-through of any "levy" and not just taxes and duties (or statutory levies), besides any expenditure of uncontrollable nature; and further, the

additional levy is also in the nature of a statutory levy or at least a statutory charge as it has been imposed by the command of the decision of the Supreme Court, and cannot be disobeyed.

Ms. Mandakini Ghosh, Learned Counsel for the WBERC, would submit that Additional Levy cannot be passed through as tariff under WBERC Tariff Regulations, 2011; as per the judgment of the Supreme Court dated 24.09.2014, Additional Levy is not meant to be borne/suffered by any other entity other than the allottees/mining leaseholders; and, in the event Additional Levy is passed on to the consumers as price of coal under the Tariff Regulations, 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 WBERC (Terms and Conditions of Tariff) Regulations, 2011 were published in the Kolkata Gazette on 29.04.2011 pursuant to the notification dated 25.04.2011. In terms of Regulations 1.1(ii) thereof, the said Regulations came into force on the date of their publication in the gazette ie 29.04.2011. These Regulations, which came into force on 29.04.2011, could not have provided for the additional levy imposed in terms of the judgment of the Supreme Court in **M.L. Sharma I** and **II,** since the said judgments were delivered on 25.08.2014 and 24.09.2014 more than three years after the afore-said Regulations were made.

It is contended, on behalf of the Appellant, that taxes, duties, levies etc. form part of uncontrollable costs and are permissible as a pass through if it has been prudently incurred; the additional levy of Rs. 295/- per metric tonne, which the Appellant had paid, would also fall under the category of uncontrollable costs which the Appellant had prudently incurred; and the additional levy should be permitted as a pass through in their tariff in terms of the 2011 Tariff Regulations. It is true that taxes, duties, levies, cess along with carrying cost is treated, by the 2011 Tariff Regulations, to form part of the uncontrollable cost which is

permissible as a pass through in the tariff, except if it is a penalty which is not permissible to be made a pass through under the said Regulations. It is contended on behalf of the Appellant that the additional levy is not a penalty.

The additional levy of Rs.295/- per metric tonne was directed by the Supreme Court to be paid by the beneficiaries of the illegal allotment of coal mine blocks in order to recover the loss which the public exchequer had suffered as result of such illegal allotment, and which the beneficiaries had gained in the process. A loss caused to the public exchequer would mean a corresponding gain to the beneficiaries of such illegal allocation of coal blocks, and it is this loss which was sought to be recouped, thereby denying the beneficiaries of the illegal gain they had derived as a result of the illegal allotment of coal blocks in their favour. This additional levy could neither have nor was it contemplated under the 2011 Tariff Regulations, since it is not a statutory tax/duty/levy and the judgment of the Supreme Court, directing payment of the determined sum of Rs. 295/- per metric tonne, by the beneficiaries of illegal allotment of coal blocks, were passed more than three years after the 2011 Tariff Regulations came into force. Since the 2011 Tariff Regulations are not applicable to this additional levy, imposed in terms of the judgements of the Supreme Court, it is unnecessary for us to undertake an analysis of each of the clauses of the 2011 Tariff Regulations relied on behalf of the Appellant.

X. W.P. (C) No.991/2014 FILED BY THE APPELLANT BEFORE THE SUPREME COURT: ITS EFFECT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that the Appellant had also filed W.P. (C) No.991/2014, *inter-alia,* seeking its exclusion from the applicability of the judgment of the Supreme Court; however, the said petition was dismissed in limini vide Order dated 18.12.2014 without any speaking order; the Appellant, in the aforesaid Writ Petition, had not challenged the Coal Mines Act; the said petition did not deal with the issue of pass through of the

Additional Levy in terms of the applicable regulatory framework; the said proceeding does not bar the Appellant from seeking recovery of Additional Levy; and the principle of *Res Judicata* is not applicable to an order passed *in limini* in a writ petition [**Daryao vs. State of U.P., (1962) 1 SCR 574 (Para 26)**].

Ms. Mandakini Ghosh, Learned Counsel for the WBERC, would submit that the Appellant has contended that it has not benefited to the extent of Rs. 295/MT of coal, and hence should be allowed to recover the same from the consumers of the State; such a contention cannot be sustained as the Appellant made identical arguments in WP No. 991/2014 filed before the Supreme Court; and, by order dated 18.12.2014, the Supreme Court dismissed the writ petition thereby confirming that the Appellant was indeed the beneficiary who had retained the benefit of Rs. 295/- per MT of coal.

A. WRIT PETITION (CIVIL) NO. 991 OF 2014 FILED BY THE APPELLANT BEFORE THE SUPREME COURT: ITS CONTENTS:

After judgement was passed, in **Manohar Lal Sharma vs. Principal Secretary and Others**: (2014) 9 SCC 614, the Appellant herein filed Writ Petition (Civil) No. 991 of 2014 before the Supreme Court under Article 32 of the Constitution of India, seeking a declaration that the Coal Mines (Special Provisions) Ordinance, 2014 (which later became the 2015 Act), in so far as it included the coal block allotted to Appellant namely the Sarshatali Coal Block in Entry 191 of Schedule I and Entry 35 of Schedule II of the Ordinance, was illegal and non-est, and to strike down the said two entries. The Appellant herein contended before the Supreme Court that, as a result of their inclusion in the said Schedules of the Ordinance, their fundamental rights under Articles 14 and 19(1)(g) were seriously infringed; inclusion of their mine in Schedules I and II of the Ordinance would also result in infringement of their constitutional rights under Article 265 and Article 300A as well as other statutory, contractual and common

law rights; and therefore, necessary declaration, that the said Ordinance is inapplicable to them, be granted.

The Appellant herein stated before the Supreme Court, in the afore-said Writ Petition, that they were not parties to the earlier proceedings before the Supreme Court which culminated in the judgment dated 25.08.2014 and order dated 24.09.2014, and they had no opportunity to present their case before the Supreme Court; once the Sarshatali Coal Block is held to be legal, the question of levy of Rs.295 per tonne for coal extracted would not arise; alternatively, and independently, they had assailed the basis for the levy of Rs.295 per tonne and elaborate grounds had been raised in the Writ Petition in this respect. The Appellant thereafter contended that (a) The additional levy of Rs.295/MT failed to take into account that the price of the coal in 2002, when the production of coal was commenced in the Coal Block of the Petitioner, was significantly lower than the figure of 2010-2011; (b) the grade of coal extracted by them was inferior compared to the average grade of coal and, therefore, their price of coal was substantially lower than the average price of coal; (c) a perusal of the price index of coal of CIL coal for their grade of coal (Grade F, which now corresponds to Grade G11) would show that, as of 2002, the price of coal (excluding taxes) was Rs.417/MT and was only Rs. 610/MT as of 2010-11 as against the much higher price assured in CAG Report (more than Rs.1000/MT); (d) additional penalty of Rs.295 per metric tonne of coal extracted, as proposed by the Attorney General at the time of hearing of the coal block allocation case, was only in case the Supreme Court permitted the 40 functional coal blocks to be retained; (e) the CAG report was not final and was subject to parliamentary debates and it was possible for the Parliamentary Accounts Committee to reject the report; (f) the CAG, in its report, had mentioned that only a part, and not all of the financial gain (Rs.1.86 lakh crores), could have accrued to the national exchequer by introducing competitive bidding for allocation of coal blocks; (g) additional levy could not have been imposed retrospectively and ought to have been imposed

prospectively only on the coal block allocatees whose mines were in production; (h) imposition of additional levy on them, who were in fact recommended to be incentivised for their timely production of coal, ran contrary to the CAG report and could not have been sustained; and (i) there was acute scarcity of supply of coal in the country, and Coal India Limited was not in a position to cater to the growing domestic requirement of coal."

In support of their contention that the additional levy of Rs. 295 per metric tonne of coal extracted could not be sustained in the light of the facts of their case, the Appellant had stated, in the afore-said Writ Petition filed by them before the Supreme Court, that, even in terms of the findings in the judgment, no illegality or arbitrariness could be attributed to allocation of Sarshatali coal block; imposition of additional levy, as imposed by the Supreme Court in its judgement dated 24.09.2014, could not be made applicable to them as the said figure was entirely arbitrary and without any legal or factual basis; this was because (a) the blanket additional levy of Rs.295 per metric tonne had failed to take into account that the price of the coal in 2002, when the production of coal was commenced in the coal block of the Appellant, was significantly lower than the figure of 2010-2011; secondly, the grade of coal extracted by the Appellant was inferior compared to the average grade of coal and, therefore, the price of coal of the Appellant was lesser than the average price of coal; (b) perusal of the price index of coal of CIL coal for the grade of coal of the Appellant (Grade F, which now corresponds to Grade G11) would show that, as of 2002, the price of coal (excluding taxes) was Rs.417 per metric tonne and was only Rs.610 per metric tonne as of 2010-11, as against the much higher price assumed in the CAG Report; therefore, effectively, the additional levy of Rs.295 per metric tonne would come to about 70% of the value of Grade F coal in the year 2002 and 48% of the total value of coal in the year 2010-11; and, therefore, the additional levy was substantially high; (c) the average price of coal taken as Rs.1028 per metric tonne, adopted/assessed in the CAG Report based on CIL's operating open cast

mines in 2010-11, was not representative of, and could not be the basis for imposing additional levy on an allocatee who was extracting coal of a lower grade in adverse geo-mining conditions for the last twelve years.

While faulting the CAG report, and raising the plea of delay and latches, the Appellant herein had also contended, before the Supreme Court, in the Writ Petition filed by them, that the Central Government could not take advantage of their own wrong by imposing additional levy on them, as they had applied to the Central Government for coal blocks as per the prevalent policies under *bona fide* impression. While seeking a direction that the Ordinance be declared illegal and invalid and non-est, and to strike down Entry 191 of Schedule I and Entry 35 of Schedule II to the Ordinance, the Appellant also sought for a mandamus restraining the Respondents from taking any coercive action in respect of the Sarshatali coal mine/block, including appropriate orders restraining the Respondents from interfering with the affairs of the Appellant; dispossessing the Appellant from the coal block and from enforcing the levy of Rs.295 per metric tonne for the coal extracted by the Appellant; alternatively, to direct the 1st Respondent to grant a coal linkage to the Appellant in lieu of the cancellation of the Sarshatali coal mine/block without any disruption of electricity supplied to its 28 lakhs consumers in and around Kolkata.

B. ORDER PASSED BY THE SUPREME COURT IN THE SAID WRIT PETITION:

By its order, in **CESC Limited & Anr. vs. Union of india & Ors,** (Order in WP (Civil) No. 991 of 2014 dated 18.12.2014), the Supreme Court found no merit in the Writ Petition, and dismissed it making it clear that they had not dealt with the coal linkages.

It is clear, therefore, that except for the alternative relief sought for by the appellant in their Writ Petition (which was to direct the 1st Respondent to grant a coal linkage to the Appellant in lieu of the cancellation of the Sarshatali coal

mine/block without any disruption of electricity supplied to its 28 lakhs consumers in and around Kolkata), all other reliefs, including a direction to restrain the respondents from enforcing the levy of Rs.295 per metric tonne for the coal extracted by the Appellant, were rejected.

C. JUDGEMENT RELIED ON BEHALF OF THE APPELLANT:

In **Daryao v. State of U.P., 1961 SCC OnLine SC 21,** (on which reliance is placed on behalf of the appellant), the Supreme Court held that, if a writ petition, filed by a party under Article 226, is considered on merits as a contested matter and is dismissed, the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution; it would not be open to a party to ignore the said judgment and move the Supreme Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs; If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order; if the order is on merits, it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar; If the petition is dismissed in limine, without passing a speaking order, then such dismissal cannot be treated as creating a bar of res judicata; dismissal in limine, even without passing a speaking order in that behalf, may strongly suggest that the Court took the view that there was no substance in the petition; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court, and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits; and as such constitutes a bar of res judicata against a similar petition filed under Article 32. The Supreme Court made it clear that the conclusions thus reached were confined only to the point of res judicata.

As noted hereinabove, after the judgment of the Supreme Court, in **Manohar Lal Sharma -I and II,** the Appellant filed WP(C) No. 991 of 2014 before the Supreme Court seeking its exclusion from applicability of the said judgments. Several, if not of all, of the contentions urged in this appeal were urged before the Supreme Court in WP(C) No. 991 of 2014. The Appellant had, in the said Writ Petition, also sought a declaration that the 2015 Act, in so far as it had included the coal block allotment to the Appellant, was illegal and non-est; and the Respondents therein be restrained from interfering with the coal block allotted to them and from enforcing the levy of Rs. 295/- per metric tonne for the coal extracted by the Appellant. Alternatively, they sought a direction to the first Respondent to grant coal linkage to them in view of the cancellation of coal mine block. The Supreme Court in its order WP(C) No. 991 of 2014 dated 18.12.2014 has specifically recorded that it found no merit in the Writ Petition, and dismissed it, making it clear that it had not dealt with the coal linkages issue.

It is only to the extent of the relief sought by them to direct. the Central Government to grant them coal linkage, in view of cancellation of their coal mines, that the order of the Supreme Court in WP(C) No. 991 of 2014 dated 18.12.2014 can be said as not to disentitle them from availing legal remedies. On all other aspects, including the relief sought to restrain the Respondents from recovering the additional levy of Rs. 295/- per metric ton from them, the Appellant's case was specifically rejected by the Supreme Court.

As has been held by the Supreme Court in **Daryao,** in cases where a writ petition is dismissed in limine, and an order is pronounced in that behalf, the question whether such dismissal would constitute a bar would depend on the nature of the order. In the present case, the Supreme Court has specifically observed that it found no merit in the writ petition, and had then dismissed it. It may, therefore, not be permissible for the Appellant to raise all such contentions, which they had urged before the Supreme Court in WP(C) No. 991 of 2014, again

in subsequent proceedings before this Tribunal. Even if we were to proceed on the premise that the order of the Supreme Court, in WP(C) No. 991 of 2014 dated 18.12.2014, does not constitute res judicata, the Appellant is nonetheless bound by the directions issued by the Supreme court in **M.L. Sharma -I and II,** and it is not open to them to now contend that they should be permitted a pass through of this additional levy of Rs. 295/- per metric tonne, paid by them to the Central Government earlier, in as much as permitting the said sum as a pass through would only mean that the amount, paid by the Appellant to the Central Government as additional levy, would now be recovered by them from their consumers and, consequently, they would be retaining the illegal benefit which the Supreme Court, in **M.L. Sharma -I and II**, had sought to deprive them of.

XI. CONCLUSION:

Viewed from any angle, we are satisfied that the impugned order passed by the WBERC, in Case No. OA-211/15-16 dated 30.07.2022, disallowing the appellant's claim, for recovery of additional levy from the consumers of the State of West Bengal as part of their retail supply tariff, does not necessitate interference in appellate proceedings. The Appellant is not entitled to be granted the relief of a pass through of the amounts paid by them as additional levy of Rs. 295/- per metric tonne, since this amount determined by the Supreme Court, in **M.L. Sharma – II,** represents the benefit they derived as a result of the illegal allotment, of coal blocks in their favour, by the Central Government. 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~~