

Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal No. 166 of 2005

Dated this 11 day of May 2006

Present : Hon'ble Mr. Justice E Padmanabhan, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

M/s Central Coalfields Limited
Through its General Manager
Darbhanga House, P.O. Darbhanga House
P.S. Kotwali, District Ranchi, Jharkhand

.....Appellant

Versus

1. Jharkhand State Electricity Regulatory Commission
Through its Secretary
2nd Floor, Rajendra Jawan-cum-Sainik Bazar
Main Road Ranchi, Jharkhand

2. M/s D.L.F Power Limited
Through its Director
D.L.F. Galleria
12th Floor, Phase – IV
D.L.F. City, Gurgaon
Haryana - 122002

.....Respondents

For Appellant

M/s Ajit Kumar Sinha, A Sharan, and
Amit Anand Tiwari, Advocates

For Respondents

Mr. S Shrivastava, Advocate and Mr. A.K.
Mehta, Secretariat, JSERC. (Respondent
No.1)
M/s S. Ganesh, Sr. Advocate, K
Budhiraja, A Dhingra, C K Ram, N Menon
and R Mathur, Advocates for DLF Power
(Second Respondent)

JUDGMENT

1. This appeal has been preferred by M/s Central Coalfields Limited through its General Manager seeking to set aside the order dated 4.12.2004 as amended by order dated 28.2.2005 passed by the Jharkhand State Electricity Regulatory Commission, Ranchi in case No.5 / 2004-05 and pass such further or other orders as this Appellate Tribunal deems fit. The appeal is being resisted by the Respondents.

2. Heard Mr. Ajit Kumar Sinha, Mr. A Sharan and Mr. Amit Anand Tiwari Advocates appearing for the appellant. Mr.S Shrivastava, Advocate appearing for the first Respondent Regulatory Commission and Mr. S Ganesh, Senior Advocate appearing along with M/s K Budhiraja, A Dhingra, C K Ram, N Menon, R Mathur Advocates for second Respondent.

3. The counsel for the appellant as well as contesting Respondents made their respective submissions in the appeal. During the hearing, this Appellate Tribunal raised the question relating to jurisdiction of the Regulatory Commission in passing the orders under appeal as well as this Appellate Tribunal to entertain the appeal. On this, the counsel on either side took time and made their submissions. In the nature of the proceedings, it may not be necessary to set out the details of the case and counter case of the parties and it would be sufficient to refer to brief facts.

4. The appellant herein is a subsidiary of M/s Coalfields India Limited, a Government of India undertaking. The appellant is engaged in the business of raising and selling of coal. The appellant is also a bulk consumer of electricity. The appellant decided to have a captive power plant to get uninterrupted power supply for the smooth mining

operations. After following the formalities prescribed, the second Respondent was selected by a bidding process to set up a captive power plant at Rajrappa and Giddi.

5. Accordingly on 8.2.2003, the appellant and the second Respondent entered into a power purchase agreement (PPA) to build and operate a captive power plants based upon Fluidized Bed Combustion technology using washery rejects on “Build own & Operate” basis. The said PPA prescribed various terms and conditions agreed to between the parties. For the first year, tariff was Rs.1.20 per unit in terms of the said agreement. For the second year onwards tariff has to be revised taking into consideration of all variation in capital cost, etc., as stipulated in the agreement. Differences arose between the appellant and the second Respondent with respect to fixation of tariff for the second and subsequent years.

6. The PPA entered between the parties contained a arbitration clause which reads thus:

“In the event of any dispute arising out or in relation to this agreement the same shall be referred to the sole arbitration of an Arbitrator actually acceptable to M/s Coalfields India Limited and DPCL as per the provisions of the Arbitration Act 1940.”

There is no doubt that the said arbitration clause is binding on the parties nor they have disputed the enforceability of said arbitration clause.

7. As per the PPA, the second Respondent has to “build, own and operate” the power plant and the entire power generated by the second Respondent shall be supplied to the appellant. The captive power plant is located within the area of coal fields and required transmission lines have been put up by the second Respondent and power from CPP is

being supplied to the appellant continuously and exclusively for its coal fields. There is no other agency involved either in the generation or transmission or wheeling of the power excepting the second Respondent who generates and transmits to the appellant herein exclusively. It is a direct sale of power generated by the second Respondent exclusively to the appellant through their own dedicated transmission lines.

8. Concedingly both the parties moved the first Respondent Jharkhand State Electricity Regulatory Commission and invited the said Commission to resolve the tariff dispute. The second Respondent also sought for redressal of other grievances. The difference between the parties relate to tariff fixation of power generated by the second Respondent for being sold exclusively to the appellant. As it is an exclusive sale, the Commission had dispensed with the obligation of publication prescribed for tariff fixation. Further all the materials were furnished by both sides to the dispute. By its order dated 4.12.2004 first Respondent fixed the tariff. As certain clerical / arithmetical errors were noticed, the Regulatory Commission amended the tariff order dated 4.12.2004 on 28.2.2005. Challenging the same, the appellant moved the Hon'ble High Court of Jharkhand at Ranchi in WP (C) No .4052 of 2005. Subsequently, the appellant sought permission to withdraw the writ petition to avail the remedy of appeal under The Electricity Act 2003. The Hon'ble High Court by order dated 9.9.2005 allowed the appellant to withdraw the appeal with liberty to move this Appellate Tribunal. Thereafter the present appeal has been filed on 4.10.2005. The appeal was entertained and notice was ordered to the Respondents. It may not be necessary to set out the details of the order / award passed by the Regulatory Commission with respect to tariff as per PPA entered between CCL and DLF. It is true that the Regulatory Commission which invited both sides to resolve the dispute after affording opportunity to either side

had fixed the tariff and it is by way of resolution of dispute simpliciter between the parties.

9. During the hearing this Appellate Tribunal raised the issue relating to the jurisdiction of the Regulatory Commission in entertaining the tariff application filed by either side under The Electricity Act 2003 and also the jurisdiction of this Appellate Tribunal to entertain the appeal as against the said determination by the Regulatory Commission. On this point, counsel on either side made their submissions after taking adjournment. Detailed arguments were advanced with respect to the issue of jurisdiction raised by this Appellate Tribunal.

10. In this appeal, the following points arise for consideration.

- i. Whether the Regulatory Commission has the authority and jurisdiction to fix the tariff with respect to sale of power generated by the second Respondent generator to the appellant, the exclusive consumer of power supplied through their own dedicated transmission line?
- ii. Whether the Regulatory Commission has resolved and decided the dispute between the appellant and the second Respondent in terms of the arbitral clause in the agreement by invitation ?
- iii. Whether the order of the Regulatory Commission is by way of resolution of arbitral dispute between the parties in terms of the arbitral clause in the PPA entered between the appellant and the second Respondent ? Whether such fixation is an arbitral award binding on the parties?
- iv. Whether as against the award of the Regulatory Commission resolving the dispute relating to tariff, in terms of arbitral clause in the agreement and on invitation by parties an

appeal is maintainable under Section 111 of The Electricity Act 2003?

v. To what relief, the appellant is entitled to?

11. Since the jurisdictional issue was raised by us, we have not heard the arguments with respect to the merits of the case and counter case and therefore, it is not necessary for us to examine the merits of the award / order passed by the Regulatory Commission. We will consider the points together as the discussions will be overlapping.

12. The appellant and the second Respondent entered into an agreement on 8.2.1993 containing various mutually agreed stipulations and terms to develop whole washery reject based power plant on “Build own & Operate” principle on the land provided by the appellant. Initially, it was bilaterally agreed that the charges payable for supply of energy to the appellant from the said power plant for a period of one year after commissioning at Rs.1.20 per unit and they also agreed for tariff variation on account of variation in capital cost and change in CEA / Government guidelines. A formula has also been stipulated in the agreement for each plant apart from the criteria for fixation of tariff. In the agreement both the parties have agreed to resolution by arbitration which clause reads thus:

“2.6 In the event of any dispute arising out of or in relation to this agreement the same shall be referred to the sole arbitration of an arbitrator actually acceptable to CIL & DPCL as per provisions of Arbitration Act 1940.”

13. The appellant submitted a formal application for adjudication before the first Respondent Regulatory Commission for redressal of four grievances including tariff fixation of power house constructed under “build, own & operate” principles located at Rajarappa and Giddi in Jharkhand State on 14.1.2004. So also the second Respondent on

6.4.2004. The second Respondent also sought for resolution of the disputes which arose under the very PPA. By an MOM dated 12.7.2004 both, the appellant and the second Respondent, requested the Regulatory Commission to fix the tariff and it is a joint invitation to resolve the dispute by the expert body, whom they have chosen jointly. The Commission referred to the stipulations entered between the parties and on the basis of the stipulations agreed to between the parties proceeded to resolve the dispute relating to tariff. The Commission in fact dispensed with the publication of tariff proposal as it is between two parties, who have entered into a commercial venture and who invited it to resolve the dispute.

14. The Commission in its order, recorded thus:-

“In view of the above the Commission observed that this is a very strange case. On 12.07.2004 both the parties had agreed and prayed that the Commission should fix the tariff.

Thereafter when the proceeding started, the CCL-respondent was trying to back out. It was therefore, observed that since the petition had become a joint [petition on 12.07.2004 it cannot be withdrawn by the respondent alone where the petitioner had refused to agree to the respondent’s proposal. Interestingly the respondent had not even approached the petitioner for such settlement. On 06.09.2004 the respondent-CCL by a letter requested the Commission to ignore their letter dated 26.08.2004 in which it was requested that the tariff fixation may be kept in abeyance. They have further requested for (i) fixation of tariff, (2) direction to DVC for synchronization of power plant with DVC grid (3) direction to JSEB for changing differential bill and (4) removal of unauthorized connection of JSEB from CCL’s transformer. The Commission after considering this

passes the order to take the 2,3, and 4th issues with the concerned licensees by the respondent.”

15. While following the stipulations agreed to between the parties, the Commission fixed the tariff for the period 2001 to 2005. As there were certain arithmetical and clerical mistakes, the Commission at the instance of the appellant rectified the same and there was no substantial change at all by the rectification ordered by the Commission. It is also to be pointed out that the Commission had proceeded as if it is to fix the tariff under Section 86 of The Electricity Act 2003 but the principles followed in resolving the tariff dispute is not in terms of the Regulations framed under Section 61 nor it had chosen to determine the tariff in terms of Section 62 of The Electricity Act 2003.

16. The parties have spent considerable time and money before the Regulatory Commission for resolving the dispute relating to the tariff in terms of arbitral clause. The Commission which was invited to resolve by both parties, after examining the respective cases of the parties in terms of the parameters agreed to between the parties as seen from the PPA, resolved the dispute relating to tariff that has arisen between the parties by way of arbitration.

17. Hacking back to the main issue, it is not in dispute that there is statutory requirement of obtaining license for generation of power under the Act. Section 7 is clear in this respect and what it mandates is compliance of technical standards relating to connectivity with the grid referred to in clause (b) of Section 73. With respect to captive generation also, as seen from Section 9, a person may construct, maintain or operate a captive generating plant as well as dedicated transmission lines. Proviso to Sub-Section (1) of Section 9 provides that the supply of electricity from the captive generating plant through the grid shall be

regulated in the same manner as the generating station of a generating company. Sub-Section (2) provides that a person who has constructed a captive generating plant shall have the right to open access for the purpose of carrying electricity from his captive generating plant to the destination of his use. Section 10 of the Act prescribes the duties of a generating company which includes establishment, operation and maintenance of generation stations, tie-lines, sub-stations and dedicated transmission lines connected therewith.

18. Sub-Section (2) of Section 10 provides that a generating company may supply electricity to any licensee in accordance with this Act and the Rules and Regulations made thereunder and may also subject to the Regulation made under Sub-Section (2) of Section 42 supply electricity to any consumer. Such act of generation of electricity falls under Part III of The Electricity Act 2003. While licensing is provided in Part IV of The Electricity Act 2003 Section 12 of The Electricity Act 2003 mandates that no person shall transmit, distribute or undertake trading in electricity unless he is authorized to do so by a license issued under section 14 of The Electricity Act 2003. Section 14 provides for grant of license to transmit as a transmission licensee, to distribute as a distribution licensee or to undertake trading as an electricity trader. Section 15 prescribes the procedure for grant of a license. In respect of the activities of a licensee, be it a transmission licensee or be it a distribution licensee or be it a license to trade, provisions have been made in The Electricity Act 2003. In respect of distribution licensee, Part VI of The Act prescribes the duties and obligations of such licensee, its privileges to recover charges, its power to require security, power to recover expenditure, stipulations as to terms of supply and laying down the code of supply and standards of performance of licensees. Part VII provides for fixation of tariff. In terms of Section 61, the commission has to specify the terms and conditions for determination of tariff and the

Commission shall be guided by the criteria set out in clauses (a) to (i) of Section 61.

19. The Section 62 provides for determination of tariff with respect to supply of electricity by a generating company to a distribution licensee, transmission of electricity, wheeling of electricity and retail sale of electricity. There is no doubt that tariff is required to be fixed only when supply of electricity by a generating company to a distribution licensee takes place. In other words, it is a supply to a distribution licensee who has secured a license under Section 14 (c) of The Act. The transmission tariff or tariff for wheeling of electricity also is required to be fixed only in respect of transmission licensee who had secured a license under Section 14. Hedged, in this context, it is obvious that tariff is to be fixed under Section 62(1) (d) if only the retail sale is by a distribution licensee who has secured a license under Section 14(b) of The Act and it is not as if tariff has to be fixed for generation of power or every sale or retail sale of electricity for which no license is required as seen from Section 10 of The Act. Where the sale or transmission of electricity is not regulated by the license/s granted under The Act, there is no requirement at all to fix the tariff by virtue of the provisions contained in Part VII of The Act. Neither Section 63 nor Section 64 are applicable with respect to sale of electricity by a generator through its exclusive or dedicated transmission lines to an individual consumer in terms of contractual obligations entered between them.

20. The learned senior counsel appearing for contesting Respondents as well as learned counsel appearing for Regulatory Commission sought to contend that sale between the Appellant and the second Respondent generator will fall within the ambit of 'retail sale' of electricity and therefore there could be a determination of tariff under Section 62 of The Act. Much reliance is placed upon Section 62 (1)(d). The learned senior

counsel also referred to “Law Lexicon” and “Law Dictionary” in support of his contentions that the sale of power generated by the second Respondent to the appellant will fall within the purview of Section 62(1)(d) of The Act.

21. Per contra, the learned counsel appearing for the appellant contended that the sale of power by the second Respondent generator being exclusively to the appellant in terms of PPA and by no stretch it could be treated or deemed or considered as a retail sale. Though the contention of the learned counsel appearing for the second Respondent is attractive, we are not persuaded to accept the same as his contention basically overlooks the fact it is not a sale to a licensed trader / transmitter or distributor but it is a simple and direct sale between a generator and a sole purchaser in terms of a commercial agreement (PPA) entered between the parties.

22. The fixation of tariff by the Commission on the invitation of both parties in this case, if at all, could be only in terms of the agreement which the appellant and the second Respondent entered between themselves and not in terms of Part VII of The Electricity Act 2003. In fact, the parameters applied by the Regulatory Commission for tariff fixation is as contained in the agreement entered between the parties, namely, PPA.

23. Apart from the various provisions referred to by us we are fortified by the Statement of Objects and Reasons behind The Act. The salient features of the Bill as seen from the Statement of Objects and Reasons are as follows:-

- “(i) Generation is being delicensed and captive generation is being freely permitted. Hydro project would, however, need approval of the State Government and

clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilization of water resources.

- (ii) ****
- (iii) ****
- (iv) ****
- (v) ****
- (vi) ****
- (vii) For rural and remote areas stand alone systems for generation and distribution would be permitted.
- (viii) ****
- (ix) ****
- (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated.
- (xi) ****
- (xii) ****
- (xiii) ****”

24. In Kumar Jagdish Chandra Sinha v. Eileen K. Patricia D’Rozarie reported in 1995(1) SCC 164, the Hon’ble Supreme Court held thus:

“The Statement of Objects and Reasons accompanying a legislative bill cannot be used to ascertain the true meaning and effect of the substantive provisions of the legislation, but it can certainly be pressed into service for the limited purpose of understanding the background, the antecedent state of affairs and the object the legislation sought to achieve.”

25. In *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.* reported in 2004 (5) SCC 385, the Hon'ble Supreme Court held thus:

“It is now well settled that for the purpose of interpretation of a statute, the same is to be read in its entirety. The purport and object of the Act must be given its full effect by applying the principles of purposive construction.”

The object is clear and no provision is found in the enactment to cover the case on hand.

26. The learned counsel for the second Respondent placed reliance on the pronouncement of the Hon'ble Supreme Court in the *BSES Ltd. v. Tata Power Co. Ltd. and Others* reported in 2004 (1) SCC 195 and contended that it will be appropriate to interpret the Act in a broad manner and not in a narrow or restrictive sense in so far as the jurisdiction of the Commission is concerned. The learned counsel relied upon the following passage:-

“The Electricity Regulatory Commissions Bill was thereafter introduced in Parliament. The Objects and Reasons of the Act show that the main functions of the State Electricity Regulatory Commission shall be: (i) to determine the tariff for electricity – wholesale, bulk, grid and retail; (ii) to determine the tariff payable for use of the transmission facilities; and (iii) to regulate power purchase and procurement process of the transmission utilities etc. The changed scenario may give rise to problems of highly complex and technical nature between the generator, supplier and distributor of energy, which can be better resolved by technically qualified people who may constitute the aforesaid Regulatory commission.

They will have the additional advantage of taking assistance from consultants, experts and professional persons. Therefore, it will be proper to interpret the Act in a broad manner and not in a narrow or restrictive sense insofar as the jurisdiction of the Commission is concerned, so that the purpose for which the Act has been enacted may be achieved.”

27. With respect, we may point out that the generation and exclusive sale directly to Appellant in the present case is not regulated nor it falls within the purview of the Act. Hence, it is clear that the Commission is not called upon to fix tariff as a Regulatory Commission exercising powers under The Electricity Act 2003. In fact, Section 73 of The Electricity Regulatory Commission Act 1998 provided for getting approval when an agreement is entered between a generator and purchaser of power for the tariff before entering into such contracts. Such a function does not find a place either under Section 86 which enumerates the functions of the State Commission or under Section 79 which enumerates the functions of the Central Commission. The enumeration of functions of State Commission is found in Section 86 of The Electricity Act relate to such functions of generation or supply or transmission or wheeling or wholesale or bulk or retail within the State which are being undertaken by the licensed transmitter or distributor and in terms of license granted or existing license and not otherwise and in terms of license granted or existing license and not otherwise. Section 42 of The Act provides for introduction of open access for the use of transmission lines or distribution system by any licensee or consumer or a person engaged in generation and with respect to open access the State Commission is required to determine only the wheeling charges and surcharge thereon, if any, for such category of consumers.

28. Section 86(i) (a) reads thus:-

“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.”

29. These provisions referred to above do not require a license being secured by a generator be in CPP or IPP nor a license being prescribed by a purchaser arising out of commercial relationship between the consumer and generator nor there is any requirement to fix tariff for such commercial sale between two parties by the Regulatory Commission. Hence, in our considered view the determination of the tariff by the regulatory Commission is not in terms of provisions of The Electricity Act 2003 but it is by virtue of the provisions contained in the PPA entered between the parties and on the invitation of the parties. The learned counsel appearing for the second Respondent brought to our notice an order passed by the Regulatory Commission on 21.8.2004 which makes it abundantly clear that it is a fixation of tariff in terms of PPA existing between them. The order reads thus:

“The petition has been filed jointly by CCL which is an instrumentality of State and also the end consumer of power and M/s DLF Power Limited which is a generating company, for fixation of tariff in terms of PPA existing between them.”

Since this is a case of PPA already existing between two parties and also that it is a joint petition, there is no need for publication of notice and for public hearing for finalizing the tariff order as well as for sending the tariff order to other agencies or government.”

A perusal of the tariff determination by the Regulatory Commission would show that the tariff has been fixed taking into consideration of the parameters agreed to between the parties to the dispute and various stipulations contained in the PPA.

30. There is no controversy pursuant to the invitation made in writing by the appellant and the contesting Respondents alone as found in the order, the Commission has taken up on itself to resolve the dispute relating to tariff fixation in terms of PPA. The PPA contains an arbitration clause and both the parties approached the commission for resolution of the said dispute. In the light of the discussion, in the light of the stipulations contained in the agreement as well as the manner in which the parties have participated with full knowledge and consent, as and by way of resolution of dispute in terms of arbitration clause in the PPA, we are well founded in holding that the Commission has just resolved the dispute between the parties in terms of the arbitration clause agreed to between them as an arbitral Tribunal on joint request or invitation or appointment. Therefore, the determination of tariff by the Regulatory Commission is by way of an arbitral award and it has to be given the same weight and effect as an arbitral award. We hasten to add that it is not a tariff determination in terms of the provisions of The Electricity Act 2003. In other words at the risk of repetition we hold that it is an award by the Regulatory Commission which it was invited to resolve as an expert body by both the parties in terms of the PPA and in terms of stipulations agreed to between themselves as well as MOM.

31. There is no difficulty in holding that that the present dispute is not a dispute, which is required to be determined by arbitration in terms of Section 158 of The Electricity Act 2003. In fact, the learned counsel for the first Respondent Regulatory Commission had taken a stand that the resolution of the dispute between the appellant and the second Respondent for resolution of tariff was pursuant to the agreement entered between the parties, at the invitation by both the parties and the Commission proceeded on the request of both the parties to resolve the tariff dispute as an expert body in terms of PPA. It is also a stand of the learned counsel for the Regulatory Commission, as an expert body it has acted as an arbitrator to resolve the dispute as it was mutually agreed upon between the parties. In this respect, in a recent pronouncement their Lordships of the Supreme Court while summarizing the law on the subject, in *Dharma Prathishthanam v. Madhok Construction (P) Ltd.* reported (2005) 9 SCC 686 held thus :

“The essence of arbitration without assistance or intervention of the court is settlement of the dispute by a tribunal of the own choosing of the parties. Further, this was not a case where the arbitration clause authorized one of the parties to appoint an arbitrator without the consent of the other. Two things are, therefore, of essence in cases like the present one: firstly, the choice of the tribunal or the arbitrator; and secondly, the reference of the dispute to the arbitrator. Both should be based on consent given either at the time of choosing the arbitrator and making reference or else at the time of entering into the contract between the parties in anticipation of an occasion for settlement of disputes arising in future. The law of arbitration does not make the arbitration adjudication by a statutory body but it only aids in implementation of the arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference.”

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“The Constitution Bench in *Khardah Co. Ltd. V Raymon & Co. (India) (P) Ltd.* decided the issue from the viewpoint of jurisdictional competence and held that what confers jurisdiction on the arbitrators to hear and decide a dispute is an arbitration agreement and where there is

no such agreement there is an initial want of jurisdiction which cannot be cured even by acquiescence. It is clearly spelled out from the law laid down by the Constitution Bench that the arbitration shall derive their jurisdiction *from the agreement and consent.*”

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32. Once we conclude that it is an arbitral award there could be no challenge before this Appellate forum as against the resolution of tariff dispute.

33. This Appellate Tribunal has been established under Section 110 of The Electricity Act 2003. Section 111 provides for an appeal to this Appellate Tribunal. Before this Appellate Tribunal any person aggrieved by an order made by an adjudicating officer or an order made by the appropriate Commission under this Act may prefer an appeal. There is no doubt that this Appellate Tribunal is a special forum constituted under Section 110 of The Electricity Act 2003.

34. Being a creature of the Statute, it is not open to this Appellate Tribunal to travel beyond the provisions of The Electricity Act 2003. Our attention is drawn to the dictum of the Hon’ble Supreme Court in *D.Ramakrishna Reddy v. Addl. Revenue Divisional Officers 2000 (7) SCC: AIR 2000 SC 2723*. In the said pronouncement their Lordships held thus:

“The Tribunals are creatures of the Act and it is not open to them to travel beyond the provisions of the statute. The High Court while examining the correctness or otherwise of the order passed by the Tribunal or any action taken by an officer under the Act is also to be guided by the provisions of the statute.”

35. The decision of the Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission Vs CESC Limited, which has since been affirmed by a latter three judges bench of the Supreme Court in M/s Clariant International Limited and another Vs Securities & Exchange Board of India reported in 2004 (8) SCC 524. In the said pronouncement it has been held thus:

“78. In Cellular Operators Assn. of India v. Union of India²⁵ this Court observed: (SCC p.211, para 27)

“TDSAT was required to exercise its jurisdiction in terms of Section 14-A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub-section (7) of Section 14-A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of jurisdiction of court or a tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by Parliament in the amending Act of 2000. TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law.”

79. The Court noticed the celebrated book Judicial Review of Administrative Law by H.W.R. Wade and C.F. Forsyth and held: (SCC pp. 212-13, paras 31-33)

“31. The rule as regard deference to expert bodies applies only in respect of a reviewing court and not to an expert Tribunal. It may not be the function of a court exercising power of judicial review to act as a supermodel as has been stated in *Administrative Law* by Bernard Schwartz, 3rd Edn., in para 10.1, at p. 625; but the same would not be a case where an expert Tribunal has been constituted only with a view to determine the correctness of an order passed by another expert body. The remedy under Section 14 of the Act is not a supervisory one. TDSAT’s jurisdiction is not akin to a court issuing a writ of certiorari. The Tribunal although is not a court, it has all the trappings of a court. Its functions are judicial.”

36. In *Associated Cement Companies Ltd. V. P. N. Sharma* reported in AIR 1965 SC 1595, as well as in *J.K. Iron & Steel Co. Ltd. V. Mazdoor Union* reported in AIR 1956 SC 231 the Hon’ble Supreme Court has laid down that tribunals are created in the strict sense of the term and they have to discharge quasi-judicial functions and their powers are derived from the statute that creates them and they have to function within the limits imposed there and to act according to its provisions.

37. It is the settled law that when jurisdiction upon the Court or a Tribunal is conferred by a statute the same is to be construed there in and not there of. The powers of the Tribunal are no doubt limited and its jurisdiction is clearly defined. Within the bounds of its jurisdiction the Tribunal has all the powers expressly and impliedly granted. It, therefore, follows that a Tribunal can only have such powers as are truly incidental and ancillary for doing of such acts employing all such means as are reasonably necessary to make the grant effective.

38. The jurisdiction of this Appellate Tribunal as seen from Section 111 and 121 is limited to the matters enumerated there in.

Section 111 (i) reads thus:-

“Any person aggrieved by an order made by an adjudicating officer or an order of Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity.”

Section 111(3) reads thus:-

“On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.”

Section 111 (6) reads thus:-

“The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.”

The entirety of power as spelt out in Section 111 could be exercised by this Appellate Tribunal only as against an “order” passed by the Appropriate Commission or adjudicating officer. The word “order” as appearing in Section 111 definitely means a decision or adjudication on certain right or liability or claim or regulatory act or adjudication by the specified authority and only against such order an appeal is provided for in the Act.

39. In the light of the above discussions, we are of the considered view that as against the resolution of dispute between the appellant and the second Respondent pursuant to invitation in terms of arbitral clause, which is an award in terms of the PPA, no appeal is maintainable under Section 111 nor we have jurisdiction or authority to entertain an appeal under Section 111 or examine the issues on merits with respect to such resolution of dispute by an arbitral Tribunal or an expert forum. Not being an order falling under any of the provisions of The Electricity Act 2003, with respect to which alone an appeal is maintainable, we hold that the appeal is incompetent, not maintainable and deserves to be rejected.

40. Once we come to the conclusion that the resolution of dispute by the Regulatory Commission is by way of Arbitration in terms of PPA and on joint invitation, the arbitral award passed by the Regulatory Commission as an expert body has all the force and adjunct of an award passed by an Arbitral Tribunal in terms of The Arbitration and Conciliation Act 1996.

41. In the result

- i. On the first point, we hold that the Regulatory Commission has neither the authority nor jurisdiction in terms of The Electricity Act 2003 to fix a tariff between the appellant, a consumer and the second Respondent a generator being a commercial transaction pure and simple, which relationship is governed by an existing PPA. We also hold that it is not an order or a tariff determination / order by the Regulatory Commission falling under one or more the provisions of The Electricity Act 2003, which alone is appellable.
- ii. On the second point, we hold that the Regulatory Commission as an expert Arbitral Tribunal has resolved the

dispute as referred to it by parties to the dispute on invitation and it is an award in terms of the PPA entered between the parties and it is enforceable as it has all the force of an arbitral award passed by a validly constituted Arbitral Tribunal.

- iii. On the third point, we hold that no appeal is maintainable before the Appellate Tribunal for Electricity and appeal deserves to be rejected as not maintainable, as it is not in dispute that in law as against the award of an Arbitral Tribunal no appeal is maintainable before this Appellate Tribunal.
- iv. On the last point, we hold that the resolution of dispute by the State Regulatory Commission is by way of arbitral proceedings and it is an award which is binding on the parties. We have neither the jurisdiction nor authority to interfere with the impugned resolution of tariff by way of arbitration and
- v. In the result, all the points are answered against the appellant and the appellant is not entitled to any relief in this appeal.

42. In the result, we dismiss the appeal as incompetent and not maintainable and the appeal is rejected accordingly.

Pronounced in open court on this 11th day of May 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

The End