BEFORE THE APPELLATE TRIBUNAL FOR ELECTRCITY
(APPELLATE JURISDICTION)

APPEAL NO. 172 OF 2010

Dated : 18th May, 2011

Coram; Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial member

In the matter:

Bihar Steel Manufacturers Association,
307, Ashiana Tower, Exhibition Road,
Patna- 800 001. …Appellant (s)

Versus

1. Bihar Electricity Regulatory Commission,
   Vidyut Bhawan-II,
   Bailey Road, Patna 800 001.

2. Bihar State Electricity Board,
   Vidyut Bhawan,
   Bailey Road, Patna 800 001. …Respondent(s)

Counsel for the Appellant : Mr. Amit Kapur
Mr. Buddy A Ranganadhan
Mr. Abhishek Mitra
Mr. Hasan Murtaza
Mr. Arjun Lal
Mr. Apoorva Misra
M. Poonam Verma

Counsel for the Respondent: Mr. Kailash Vasdev
Mr. Mohit Kumar Shah
Mr.Gopal SinghAshish Bernad for R-1
Mr. Ravi Bhushan
Mr. Samuel Haque
Mr. Aabhas Parimal

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. Questions more on law than on facts are involved in this appeal preferred by the Bihar Steel Manufactures Association against the order dated 30.03.2010 whereby the Bihar Electricity Regulatory Commission, the respondent no 1 herein, on the application dated 10.12.2009 of the respondent no.2, the Bihar State Electricity Board approved levy of fuel and power purchase cost adjustment charges at the rate of 69 paise per unit for the period during October,2008 to March,2009 and the order dated 19.05.2010 whereby the same charges were levied for the period from April 2009 to September, 2009 on the application dated 08.02.2010 filed by the said Board.

2. The appellant is an association of High Tension Specified Service Consumers of the second respondent having nineteen consumers each of whom operates induction furnaces with a dedicated transmission line directly connected with the grid/substation of the said respondent no 2.

3. The State Commission on 24.04.2007 notified the Bihar Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations,2007 (Regulations,2007,for short) of which regulations 3,12,18,19,21,32 , and 83 which we will reproduce later will be relevant for the purpose of adjudication of the dispute.

4. Upon submission of the application for determination of annual revenue requirement and tariff for the years 2008-09 by the Bihar State Electricity Board, the Respondent No. 2 herein, the Commission passed a

tariff order on 26th August, 2008 for the FY 2008-09 and directed the Board to introduce multi year tariff from the year 2010-11. It also set out a formula for determination of the charge for fuel and power purchase cost adjustment subject to several conditions which are reproduced below.

"The approved (FPPCA) formula is subject to following conditions:

(i) The basic nature of FPPCA is 'adjustment' i.e. passing on the increase or decrease, as the case may be.

(ii) The operational parameters / norms fixed by the Commission in this tariff order shall be the basis of calculating FPPCA charges.

(iii) Incremental cost of power purchase due to deviation in respect of generation mix, power purchase at higher rate, etc. shall be allowed only if it is justified to the satisfaction of the Commission.

(iv) Any cost increase by the Board by way of penalty, interest due to delayed payments, etc. and due to operational inefficiencies shall not be allowed.

(v) FPPCA charges shall be levied on all categories of consumers, except agriculture and BPL consumers.

(vi) The data in support of FPPCA claims shall be duly authenticated by an officer of the Board, not below the rank of Chief Engineer on affidavit.

(vii) Variation of FPPCA charge will be allowed only when it is five (5) paise and more per unit.

(viii) The FPPCA charges shall be reviewed by the Board for the first time after six months from the date of implementation of this order and every six months thereafter.

(ix) The approved formula is subject to review, as the Commission may deem fit. Since the operational parameters for generating stations of BSEB are not approved by the Commission in the tariff order, the Board shall submit the operational parameters of the

power plants after R&M of the plant and get the parameters approved by the Commission before implementation of the fuel cost adjustment provision".

5. Against this tariff order dated 26th August, 2008 some consumers, the appellant included, preferred appeal being No. 126 of 2008 and appeal No. 128 of 2008 before this Tribunal which disposed of the same by a common judgment and order dated 12th February, 2009.

6. Against this factual background it is now contended that the Board on 10.2.2009 filed application before the Commission for levy of fuel and power purchase cost adjustment charge to the consumers for the period from October 2008 to March 2009 in terms of fuel and power purchase cost adjustment formula stipulated in the tariff order dated 26.8.2008 for FY 2008-09. Similarly, on 8.2.2010 the Board made similar application for levy of

fuel and power purchase cost to the consumers for the period from April, 2009 to September, 2009 in terms of the said formula. In neither of the applications the appellant association was made party thereto, nor any opportunity was given to the appellant herein of being heard. The Commission passed two orders dated 30.3.2010 and 19.5.2010 allowing the levy of fuel and power purchase adjustment cost at 69 paise in each of the cases for each of the periods mentioned above. The orders were not communicated to the appellant which came to know of it only when it received the bill dated 6.8.2010 wherein the two orders were mentioned.

7. Against these facts it is now contended by the appellant as follows:

a) No prior notice nor opportunity of hearing was given to the appellant.

b) The orders were not communicated to the appellant.

c) Claim for enhanced fuel and power purchase cost adjustment charges is subject to precondition of submission of operational parameters by the Board and getting approval of the same through the Commission which have not yet been done.

d) Without approval of the operational parameters fuel and power purchase cost adjustment formula is unworkable.

e) The orders impugned are violative of section 64 and section 86 (3) of the Act read with Regulation 18 and 19 of the Tariff Regulations.

f) The said impugned orders are again in violation of the Regulation 21 of the Tariff Regulations mandating therein that the formula must be “specified “in terms of the regulations notified by the Commission. Under section 2 (62) of the Electricity Act the word “specified” means to be

specified by the regulations to be made by the Commission.

g) There is no provision in the Act that empowers the Commission to pass a provisional fuel and power purchase cost adjustment charge and fuel and power purchase cost adjustment charges can only be considered on the basis of audited actuals. As admitted in the tariff petition for the year 2010-11 filed by the Board, audit of the annual accounts for the financial year 2007-08 is under progress and the Commission has no jurisdiction to pass the provisional fuel and power purchase cost adjustment charges.

h) The Commission in both the orders excluded the power exchange from Nepal on the ground that it is a bilateral transaction irrespective of the fact that the said exchange of power is admittedly sale and purchase of power against a specified tariff rate.

i) The Commission in the tariff order should have excluded cost increase by way of penalty/interest due to delayed payment etc. and also due to operational inefficiencies in calculation of fuel and power purchase cost adjustment.

j) The Commission has not segregated the power purchase cost into fixed/capacity charges, variable charges and delayed payments surcharge.

k) The Commission did not follow section 61(a) and section 62(4) of the Act.

Accordingly, prayer has been made to set aside the orders dated 30.3.2010 and 19.5.2010 and to remand the matter to the Commission for de novo consideration.

8. The Respondent No. 2, the Bihar State Electricity Board did not file any counter affidavit in response to

the memorandum of appeal but filed a written a note of argument on 8.4.2011 which covers all the points raised by the appellant and which inter alia invokes Explanation IV to Section 11 of the Civil Procedure Code and the provision of Order 2 Rule 2 of the said Code. The State Commission did not file any counter.

9. According to the Board, the formula for fuel and power purchase cost adjustment (FPPCA) has been challenged neither in this appeal not in the previous appeal No. 126 of 2008 and 128 of 2008 decided on 26.8.2008. The appellants' sole concern is with respect to the rate at which the Board is required to recover FPPCA charge. But the fact is that upon consideration of material and relevant facts and objections raised by the objectors and upon public hearing the tariff order was passed which provides for formula for FPPCA. The said tariff order dated 26.8

.2008 was challenged in the aforesaid two appeals but the Tribunal dismissed the appeals by the order dated 12.2.2009. In that view of the matter the appellant cannot in the garb of the present appeal seek to challenge the FPPCA formula. In this connection, the rule of the constructive *res judicata* and also the provision of Order 2 Rule 2 of the Civil Procedure Code has been invoked by the respondent Board. Some decisions of the Hon'ble Supreme Court have been cited on the two aforesaid principles which we will consider at appropriate places of the judgment. In a word it is contended that that the appellant is estopped from raising any challenge to the FPPCA formula in the present proceedings because it was not challenged in the earlier appeal. It was open to the appellant to make such challenge in the earlier appeal. On the question of notice it is contended that there is no requirement of issuance of any prior notice or granting opportunity to file objections before passing

the impugned orders in view of the fact that the Commission was not determining tariff but only scrutinizing the authenticity of the computation of the FPPCA rate according to the formula prescribed and approved by it. It is contended that word “specified” does not connote the meaning as given in the Act. Section 62 (4) clearly provides that a tariff cannot be amended more frequently than once in any financial year except with respect to any charges expressly permitted under the terms of any fuel surcharge formula as may be specified by the Regulations. The section does not prohibit the Commission from determining fuel surcharge formula while determining the tariff. As such, the formula cannot be challenged. With regard to the point that the precondition laid down in the tariff order dated 26.8.2008 to the effect that the Board shall submit operational parameters of the power plant after R& M of the plant and seek the approval by the Commission of such parameters it is

contended that the Commission in the tariff order dated 26.8.2008 has already fixed the operational parameters for the Board's own generation; as such it is not correct to say now that FPPCA formula is unworkable. Still then the Commission has deducted a sum of Rs.2.31 crore for the period from October 2008 to March 2009, and a sum of Rs.3.76 crore for the period from April 2009 to September 2009 in view of the fact that the Board spent less amount on the head of fuel cost in comparison to what has been approved by the Commission. It is also contended that UI charges are not included and the said UI charges paid by the Board is not on account of grid indiscipline but the same has been paid on account of the fact that the Board's major source of power is the purchase from other agencies like NTPC and NHPC etc. As regards exclusion of power from Nepal, the Commission kept the same out of the purview of the said formula in as much as the rates for

supply/purchase of energy to and from Nepal is fixed by the Central Government. Alleged non-communication of the order cannot be a ground to impugne the orders in question and the Board incurred the increased cost for purchase of power from various sources and is entitled to have the cost realized from the consumers. The Board's annual accounts for the period 2008-09 was already approved by the Board and then was submitted to the AG Bihar and then only the Commission approved provisional FPPCA. The annual accounts for 2009-10 are under preparation. The tariff order nowhere precludes the Board from calculating FPPCA charges on the basis of un-audited accounts. FPPCA is only an adjustment on account of variation in fuel cost and power purchase cost which is not an exercise for fixation of tariff which has already been fixed and only the components of FPPCA formula has to be determined for calculation of the rate. The impugned orders are, therefore, not in

violation of section 64 and 86(3) of the Electricity Act, 2003 or Regulation 18 and 19 or 21 of the Tariff Regulations. Accordingly the appeal is meritless.

10. The issues are:

1) Whether the impugned orders are in violation of section 64 and 86(3) of the Act and Regulation 18 and 19 of the Tariff Regulations.
2) Whether the FPPCA formula is violative of Regulation 21 of the Tariff Regulations, 2007?
3) Whether the Commission has ignored the compliance with section 61(a) and section 62(4) of the Act.
4) Whether the Commission acted in violation of principle of natural justice?
5) Whether the condition laid down in the tariff order dated 26.8.2008 was a precondition before exercise of jurisdiction by the Commission?

6) Whether the appeal is hit by the rule of constructive res judicata and the provision of Order 2 Rule 2 of the CPC?

7) Whether computation of FPPCA is a tariff determination exercise?

11. Mr. Amit Kapur, learned Counsel appearing for the appellant has raised the above issues which are being discussed comprehensively because barring issue No.6 all the other issues overlap one another. At the outset this is to place on record that subject to certain observations which we reproduce below the aforesaid two appeals preferred against the tariff order dated 26th August, 2008 were dismissed. The observation which the appellant lays great stress is as follows:-

"14. Before parting with this order, we would direct that the Commission draws a road map for

drastic reduction of Transmission and Distribution losses and the Board should implement the same. Inadequate resources and organizational deficiencies of the Board cannot be an excuse for increase in tariff due to excessive T&D losses. The Commission is not powerless to ensure that its instructions are carried out by the Board meticulously. Allowing the T&D losses of over 46% is nothing sort of criminal wastage of scarce energy source and is, therefore, deprecated. The Board has to sit its house in order. The consumers at large cannot be made to bear the brunt of inefficiency and mismanagement of the Board. The Commission is directed to monitor the T&D loss reduction programme of the Board quarterly and send report to this Tribunal with its own evaluation of the progress made by the Board. First such report should be submitted on 1st July, 2009.

15. We also note with concern that whereas, the Act requires 100% metering, the Commission in its reply has stated that historically the Board has not metered the rural and agricultural load, domestic and commercial consumption except in a few cases. This is a case of blatant violation of section 55 of the Act. The Commission is directed to monitor progress on the trajectory projected by it to achieve 100% metering and report the same to the Tribunal along with the report on T&D losses."

12. The above two paragraphs are the last paragraphs of the judgment and they constitute direction upon the Commission so that the deficiencies noticed in the functioning of the Board could be got corrected by the supervision of the Commission by drawing a road map for the purpose indicated above. So far as the merits of the appeal are concerned, this Tribunal held *"the impugned order does not call for*

any interference. Both the appeals are accordingly dismissed"

13. The aforesaid judgment of this Tribunal revealed that four issues were raised by the appellants in those two appeals including the present appellant and they were (a) though the unaudited accounts for the FY 2006-07 of the Board showed a surplus of Rs.56.28 crores the Commission did not take this surplus into account while fixing tariff for the 2008-09, (b) by allowing transmission and distribution losses of 38% the Board created a deficit of Rs.160 crores in the ARR for 2008-09. (c) by not taking category-wise cost of supply the Commission failed to comply with the statutory requirement of progressively reducing the cross subsidy so as to bring the tariff within 20% of the average cost of supply by the FY 2010-11 for the appellants and (d) the entire proceedings of determination of ARR for the FY 2008-09 and tariff

based on such ARR are bad and erroneous as they were based on vague and non-specific data furnished by the Board. No other point was raised although it is noticeable that many a points were decided in the Commission's order dated 26th August, 2008, and in particular the said order has a section dealing with what is called '***formula for fuel and power purchase cost adjustment.'*** The formula as laid down in the said tariff order was made subject to certain conditions which we have reproduced above. The order was passed on 26th August, 2008 determining the tariff for FY 2008-09. The aforesaid appeal of the appellant against the Commission's order dated 26.8.2008 was confined to the four issues we have noticed above and no challenge was made to the enunciation of the formula called FPPCA. The matter of the fact is that in the present appeal the formula is challenged not on the ground that the

formula as such is bad or illegal but on the ground that it violates the provision of section 62 (4) of the Act which provides “no tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be **specified”** The word ‘specified’ has been defined in section 2 (62) as : “*specified means by Regulations made by appropriate Commission or the authority, as the case may be, under this Act”*

14. In order to appreciate the arguments of Mr. Kapur, it is worthwhile to read certain provisions of the Act and certain provisions of the Tariff Regulations, 2007 as they would be relevant to the issues we are considering.

“62. (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity.

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting

competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly

permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

63. Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

Procedure for tariff order.

64. (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.33

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for anyinter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor:

(6) A tariff order shall, unless amended or revoked, shall continue to be in force for such period as may be specified in the tariff order."

15. Now, we quote below the relevant provisions of the Tariff Regulations, 2007 which were gazetted on 24th April, 2007 .

"18. Decision of the Commission

The Commission shall, after considering the suggestions / objections received in response to the public notice, and the comments / remarks of the applicant thereon.

(i) issue a tariff order accepting the application with such modification or such conditions as it may consider appropriate after giving an opportunity of hearing to the applicant, the beneficiary or any person who has filed objections / suggestion or any one or more of them, if so required, before issue of tariff order.

(ii) reject the application for reasons to be recorded in writing, if the application is not in accordance with these regulations, or the Act, the rules and regulations made thereunder or a provision of any other law in force. The applicant shall be given an opportunity of being heard before rejecting the application.

19. Hearing and communication of decision of the Commission on Tariff

The Commission shall initiate a proceeding on the revenue calculations and tariff proposals given by the Transmission or Distribution licensee and hold public hearing(s) to decide on such revenue calculations and tariff proposals. Considering the proceedings of the hearing(s) as well as suggestions/objections received in response to the public notice, the Commission shall issue an order communicating its decision on the revenue calculations and Tariff proposals to the Transmission or Distribution

licensee, as the case may be. The Commission shall forward within7 days of making the order, a copy of the order to the State Government, the Central Electricity Authority, the concerned licensees and other authorities, as may be necessary.

20. Tariff publication

(1) While issuing an order as above or at any time thereafter, the Commission shall direct the Licensee for the publication of tariff determined by it, which the Transmission or Distribution Licensee shall charge from the different consumers / customers or categories thereof in the ensuing period determined by it.

(2) The Transmission / Distribution licensee shall publish the tariff, approved by the Commission in the newspapers at least in two newspapers on in English and other in Hindi language having wide circulation in its area of supply in the form and manner as directed by the Commission.

(3) The tariff as determined shall take effect from the date as given in the order of the Commission.

21. Periodicity of tariff determination and revision thereof

(1) No tariff or any part thereof shall ordinarily be amended more frequently than once in any financial year, except in respect of any charges expressly printed under the terms of the Fuel and Power Cost Adjustment formula as specified by the Commission.

(2) The orders, which the Commission may issue to give effect to the subsidy which the State Government may grant from time to time, shall not be construed as amendment to tariff. The Distribution licensee shall make appropriate adjustments for the subsidy amount as the Commission may direct."

32. Components of tariffs

(1) Tariff for sale of electricity from a thermal power generating station shall comprise of two parts,

namely, the recovery of annual capacity (fixed) charges and energy (variable) charges.

(2) The annual capacity (fixed) charges shall consist of:

(a) interest on capital

(b) Depreciation, including Advance Against Depreciation

(c) Return on equity

(d) Operation and Maintenance expenses, and

(e) Interest on working capital

(3) The energy (variable) charges shall cover fuel cost

(4) Where the existing Power Purchase Agreement (including any changes, in the norms or parameters, made in the Power Purchase Agreement following renegotiation between the integrated utility and concerned generating company) lay down different parameters, such parameters shall continue to govern the parties for the term of the contract, but not

for any renewal of the contract or any extension of the term of the contract subsequent to commencement of these regulations. Upon expiry of the existing term of PPA the parties shall be governed by the provisions contained in these regulations as amended from time to time.

83. Revision of Tariff

The Commission shall consider revision of tariff subject to the following conditions:

(a) The tariff shall be revised ordinarily once in a year except for adjustment on account of fuel and power purchase. No reimbursement of fuel and power cost shall be allowed due to excess beyond permissible technical and commercial loss and self consumption of electricity by the licensee.

(b) The tariff shall normally be revised from a prospective date with due notice except for adjustment of Fuel and Power Purchase Account unless there is compelling reason to revise the same

from a retrospective date, in which case detailed justification shall be given in writing by the Commission.

(c) If any difficulty arises in giving effect to this Regulation, the Commission may suo-motu issue a direction or order to integrated utility or the concerned licensee or the generating company, as it deems fit, duly indicating the process for overcoming the difficulties. of fuel and power cost shall be allowed due to excess beyond permissible technical and commercial loss and self consumption of electricity by the licensee.

16. Mr. Amit Kapur, learned Counsel appearing for the appellant has raised a volley of questions. According to him, the principle of natural justice has been given go by and the impugned orders which are ex parte ones were passed behind the back of the appellant

without affording the appellant an opportunity of being heard. Further more, the orders impugned here are adhoc determination of the tariff. No notice was issued to the persons likely to be affected by the impugned order.

16.1 Secondly, in fact, the order impugned is not simply a fuel surcharge determination but is beyond that and impermissible in the law.

16.2 Thirdly, the FPPCA in terms of section 62 (4) is required to be specified in the Regulations which has not been done in this case and as a result where there is no regulation providing for FPPCA the Commission cannot lay down any formula in a tariff order. When, it is argued by Mr. Kapur, that law requires a thing to be done in a particular way the thing has to be done in that way or not at all.

16.3 Fourthly, the FPPCA laid down by the Commission in the Tariff Order dated 26th August, 2008 is applicable only when certain conditions which we have reproduced above are fulfilled. One of the conditions is approval of the operational parameter for generating stations of the BSEB by the State Commission and unless the operational parameters are determined and made certain through the approval of the Commission the FPPCA charges will be meaningless and of no consequence. That is, without approval of the operational parameters fuel and power purchase cost adjustment formula is unworkable.

16.4 Fifthly, the orders impugned were passed in complete violation of the provision of section 64 and 86 (3) of the Act read with regulation 18 and 19 of the Tariff Regulations, 2007 framed by the State Commission. A public authority entrusted with the

discharge of public functions under the Act are statutorily required to ensure transparency while exercising and discharging function as is reminded in sub-section (3) of 86 and section 64 is a vivid description as to how such transparency has to be shown. According to Mr. Kapur the function of determination of fuel and power purchase cost adjustment charges is undoubtedly a statutory function and it forms part of the process of determination of tariff and when the Commission does so, it has to comply with all the provisions of section 64 of the Act. The Commission in the instant case was totally oblivious of the requirement of the statute, accordingly the impugned orders are not legally sustainable.

16.5 Sixthly, there is no provision in the Act that empowers the Commission to pass a provisional fuel and power purchase cost adjustment charge which

can only be considered on the basis of the audited actuals. Therefore the Commission was powerless to make the impugned orders.

16.6 Seventhly, the orders impugned were not communicated to the appellant which came to know of the orders only when it received a bill concerning the relevant financial year for payment.

16.7 Eighthly, it is not understood how the Commission could be persuaded in both the impugned orders to exclude the power exchanged from Nepal as it was a bilateral transaction.

16.8 Ninthly, the Commission unjustly excluded increase of cost by way of penalty/interest on account of delayed payment and also on account of operation inefficiencies in calculation of fuel and power purchase cost adjustment.

16.9 Tenthly, it was required of the Commission to segregate power purchase cost into fixed/capacity charges, and variable charges as also delayed payment surcharge.

16.10 Eleventh, there is no definition of fuel surcharge formula in the Act, nor is there any regulation to that effect. The determination of the tariff has to be an annual feature and there is no question of revision of tariff more than a year particularly when the regulations are silent on this point.

16.11 Twelfth, the Commission has not determined category-wise tariff and the majority of the agriculture consumers are un-metered.

17. Mr. Kapur refers to the decision in *Secretary and Curator, Victoria Memorial Hall Vs Howrah*

Gantantrik Nagarik Samiti & Ors. reported in (2010) 3 SCC 732. It is argued that the Commission faulted in not maintaining proper records and a statutory body when it exercises administrative, quasi-judicial and judicial functions, it is required of the Commission to go by the practice of keeping objectivity, transparency and fairness in the decision making process. Reason is the heart beat of every conclusion and introduces clarity in order. Without reason the order is lifeless. Absence of reasons renders the order indefensible. Mr. Kapur also takes us to the decision in *Sahara India (Firm) Lucknow v/s Commissioner of Income Tax, Central-1 and Anr. reported in (2008) 14 SCC 151.* This decision is prior to the Victoria Memorial Hall case and there is mention of *Sahara India in Victoria Memorial Hall.* In Sahara India which is a matter related to Income Tax, the law laid down is that where the exercise of power under a statutory provision leads to severe

civil consequences the principles of audi alteram partem even when is not expressly provided in the law has to be followed in pre decisional hearing. Para 14, 15, 16 and 17 of the judgment are very eloquent on this topic. It has been held that the underlying principle of natural justice formulated under the common law is to check arbitrary exercise power of the state and its functionaries. In this decision a reference has been made to *Swadeshi Cotton Mills vs Union of India reported in (1981)1 SCC 664* where rules of natural justice have been elaborately described. It has been held in Canara Bank Vs B.K. Awasthi reported in (2005) 6 SCC 321 that even though the rules of natural justice are not embodied expressly in a statute they may be implied from the nature of the duty performed under a statute. Mr. Kapur took us to a Handbook for Evaluating Infrastructure Regulatory Systems, a publication by the World Bank which deals with a

chapter on Regulatory Systems. There is chapter III dealing with 'Benchmarks for Regulatory Governance: Key Principles and Critical Standards' in which it has been observed that a regulatory system can be effective only when it satisfies three basic meta principles namely a) credibility, (b) legitimacy and (c) transparency.

18. Mr. Kailash Vasudev, learned Counsel for the Respondent No. 2, Bihar State Electricity Board submitted at the outset that the appeal itself is not maintainable, it being hit by the principle Order 2 Rule 2, Civil Procedure Code and that of the Constructive Re judicata as laid down section 11 of the Civil Procedure Code in view of the fact that the FPPCA as was vividly laid down in the tariff order dated 26th August, 2008 was so given after prolonged public hearing wherein the appellant was also a participant and the same appellant when assailed the

order dated 26th August, 2008 before this Tribunal in the two appeals as said above did not prefer to challenge the FPPCA and confined the appeals only to the four points as it would appear from the judgment of the Tribunal dated 12th February, 2009. Secondly, the concept of natural justice, absence of arbitrariness, maintenance of fair play, maintenance of transparency and objectivity with respect to which Mr. Kapur made a lengthy submission is of no avail in the instant case in view of the fact that the said concept is really not applicable given the nature of statutory duty required to be performed by the statutory authority and it does not lie in the mouth of the appellant to say that it was denied natural justice when it chose not to challenge the FPPCA meaning thereby it admitted the formula which in fact was the outcome of public hearing wherein, as said above, the appellant was present and it made its submissions. It is submitted by the learned Counsel

for the Respondent No. 2 that it is not denied that the transparency and objectivity are the hall marks of a decision making body, whether it functions in administrative or quasi-judicial jurisdictions but the provision of section 64 are not at all applicable when the Commission is duty bound to amend the tariff only in respect of changes under the terms of any fuel surcharge formula. The vary word 'formula' which does not find its berth in the impugned order for the first time and which had its origin in the order dated 26th August, 2008 connotes that it is one being the outcome of a mathematical exercise based on a principle made known previously; as such it does not require any public hearing and invitation from the public of objections and comments. Moreover, it is not the case of the appellant that formula was not discussed in the public hearing or that it was precluded from challenging the formula or that the formula by itself is defective. In a word formula as

such has not been challenged; what has been challenged is the application of the formula with reference to the rate. It is contended by Mr. Vasudev that absence of FPPCA in the regulations is of no serious consequence particularly when it has been laid down in the tariff order upon hearing all concerned. It is the Commission that exercises legislative jurisdiction to frame a regulation and upon framing the regulation it determines the tariff. It is contended that the two impugned orders were displayed on the website of the Commission immediately on pronouncement. It is also contended that the Commission in the order dated 26th August, 2008 had fixed the parameters for Board's own generation and accordingly it cannot be contended that the FPPCA is unworkable. It is also submitted that so far as UI charges are concerned, they are not included in clause IV and the said charges paid by the Board are not on account of grid indiscipline but

on account of the fact the Board's major source of power is purchase from certain agencies like NTPC and NHPC etc. Mr. Vasudev refers to the decision in *Alka Gupta vs Narinder Kumar Gupta reported in (2010) 10 SCC 141*. This decision extensively deals with the provision of Order 2Rule 2 CPC and Explanations III and IV to section 11 of the CPC. We will discuss this decision when we come to the issue. We will also read, as Mr. Vasudev cited, *Deva Ram Another Vs Ishwar Chand & Another reported in (1995) 6 SCC 733* which also contains a lengthy discussion on the above two principles. Mr. Vasudev cites a five Bench decision of the Hon'ble Supreme Court in *Direct Recruit Class II Engineering Officers' Association Vs State of Maharashtra & Ors. reported in (1990) 2 SCC 715*. This is a decision on service jurisprudence. In this lengthy decision our attention has been invited to paragraph 35 of the order which refers to a decision of the Supreme Court in *Forward*

Construction Company Vs Prabhat Mandal (Regd.) Andheri reported in (1986)1 SCC 100. These two decisions lay down the principle that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated.

19. Mr. Samuel Haque, learned Counsel for the State Commission justified its order and adopted the arguments advanced by Mr. Vasudev. Mr. Haque refers to a decision of the Hon'ble Supreme Court in *Central Power Distribution Co. & Ors. vs CERC & Anr. in appeal (Civil) 2104 of 2006* downloaded from JUDIS. NIC which inter alia deals with UI charges which according to the Hon'ble Supreme Court are a commercial mechanism to maintain grid discipline and irrespective of whether one is generator or distributor he is subject to payment of UI charges only when he does not follow the schedule. At para

24 of the judgment it has been held that the Central Commission has the power and function to evolve commercial mechanism such as imposition of UI charges to regulate discipline. Mr. Haque also refers to a decision of the Supreme Court in *Ramchandra Dagdu Sonavane (Dead) by L.Rs. & Ors. vs Vithu Hira Mahar (Dead) by L.Rs. & Ors. (Reportable)* passed in Civil appeal No. 7184-7185 of 2001. This decision also deals with the principle of res judicata.

20. It is required to see what was submitted before the Commission by the Board with regard to levy of fuel and power purchase cost adjustment (FPPCA) and the Commission's findings thereon. The submissions were identical in both the applications . The submissions of the Board were the following:-

a) Power purchase cost increased due to import of coal by NTPC at Farakka,

Kahalgaon and Talchar Thermal Power Stations,

b) The Board's own generation at Barauni TPS during Oct.08 to Mar.09 was very low and as such there was no increase in cost of generation.

c) The Board submitted two options ,i)levy of 83 paise/kWh,ii)112 paise /kWh exempting BPL(Rural),BPL(Urban)and Private Agriculture IAS-1 in either of the options and exempting IAS-II(State Tubewells), Domestic (Rural), Street Light-1 and power sold to Nepal and UI additionally in respect of the second option. .

d) The Board presented a table showing source of purchase of power which included UI at Rs.35.131 crores for 80.30 MU and PGCIL Transmission & RLDC charges for Rs. 22.306 crores. The total

power purchase cost was Rs.1915.96 crore for purchase of power of 4445.07 MU and average rate was Rs.2.28.

e) During October,2008 to March,2009 ex-bus generation at BSEB own power station i.e., Barauni TPS was 61.89456 MU and fuel cost Rs.12.548 crores.

f) The total energy sold to the exempted categories during October 2008 to March,2009 was 212.967MU.

21. In this connection it is to place on record that the learned counsel for the appellant has raised objection to the inclusion of RS.22,306 Crore on account of PGCIL Transmission & RLDC charges and RS.35.131 Crore on account of UI purchase of 80.30 MU during the first period and an amount of Rs. 10.646 crore on account of PGCIL Transmission & RLDC charges and Rs. 68.784 Crores in respect of power purchase of

155.323 MU on account of UI charges during the said period on the ground that this inclusion is contrary to the order of the Commission dated 26.08.08 and secondly the amount shown in respect of purchase cost on account of UI constitutes premium on inefficiency. In respect of the period from April ,2009 to September,2009 the quantum of power purchased from different sources was 5065.918 MU and the power purchase cost was Rs. 1182.174 and the average rate was Rs.2.33 per kWh. The energy sold to the exempted categories was 1167.02 MU, and energy purchase has been reduced by 3.7% due to transmission loss in CTU system. This point we will consider later. But the Commission noted that in respect of Talcher TPS the power purchase cost has been reduced to Rs.229.101 Crores after reducing power purchase in September ,2008. So far as Barauni is concerned, the Commission has noted that the Board incurred the cost of Rs.8.365 crores on

account of coal and Rs.4.1698 crores towards cost of oil as against the approved cost of Rs.27.36 crores and Rs.3.815 crore respectively taken on pro rata basis for six months. The Board assessed the energy sales to the exempted category of consumers at 212.967 MU for the period from October 2008 to March 2009 by assuming consumption norm of 30 units for KG/ BPL, both rural and urban against the approved norm of 18 units for KG(Rural) in tariff order 2008-09. During the second period the Board incurred an expenditure of Rs.11.78 crores on cost of coal and Rs.8.46 crore on cost of oil as against the approved cost as noted above. The energy sales during the period from April 2009 to September 2009 to the exempted categories which has been not allowed stood at 1167.02 MU by assuming consumption norm of 30 unit. In respect of each of the two periods the Commission decided to allow the Board to recover FPPCA charge provisionally @ 69

paise per unit on the energy consumption but subject to final adjustment on audit of annual accounts of the Board for FY 2008-09.

22. It is noticeable that the formula for fuel and power purchase cost adjustment as was given in the tariff order dated 26th August, 2008 is really not the subject matter of the present appeal nor it was challenged in the earlier two appeals. Therefore, nothing can be taken exception to the formula which is subject to review by the Board for the first time after six months from the date of implementation of the order and after every six months thereafter and the Commission reserved to itself the right of review of the approved formula.

23. Therefore, what is really objected to is the rate of levy which the Commission fixed at 69 paise / Kwh to its consumers except the KJ/BPL (urban and rural) and

private agriculture against the Board's proposal of 83 paise or 112 paise with exemption to BPL(rural or urban), private agriculture and other categories. Learned Counsel for the appellant opposes inclusion of the power purchase cost on account of UI charges. Objection has also been raised to the amount included on account of PGCIL. Transmission & RLDC charges. According to the learned Counsel for the appellant, such inclusion are contrary to the directions contained in the tariff order dated 26th August, 2008 wherein the Commission excluded or disallowed inclusion of any cost increase by way of penalty, interest due to delayed payment etc. and operation inefficiencies in calculation of FPPCA. The submission is that the inclusion of the amount on account of UI charges is not permissible. Reference has been made to the decision of the Hon'ble Supreme Court in *Central Power Distribution Co. Ltd. Vs CERC reported in (2007) 8 SCC 197*. The submission of the learned

counsel for the appellant does not appear to be acceptable because in the *Central Power Distribution Company Limited* case, it has been held by the Hon'ble Supreme Court that the UI charges are a commercial mechanism in order to maintain grid discipline and the said charges are payable either by the generator or the distributor not adhering to the schedule. In the said decision, it has been categorically held that the UI charges are not to be construed by way of penalty. Now, the UI charges are not included in clause (iv). In the instant cases it does not appear that the charges on account of UI drawal is invariably on account of what is called grid indiscipline. According to the respondent no.2, the Board's major source of power is purchase from different agencies like NTPC and NHPC etc. who sometimes do not supply the full share earmarked for the Board by the Central Government thus compelling the Board to draw in excess of the schedule for the purposes of

fulfilling the requirement of its consumers including intensive consumers. By way of an example, it has been pointed out by the learned Counsel for the respondent No.2 that when Board's share is allocated at 25% when there are three units in a generating station and one unit is shut down then also the Board's allocation is confined to 25% by the remaining two units and the balance power has to be made good by the Board by excess drawal for the grid at unscheduled inter exchange charges. Admittedly, the unscheduled interchange is a commercial mechanism for maintaining grid discipline but it is also a tool to induce economic operation. Unscheduled interchange which is detrimental to grid security and leading to uneconomic operation has to be discouraged. However, unscheduled interchange which helps in improving grid frequency and economic operation of the grid cannot be objected to. Be that as it may, UI charges do not amount to penalty and

accordingly clause (iv) of the conditions as it appears in the FPPCA formula is not attracted here, as such the basic misgivings of the appellants is repelled. Having considered the submissions of the learned Counsel for the parties, we do not think that on the ground advanced by the respondent No.2 the Commission has committed error in inclusion of UI charges in the FPPCA. It is also brought to our notice that the Board also made profit by sale of electricity under UI category and same has also been taken into account while calculating FPPCA charges. It is to be noted here that the Commission deducted the sale of UI units from the purchased UI units to give due credit to the consumers for sale of energy under UI. Similarly, cost included in respect of both the periods on account of PGICL Transmission & RLDC charges cannot be excluded from the FPPCA as these are reuired to be paid for transmission of power purchased from sources from outside the State. Objection was

raised that increase in cost through FPPCA appears to be an ad hoc increase which is not permitted in the law because the impugned orders say that such increase is provisional and subject to final adjustment on audit of annual accounts of the Board for FY 2008-09. We find no merit in this submission because the annual audited accounts of the Board was not made available to the Commission for the year 2008-09 when it passed the orders, hence the Commission made the orders provisional subject to final adjustment on audit of annual accounts for FY 2008-09. Though one of the conditions namely (iv) in the FPPCA was that cost increased by way of penalty, interest due to delayed payments and also due to operational inefficiencies would not be allowed we do not think that the Commission has intended to include UI charges under the penalty clause (iv). The Commission explicitly observed that power has been both sold and purchased under UI from the grid. As

such, the Commission upon consideration thought properly that the amount on account of UI charges is really on account of purchase and sale of electricity. It is submitted by the learned Counsel for the Board that the annual accounts of the Board for FY 2008-09 has already been approved by the Board and submitted to AG Bihar and certificate from AG is awaited. Moreover, the annual account for the period 2009-10 is also under preparation. It is not unworthwhile to say that the tariff order dated 26th August, 2008 does not prohibit the Board from calculating FPPCA charges on the basis of un-audited accounts.

24. The point has been taken that the Commission has not segregated the power purchase cost into fixed / capacity charges, variable charges, delayed payment surcharge and other charges and such an approach is contrary to the principles for calculating the FPPCA

wherein the only changes in the variable component of the power purchase cost excluding any panel charges are to be considered. This argument does not appear to be impressive because what we find from the Commission's order is cognizance of the total cost of power purchase vis-à-vis the approved cost. The Commission in both the impugned orders considered the increased cost of coal and oil while fixing FPPCA charges.

25. As regards exclusion of power exchange from Nepal, the Commission has noted that the power exchange takes place between India and Nepal under bilateral arrangement between the two countries and the tariff rates for such exchange of power is fixed by Indo-Nepal Power Exchange Committee at the Government of India level and accordingly the Commission wrote in the orders that power exchange

from Nepal is kept out of the purview of FPPCA. We do not find any error in such finding.

26. The submission has been raised that on perusal of the fuel and power purchase cost adjustment formula it is apparent that without approval of the operational parameters as provided in the tariff order dated 26th August, 2008 the said formula is unworkable. It is further submitted the FPPCA charges are contrary to the letter and spirit of the directions of the Tribunal in paragraph 14 and 15 of the judgment dated 12th February, 2009 in *Bihar Industrial Association vs Bihar Electricity Regulatory Commission and Anr. reported in (2009) ELR (APTEL) 0171.* The argument does not appear to be tenable because clause (ii) of the conditions is that the operational parameters/norms fixed by the Commission in the tariff order shall be the basis of calculation of FPPCA charges. The matter of the fact is that in the tariff order dated 26th August,

2008 itself, the Commission has fixed the operational parameters for the Board's own generation. Furthermore, it is pointed out by the respondent No. 2 that the Commission took into account fuel cost pertaining to BTPS and in the process directed to deduct a sum of Rs.2.31 crores for the period from October 2008 to March 2009 and a sum of Rs.3.76 crores for the period from April 2009 to September 2009 because of the Board having spent less amount of fuel cost against what was approved by the Commission. As regards alleged violation of this Tribunal" order dated 12th February, 2009 it is with respect to T&D losses which for the purpose of computation of FPPCA charges have been taken to be only 38% for the first mentioned period and 35% for the second mentioned period and it is noticeable that though the Tribunal made some holistic observations like drawing up of a road map for gradual reduction of T&D losses the Tribunal did not interfere with the tariff

order of the Commission and dismissed both the appeals.

27. The Commission rightly viewed that the changes in the power purchase cost from other sources and fuel cost for its own power station are to be allowed as a pass through.

28. Thus, so far as the merit of the matter is concerned, we do not find that the Commission has committed any gross illegality in passing the impugned orders whereby levy of 69 paise per unit on the energy consumption was made. The Commission justified such increase through the materials and data as would be found in the impugned orders. The formula as such remains not assailed so far as this appeal is concerned, and the amount of levy on account of FPPCA does not appear to be unreasonable.

29. With regard to the argument that the orders impugned are devoid of reasons, we feel that the argument is not a sound one. The Commission recorded the points raised by the Board, considered the submissions, considered the cost of purchase vis-à-vis the cost approved by the Commission and then fixed a levy of 69 paise per unit towards the energy consumption in respect of each of the periods in question. The Commission considered the statement showing purchase of power as approved by the Commission from October 2008 to March 2009 after reducing the central sector transmission loss @ 3.7% from the actual, not from the approved energy purchased data, a statement showing expenditure on coal and oil related to BTPS for the period from April 2008 to March 2009 the copy of the regional energy accounting of the eastern region for the period from October 2008 to March 2009 on the basis of which the quantum of power supplied to the Board is

determined, details of coal purchased from NTPC pertaining to eastern region generating station for the period 2008-09 and CERC Tariff Regulations, 2004, computation of energy sold to exempted categories and other materials. The decisions in *Secretary and Curator Victoria Memorial Hall and Sahara India Ltd. (ibid)* as was cited by the learned Counsel for the appellant do not appear to be helpful in connection with the appeal. Every administrative and judicial order has to be supported by reasons but the impugned orders do not show that this essential principle has been ignored. The orders as they are, it cannot be said that the principle of fairness has not been maintained. The facts in Sahara India case which refers to *Rajesh Kumar V/s CIT* are in a different context and they do not apply here.

30. The point for consideration is whether the appellant was entitled to hearing while determining the FPPCA charges. It is the submission of Mr. Kapur that in respect of determination of fuel surcharge the provisions laid down in section 64 are equally applicable. Now, section 64 gives a complete description how a tariff application has to be processed towards making a tariff order. This section speaks of publication of the application which implies inviting objections and suggestions which again implies hearing of the parties likely to be affected and in case the Commission proposes to reject any application opportunity of hearing has to be given to the applicant concerned. In essence, section 64 speaks of natural justice so that arbitrariness is avoided, transparency is maintained, and the persons likely to be affected by any proposed tariff order are heard. So far as section 62 is concerned, it speaks determination of tariff and sub-section (4) which is

decisive for our purpose is that no tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. This sub section (4) clearly permits amendment of tariff or a part of tariff at least once in a financial year. But such amendment more than once is permissible in any financial year only in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. The two impugned orders are application of fuel surcharge formula on the two applications of the Board. These two applications clearly revealed prayer for FPPCA charges on account of increase of cost of fuel and oil. These two orders are not comprehensive tariff order for any financial year. The tariff order for the year 2008-09 was already passed in compliance with the procedure laid down in section 64. By the two impugned orders there has

been increase in the levy of 69 paise per unit and energy consumption by way of FPPCA. It is the fuel surcharge formula which has to be applied while making any changes in the tariff order already passed in respect of any financial year. This sub section makes it clear that the formula has to be applied and that formula has to be made known to all concerned and specified. It is to be noted that the formula in details was formulated in the tariff order dated 26th August, 2008 itself which was passed upon hearing all the parties concerned including the appellant. No objection was raised in earlier two appeals concerning the formulation of the formula, nor such formula is challenged here also. What is challenged is, as we noted earlier, the levy of 69 paise in respect of the unit consumed. Sub section (4) does not contemplate that the procedure laid down in section 64 has to be repeated again for a second time in a financial year when the Commission finds that the changes are

necessary only in respect of the increase in fuel and such changes are done and have been done in the instant case in accordance with the formula made known earlier to all concerned. It is the application of formula on the materials and data provided that fuel surcharge is determined. The materials and data were furnished before the Commission by the Board and the same as have been furnished before this Tribunal by the Board have not been challenged as untrue and incorrect. If the formula had been specified in the two impugned orders themselves for the first time then the appellant would have a point to raise. We do not think that when fuel surcharge formula permits change in the tariff order in any financial year and such formula was known to the appellant when the tariff order was passed, the whole exercise as laid down in section 64 has to be repeated. While saying so, we are not oblivious of the section 86 (3) that provides for ensuring transparency while exercising its power and

discharging its functions by the State Commission. No amount of transparency is lost when a formula already known through the process of law is applied to determine the fuel surcharge amount in terms of the formula. So far as the Regulations are concerned, the regulations 18 and 20 do not contain anything new , they are merely the reproduction of the provisions of section 64 of the Act. Again, the regulations 21 is the virtual reproduction of the provision of section62(3) of the Act. Regulation 83 again repeats what was said in regulation 21 , and adds something more with which we are not concerned. FPPCA is only an adjustment on account of variation in fuel cost and power purchase cost and the same cannot by any stretch of imagination be said to be an exercise for fixation of tariff. The tariff is already fixed and only the components of FPPCA formula have to be determined for calculation of the rate. Therefore, it cannot be said that for the purpose of determination

of the FPPCA rates, public hearing/ inviting objections by the commission is essential.

31. Mr . Kapur has prima facie a point when he says the impugned orders are in violation of the provision of section 62(3) as also the provision of the regulation 21 of the Tariff Regulations because both the provisions provide that the formula has to be specified, and section 2(62) clearly says that "specified" means specified by the regulations made by the Appropriate Commission or the Authority , as the case may be , under this Act, but in the instant case the formulae has not been specified by the Commission in their Regulations, and it is for the first time that the Commission brought out the formula in the tariff order dated 26th. August,2008. Now what would be the effect of the omission of the formulae in the Regulations of the Commission is the question. Whether specification in the regulation has to be

construed as a mandate of the Legislature and the consequence of non compliance has to be made the formula non acceptable and nugatory is the question before us. Would the impugned orders fail on that count is to be considered. Inclusion of the formulae in the Regulations has a underlying purpose, it being that all concerned are in a position to know beforehand as to what the formula was or was about. It is only to facilitate the persons concerned or parties concerned to know the formula before fuel surcharge is made in terms of the formula that the Legislature provides for publication of the formulae in the notified Regulations. Instead of the Regulations it is the tariff order dated 26th. August,2008 where the formula has got its berth. If the purpose of the inclusion of the formula in the Regulations is to make one likely to be affected aware of the formula then the purpose in instant case is well served when the Commission formulates the formula in the tariff order which was pronounced in due

compliance with the provisions of section 64 and section 86(3) of the Act. In this connection it is relevant to mention the observation of the Hon"ble Supreme Court In *PTC India Ltd., Vs CERC, reported in (2010)4 SCC 603* where it has been observed that framing of regulation is not a condition of making a tariff order . To quote the words of the Hon'ble Court *"Making of a regulation under section 178 is not a precondition to passing of an order levying a regulatory fee under section 79(1)(g). However , if there is a regulation under section 178 in that regard, then the order levying fees under section 79(1)(g) has to be in consonance with such regulation."*

32. As regards non-communication of the order it has been stated in the counter affidavit of the respondent no.2 that after the passing of the impugned orders they were put on the Commission's website so as to make all aware of the orders . This averment has not

been denied particularly in the rejoinder of the appellant.

33. As regards the argument of the learned Counsel for respondent No. 2 that the instant appeal is barred by the principle of constructive res judicata as provided in the Explanation iv to section 11 of the CPC we are to observe that the submission is not without any merit. It is settled law that in every proceeding the whole of the claim which is a party is entitled to make should be made and where a party omits to sue in respect of any portion of the claim he cannot afterwords sue for the portion omitted. The decision in Forward Construction Co.(ibid) it has been held that adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might an ought to have had decided as incidental to the subject matter of litigation. Evidently in the earlier appeals formulation of the FPPCA formula as was made in the tariff order dated 26th August, 2008 was

not challenged. In the impugned orders simply the formula has been applied for so as to find out the adjustment charges. The decision in Alka Gupta vs Narinder Kumar Gupta(ibid), Deva Ram & Anrs. Vs Ishwar Chand & Anr. and direct recruit class II Engineers Association the principle was reiterated in different languages but essentially the matter is the same as we have reproduced above. Thus constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised. The principle of Order 2 Rule 2 CPC as has been invoked here by respondent No.2 is not without absolute irrelevance because the said principle relates to reliefs which ought to have been claimed on the same cause of action what not claimed. It was opened to the appellant to have challenged the provision of levy of FPPCA charges and also the formula specified therein in the earlier appeals but the appellant did not do so.

34. In the premises we do not find that the appeal can succeed. We hold that :

a) The impugned orders are not in violation of sections 64 and 86 (3) of the Act and regulations 18 and 19 of the Tariff Regulations.
b) The FPPCA formula as have been laid down in tariff order dated 26th August, 2008 cannot be defeated because of not being specified in the tariff regulations in terms of regulation 21 thereof.
c) The Commission has not ignored the provisions of section 61 (a) and section 62 (4) of the Act.
d) Principle of natural justice has not been violated.

e) The question of approval of parameters before implementation of the FPPCA formula does not arise because operational parameters have been laid down in the tariff order itself.

f) Computation of the FPPCA though it is related to the chapter on determination of tariff is virtually a mechanical application of the formula already specified and made known to all concerned.

g) Principle of constructive res judicata and the provision of Order 2 Rule 2 CPC are applicable vis-à-vis the earlier two appeals where FPPCA as formulated in the tariff order dated 26th August, 2008 was not challenged.

35. In the result, the appeal fails and is dismissed but without cost.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical member

Dated 18th May, 2011

Index: Reportable/Non-Reportable

PK