



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on : 15th September, 2021
Judgment delivered on: 17th January, 2022

+ W.P.(C) 4167/2020

TATA POWER DELHI DISTRIBUTION LIMITED Petitioner

versus

CENTRAL ELECTRICITY REGULATORY
COMMISSION & ANR.

..... Respondents

&

+ W.P.(C) 10026/2020 & CM APPLN. 34096/2020 &
28044/2021

TATA POWER DELHI DISTRIBUTION LIMITED Petitioner

versus

CENTRAL ELECTRICITY REGULATORY
COMMISSION & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioners Dr. Abhishek Manu Singhvi and Mr. Sandeep Sethi, Senior Advocates with Mr. Anand Srivastava, Ms. Ashima, Ms. Priyansha Indra Sharma and Mr. Rahul Jajoo, Advocates.

For the Respondents: Mr. Tushar Mehta, Solicitor General, Mrs. Swapna Shesadri & Ms. Ritu Apurva, Advocates for NTPC.

Mr. Nikhil Nayyar, Senior Advocate with Mr. TVS Raghavendra Sreyas, and Mr. Siddharth Vasudev, Advocates.

Mr. Dhananjay Mishra, Advocate for R-3.



**CORAM:-
HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

JUDGMENT

SANJEEV SACHDEVA, J.

1. Petitioner in W.P.(C) 4167 of 2020 seek quashing of letter dated 02.05.2020 issued by Respondent No. 2 NTPC Limited, whereby NTPC has opined that the provisions of Regulation 17 of the Central Electricity Regulatory Commission (CERC for short) (Terms & Conditions of Tariff) Regulations, 2019 (hereinafter referred to as the (CERC Regulations) are optional and may be exercised after completion of the useful life of a thermal generating station, if both the beneficiary and the generating company agree and further that presently NTPC was not considering the said provision of Regulation 17 for any of its stations and if any such arrangement was considered in future, same shall be communicated to the beneficiaries including the Petitioner. Petitioner further seeks a mandamus to NTPC to consider the request of the Petitioner to enter into an arrangement under Regulation 17.

2. Petitioner in W.P.(C) 10026 of 2020, seeks quashing of letter dated 30.11.2020 issued by Respondent No. 2 NTPC Limited, whereby NTPC has declined to accept the request of the Petitioner not to schedule any power from Dadri – I power generating station or



raise any bills against the Petitioner after 30.11.2020. Petitioner further seeks a declaration that the useful life of 25 years and Power Purchase Agreement validity qua Dadri – I generating station have ended on 30.11.2020 and seeks a restraint on NTPC Limited from scheduling any power from Dadri – I generating station or to raise any bill for the period after 30.11.2020 and further to make a reasoned offer of an arrangement as per Regulation 17 (2) of the CERC Regulations.

3. Petitioner and Respondent No. 2 – NTPC entered into a consolidated Power Purchase Agreement consisting of a Power Purchase Agreement dated 08.05.2008 read with a Supplementary Power Purchase Agreement dated 22.03.2012 (hereinafter collectively referred to as the PPAs) for procuring power from various generating stations of NTPC including the subject generating station called Dadri-I.

4. As per the Petitioner in terms of Clause 13.1 (A) of the PPAs, the validity of the PPAs qua the subject generating station Dadri – I was till the end of life of the said station considered in the tariff orders or Regulations issued by Respondent No. 1 (Central Electricity Regulatory Commissioner) or Government of India allocations, whichever is later.

5. It is the case of the Petitioner that as per the Central Electricity



Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009, useful life of a thermal generating station was 25 years and as the Commercial Operation Date of Dadri – I was 01.12.1995, Dadri – I completed its useful life of 25 years on 30.11.2020 and consequently the validity of PPAs qua Dadri – I expired on the said date.

6. As per the Petitioner, Regulation 17 of the CERC Tariff Regulations provides for a special provision for tariff of thermal power stations which have completed 25 years from the Commercial Operation Date. It is contended that the said special provision allows a generating station to continue supply of power to beneficiaries based on a mutually agreeable arrangement, even though such generating station has completed 25 years from its Commercial Operation Date.

7. It is contended by learned senior counsel for the Petitioner that Sub clause (1) of Regulation 17 provides for an arrangement between the generating company and the beneficiary which includes transmission/distribution companies, regarding target availability and incentives. It is contended that the energy charges and capacity charges shall be payable only as per the power scheduled for generation as against the concept of fixed charges based on availability for the thermal generating plants having life less than 25 years old even if no power is scheduled.



8. It is contended that a thermal generating plant having useful life of 25 years from date of commercial operation and tariff recovery is determined by CERC in such a way such that complete investment is recovered in 25 years even if no power is scheduled by beneficiaries from the thermal generating plant and after completion of 25 years, if the plant still has the potential to generate power, it can do so, but only after passing the muster of Regulation 17 (1).

9. It is contended that sub clause (2) of Regulation 17 gives the first right of refusal to the beneficiary to procure power at the tariff determined by the arrangement entered into under sub-clause (1) and in the event the beneficiary refuses to procure power from the generating station, the generating company shall be free to sell the electricity generated to third parties.

10. It is submitted that the intention of the Electricity Act, 1963 (hereinafter referred to as the Act); is that electricity is to be provided to customers at competitive rates and Regulation 17 (2) of the CERC Regulations is aimed at bringing efficiency in the power sector, enabling beneficiaries to optimize power procurement from generating stations older than 25 years as well as safeguard end consumer's tariff interest.

11. It is contended that Regulation 17 (1) was introduced in the CERC Tariff Regulations to balance the interests of the generating



companies and the beneficiaries with regard to generating stations, which have completed 25 years of useful life. Regulation 17 provides for an arrangement to be offered by the generating companies to the beneficiaries regarding special provisions for tariff of thermal power stations which have completed 25 years from the date of commercial operation. The generating companies are allowed to sell the electricity to third parties, in the event the beneficiaries refuse to procure power from them based on the arrangement so offered.

12. By letter dated 13.03.2020, Petitioner invoked Regulation 17 (2) of the CERC Tariff Regulations qua Dadri – I and sought information from NTPC regarding the terms of the arrangement on the various parameters *inter alia* tariff mentioned under Regulation 17 (1) and requested NTPC to provide single part tariff for the Dadri - I power plant.

13. NTPC by the letter dated 02.05.2020 (impugned in W.P.(C) 4167/2020) opined that the provisions of Regulation 17 of the CERC Regulations were optional and may be exercised after completion of the useful life of a thermal generating station, if both the beneficiary and the generating company agree and further that they were not considering the said provision of Regulation 17 for any of its stations and if any such arrangement was considered in future, same shall be communicated to the beneficiaries including the Petitioner.



14. Petitioner thereafter filed W.P. (C) No. 4167/2020 impugning the said letter.

15. Thereafter on 30.11.2020, Petitioner requested NTPC not to schedule any power from Dadri – I for the Petitioner and not to raise any bills beyond 30.11.2020 i.e. 25 years from the Commercial Operation Date of Dadri – I generating station. Respondent NTPC by its response also dated 30.11.2020 declined to accede to the request of the Petitioner. Consequently, Petitioner filed W.P.(C). 10026/2020.

16. At this juncture, it may be pertinent to note that when the petitions were filed by the Petitioner, CERC was not functional, however by the time the petitions were heard CERC had become functional.

17. On behalf of Respondent No. 1 - CERC it is submitted that as per clause (a) of sub-section (1) of Section 79 of the Act, CERC has the power to regulate the tariff of the generating companies owned or controlled by the Central Government. Clause (b) of Section 79(1) provides that the Respondent Commission shall have the jurisdiction if the sale of electricity shall be from a generating company to more than one State under a composite scheme. Under Clause (c) of Section 79 (1), the Respondent Commission has the jurisdiction to regulate inter-State supply of electricity and under Clause (d) of Section 79 (1), the Respondent Commission has the power to determine the tariff for



inter-State transmission of electricity. Under Clause (f) of Section 79 (1) of the Act, the Respondent Commission has the power to adjudicate the dispute involving generating company or transmission licensee in respect of Clauses (a) to (d) of sub section (1) of Section 79 of the Act.

18. It is submitted that NTPC is a Government Company and is owned and controlled by the Central Government and is engaged in the business of generation and supply of electricity from its generating stations to the various distribution licensees/utilities throughout the country in terms of the Power Purchase Agreements executed by it, based on the allocation of power by the Ministry of Power, Government of India.

19. It is submitted that the regulation/determination of tariff for the supply of electricity from the generating stations of NTPC to the distribution licensees, fall within the scope and jurisdiction of the CERC in terms of Section 79(1)(a) including the adjudication of disputes under Section 79(1)(f) read with section 79(1)(a) of the Act.

20. It is further submitted that Petitioner is a distribution licensee in Delhi, procuring electricity from some of the generating stations of NTPC in terms of the PPAs and per clause (b) of sub-section (1) of Section 86 of the Act, the State Commission (Delhi Electricity Regulatory Commission), is mandated to regulate the power purchase



and procurement process of the Petitioner from the generating stations owned by NTPC, based on tariff approved by CERC.

21. It is contended that if Petitioner is aggrieved by the interpretation of Regulation 17 by NTPC, the remedy is to approach CERC under Section 79(1)(f) read with section 79(1)(a) of the Act.

22. Mr. Tushar Mehta, learned Solicitor General of India appearing for NTPC also objected to the maintainability of the Petitions under Article 226 of the Constitution of India and contended that Petitioner is liable to be relegated to approach CERC for adjudication of the disputes being raised.

23. It is further submitted that the issues at hand also involve complex technical and financial issues which have to necessarily be gone into only by the CERC under the Electricity Act, 2003 and the Act provides for a statutory dispensation for the adjudication of all disputes, especially involving and affecting the tariff of generating companies such as NTPC, by the Central Commission which is a specialized statutory body, having experts from various fields including technical and financial experts to adjudicate on the disputes between the parties.

24. It is submitted that there is also a first appellate body, being the Appellate Tribunal for Electricity, which has appellate jurisdiction on



all questions of facts and law, against the decision of the Central Commission and thereafter a second appellate remedy on substantial questions of law before the Supreme Court of India.

25. It is submitted that since the issue herein is only with respect to interpretation of Regulation 17(1) of the Tariff Regulations and to determine as to whether NTPC is under an obligation to enter into an arrangement with the beneficiary after the completion of 25 years of operation of its generation plant, same lies within the exclusive jurisdiction of the Central Electricity Regulatory Commission for adjudication.

26. Learned Solicitor General further submitted that NTPC is the largest power generating company in India, with 45 number of generating stations with an aggregate installed capacity of 51,163 MW comprising of coal, gas and renewable energy generating stations and falls within the definition of a Government Company under Section 2(45) of the Companies Act, 2013 and also falls within the meaning of a company owned and controlled by the Central Government under Section 79(1)(a) of the Act and falls within the exclusive jurisdiction of the Central Commission for the tariff determination, regulatory jurisdiction and also adjudication of disputes.

27. It is submitted that Petitioner is one of the procurers of electricity from NTPC and has entered into PPAs for procurement of



electricity from 17 stations of NTPC and that the tariff for the supply of electricity by NTPC to the Petitioner is subject to the exclusive jurisdiction of CERC under Section 62 read with Section 79(1)(a) of the Act.

28. It is submitted that under Regulation 17 (1) of the CERC Regulations, there is no obligation on the parties, but said provision is only an enabling provision for the parties to agree on any such arrangement. It is submitted that the expression used in the PPAs is *'the generating company and the beneficiary may agree on an arrangement'*.

29. It is submitted that the PPAs provide that the PPAs shall remain in force till the life considered in tariff orders or till Ministry of Power allocation and the life of these stations has been extended by CERC till 40 years for the purpose of tariff and the Ministry of Power allocation is also persisting.

30. It is submitted that the interpretation of Regulation 17 (1) & (2) as sought to be made by the Petitioner is incorrect and also against the basic principles of Section 61 and 79 (1) (a) of the Electricity Act, 2003. It is submitted that the PPAs are not mere commercial contracts but are based on the allocation of power made by Ministry of Power, Government of India and NTPC owns, operates and maintains 45 Generating stations with the total capacity of 51,163 MW.



31. It is further submitted that the generating stations of NTPC are spread throughout the country and electricity from the generating stations are allocated by the Ministry of Power. Petitioner has allocation from several of the generating stations of NTPC. It is contended that it is not that one generating station is entirely dedicated to one State but from all generating stations of NTPC, the Ministry of Power allocates capacity to multiple purchasing entity/to distribution company. NTPC being a generating company sets up stations for selling power to multiple states, a common approach is to be taken insofar as any tariff or non-tariff related issue is concerned.

32. It is submitted that all tariff matters including the capital cost spent by NTPC, any additional capitalization, the rate of depreciation, recovery of taxes, operation and maintenance expenses, the rate of interest on loan, interest on working capital are to be decided exclusively by CERC by following the provisions of Section 61, 62 and 64 of the Electricity Act, 2003.

33. It is submitted that NTPC cannot make an exception for a particular beneficiary/state distribution company or agree only with a particular beneficiary/state distribution company to the exclusion of all other beneficiary/state distribution companies and such an action would be against the basic premise of the Section 79 (1) (a) of the Act which provides for uniformity of the terms and conditions of tariff in



case a generating station supplies electricity to one or more beneficiaries.

34. It is submitted that only 1.75 and 1.19 percentage of electricity stands allocated to the Petitioner from the Unchahar and Dadri stations respectively and the balance (more than 98%) is allocated to various other beneficiaries and if the plea of the Petitioner was to be accepted then it would imply that one beneficiary of power can without any consultation with the other beneficiaries simply call upon the generating company to negotiate for a tariff different from those applicable to the other beneficiaries, who have not sought any such negotiation, and the same would be contrary to the scheme of the Act.

35. It is submitted that substantial additional capitalization, renovation and modernization etc. have been undertaken by NTPC for the Unchchar and Dadri stations over the years and such expenditure will also be incurred for the future which needs to be serviced by the beneficiaries of electricity in order to ensure uninterrupted supply of power and accordingly the life of the generating stations stands extended.

36. It is also disputed on behalf of NTPC that taking power from Dadri – I is very costly for the Petitioner. It is submitted that Petitioner has been continuously scheduling power from stations which are costlier than Dadri – I. It is submitted that the landed cost of



power from some of the other stations would be significantly higher as compared to Dadri – I considering the Transmission and other associated costs.

37. It is further submitted by Learned Solicitor General of India that the Ministry of Power on 22.03.2021 has issued detailed guidelines with regard to exit/continuation of the PPAs after 25 years from the commercial operation of the generating station. It is submitted that following the procedure to exit from PPA notified by the Ministry of Power, Petitioner has, on 10.06.2021, written to its regulator Delhi Electricity Regulatory Commission seeking permission to surrender electricity from Dadri – I generating Station.

38. It is further submitted that two other licensees of Delhi – BSES Rajdhani Power Ltd and BSES Yamuna Power Ltd, which had also been allocated electricity from Dadri – I generating station, had approached the CERC with regard to the interpretation of Regulation 17. It is submitted that CERC by Order dated 01.07.2021 has held the PPA to be effective and binding between the parties till the date of its re-allocation by Ministry of Power. It is pointed out that said order has been challenged before the Appellate Tribunal for Electricity and the Appellate Tribunal has passed an interim Order on 26.08.2021 with regard to recovery of tariff/fixed charges by NTPC.

39. Section 79 of the Act lays down the functions of the Central



Commission and Section 86 of the Act lays down the functions of the State Commission. The relevant provisions are as under:

79. Functions of Central Commission.—(1) The Central Commission shall discharge the following functions, namely:—

- (a) to regulate the tariff of generating companies owned or controlled by the Central Government;*
- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*
- (c) to regulate the inter-State transmission of electricity;*
- (d) to determine tariff for inter-State transmission of electricity;*
- (e) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;*
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*
- (g) to levy fees for the purposes of this Act;*
- (h) to specify Grid Code having regard to Grid Standards;*



- (i) *to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;*
- (j) *to fix the trading margin in the inter-State trading of electricity, if considered, necessary;*
- (k) *to discharge such other functions as may be assigned under this Act.*
- (2) *The Central Commission shall advise the Central Government on all or any of the following matters, namely:—*
 - (i) *formulation of National electricity Policy and tariff policy;*
 - (ii) *promotion of competition, efficiency and economy in activities of the electricity industry;*
 - (iii) *promotion of investment in electricity industry;*
 - (iv) *any other matter referred to the Central Commission by that Government.*
- (3) *The Central Commission shall ensure transparency while exercising its powers and discharging its functions.*
- (4) *In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.*



86. Functions of State Commission.—(1) The State Commission shall discharge the following functions, namely:—

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

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

- (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*
- (c) facilitate intra-State transmission and wheeling of electricity;*
- (d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;*
- (e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such*



sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;

(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely:—

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganisation and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission, distribution and trading of electricity or any other



matter referred to the State Commission by that Government.

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.

40. Section 110 of the Act provides for establishment of the Appellate Tribunal for Electricity to hear appeals against the orders of the adjudicating officer or the Appropriate Commission under the Act or any other law for the time being in force.

41. Section 111 of the Act provides for an appeal to the Appellate Tribunal by any person aggrieved by an order made by an adjudicating officer under the Act (except under section 127) or an order made by the Appropriate Commission and provides for a time bound disposal of the appeal.

42. Section 125 of the Act provides for a Statutory Appeal to the Supreme Court by any person aggrieved by any decision or order of the Appellate Tribunal.

43. As noticed hereinabove, the disputes raised by the Petitioner in these petitions are:



- i. with regard to the interpretation of the clauses of the Power Purchase Agreements particularly Clause 13.1 (A) of the PPAs;
- ii. as to whether the useful life of the generating station Dadri – I has ended on 30.11.2020 and consequently the validity of PPAs qua Dadri – I has expired on the said date;
- iii. whether Regulation 17 of the CERC Tariff Regulations mandates supply of power to beneficiaries only on a mutually agreeable arrangement after the generating station has completed 25 years from its Commercial Operation Date;
- iv. whether Sub clause (1) of Regulation 17 provides for an arrangement between the generating company and the beneficiary inter alia with regard to target availability and incentives;
- v. whether the Tariff would be based only on the energy charges and capacity charges as per the power scheduled for generation as against the concept of fixed charges;
- vi. whether tariff recovery is determined by CERC in such a way that complete investment is recovered in 25



years even if no power is scheduled by beneficiaries from the thermal generating plant;

- vii. whether after completion of 25 years, if the plant still has the potential to generate power, it can do so, but only after passing the muster of Regulation 17 (1);
- viii. whether sub clause (2) of Regulation 17 gives the first right of refusal to the beneficiary to procure power at the tariff determined by the arrangement entered into under sub-clause (1) and in the event the beneficiary refuses to procure power from the generating station, the generating company shall be free to sell the electricity generated to third parties;
- ix. whether NTPC has to mandatorily enter into an arrangement with Petitioner in terms of Regulation 17 or said Regulations are optional and may be exercised after completion of the useful life of a thermal generating station, if both the beneficiary and the generating company agree.

44. The Supreme Court of India in *West Bengal Electricity Regulatory Commission versus CESC Ltd.* (2002) 8 SCC 715, while considering the constitution of the Regulatory Commissions and the



nature of their functions, recommended constitution of an Expert First Appellate Forum hear appeals against the decisions of the Regulatory Commission. It held as under:

“102. We notice that the Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. A perusal of the report of the ASCI as well as that of the Commission abundantly proves this fact. Therefore, we think it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first stage also. From Section 4 of the 1998 Act, we notice that the Central Electricity Regulatory Commission which has a Judicial Member as also a number of other Members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect to the Judges of the High Court, we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with this type of factual and technical matters. Therefore, we recommend that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. We notice that under the Telecom Regulatory Authority of India Act, 1997 in Chapter IV, a similar provision is made for an appeal to a special Appellate Tribunal and thereafter



a further appeal to the Supreme Court on questions of law only. We think a similar appellate provision may be considered to make the relief of appeal more effective.”

45. Pursuant to the Judgment in *West Bengal Electricity Regulatory Commission (supra)*, the Electricity Act, 2003 created the Appellate Tribunal for Electricity.

46. Further, in *Gujarat Urja Vikas Nigam Limited versus Essar Power Limited* (2008) 4 SCC 755, the Supreme Court while considering the issue of jurisdiction of the Regulatory Commission on adjudication of disputes, *vis-à-vis*, an arbitrator, held that the Regulatory Commission under the Act is the authority to adjudicate on disputes and the arbitration clause in the Agreement between the parties could not be acted upon.

47. The Supreme Court in *PTC India Ltd versus Central Electricity Regulatory Commission* (2010) 4 SCC 603 held as under:

“92. *Summary of Our Findings:*

(i) *In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of Regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).*



(ii) *A Regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said Regulations.*

(iii) *A Regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.*

(iv) *Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words “orders”, “instructions” or “directions” in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.*

(v) *If a dispute arises in adjudication on interpretation of a Regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a Regulation made under Section 178.*



(vi) Applying the principle of “generality versus enumeration”, it would be open to the Central Commission to make a Regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that the CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned notification dated 23.1.2006.”

(vii) Section 121, as amended by Electricity (Amendment) Act 57 of 2003, came into force with effect from 27.1.2004.

(underlining supplied)

48. In *PTC India Ltd (supra)*, the Supreme Court has held that a Regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act. However, if a dispute arises in adjudication on interpretation of a Regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a Regulation made under Section 178.

49. The Supreme Court in *Sai Bhaskar Iron Ltd. versus A.P. Electricity Regulatory Commission*, (2016) 9 SCC 134 has held that the scope of interference in judicial review in such matters, reserved for expert bodies, is limited. The court cannot substitute its opinion. It



has been held that price fixation is not the function of the court.

50. *In PTC India Ltd. (supra)* the Supreme Court has held that fixation of tariff like price fixation is legislative in character. The functions of the Commission have been held to be adjudicatory, advisory and legislative.

51. The scheme of the Act provides for a statutory dispensation for adjudication of all disputes by the Central Commission having experts from various fields including technical and financial experts to adjudicate on the disputes between the parties and a statutory first appeal is provided to the Appellate Tribunal for Electricity, which has appellate jurisdiction on all questions of facts and law, against the decision of the Central Commission and a further second appeal on substantial questions of law before the Hon'ble Supreme Court.

52. No doubt, the existence of an alternative remedy is not a bar to maintainability of a petition under Article 226 of the Constitution of India, however as noticed herein above the issues that arise for consideration in these petition are well within the adjudicatory powers of the Central Electricity Regulatory Commission.

53. The settled position of law is that *the power to issue prerogative writs under article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution.*



The High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction.¹

54. In the present case, there is no challenge to the Regulations. The dispute is with regard to the interpretation of Regulation 17 and its enforcement, which, is clearly within the domain of the Regulatory Commission as also the Appellate Tribunal.

55. Admittedly, petitioner's allocation from the Dadri – I generating station is only 1.19% and two other licensees of Delhi – BSES Rajdhani Power Ltd and BSES Yamuna Power Ltd., having over 75% allocation from the Dadri – I generating station, had approached CERC with regard to the interpretation of Regulation 17 and CERC by order dated 01.07.2021 has held the PPA to be effective and binding between the parties till the date of its re-allocation by Ministry of Power. Said order has been challenged before the Appellate Tribunal for Electricity and the Appeals are pending.

56. In view of the above, it would not be expedient for this court to exercise jurisdiction under Article 226 of the Constitution of India,

¹ *Whirlpool Corporation Versus Registrar of Trade Marks (1998) 8 SCC 1*



particularly when, other similarly situated licensees, having over 75% of the allocation from Dadri – I generating station as compared to 1.19% of the Petitioner, have already availed of the alternative remedy of statutory resolution mechanism.

57. Accordingly, the petitions are dismissed. Petitioner is relegated to avail of its remedy before the Central Electricity Regulatory Commission.

58. It is clarified that nothing stated herein shall amount to an expression of opinion on the merits of the contentions of either party. All rights and contentions of parties are reserved.

59. Copy of the order be uploaded on the High Court website and be also forwarded to learned counsels through email by the Court Master.

JANUARY 17, 2022
‘HJ’

SANJEEV SACHDEVA, J