

**THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO.173 OF 2016
&
I.A. NO.373 OF 2016 & IA NO.569 OF 2016**

Dated : 30th NOVEMBER, 2016

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I. J. Kapoor, Technical Member.**

In the matter of:-

MR. RAMA SHANKER AWASTHI)
301, SURBHI DELUXE APARTMENTS)
6/7 DALIBAGH, LUCKNOW-226 001) ... Appellant(s)

AND

1. **LANCO ANPARA POWER LIMITED**)
411/9, RIVERSIDE APARTMENTS,)
NEW HYDERABAD, LUCKNOW-)
226007.)
2. **U.P. POWER CORPORATION LTD.**)
(THROUGH ITS CHAIRMAN),)
7TH FLOOR, SHAKTI BHAWAN, 14,)
ASHOK MARG, LUCKNOW-226001.)
3. **UTTAR PRADESH ELECTRICITY**)
REGULATORY COMMISSION,)
II FLOOR, KISAN MANDI BHAWAN,)
GOMTI NAGAR, VIBHUTI KHAND,)
LUCKNOW-226010.) ... Respondent(s)

Counsel for the Appellant(s)	Mr. M.G. Ramachandran Mr. Shubham Arya Ms. Ranjitha Ramachandran Ms. Poorva Saigal Ms. Anushree Bardhan
Counsel for Respondent(s)	Mr. C.S. Vaidyanadhan, Sr. Adv. Mr. Sakya Singha Chaudhuri Mr. Avijeet Lala Ms. Shruti Dass Ms. Puja Priyadarshini for R-1 Mr. Gopal Jain, Sr. Adv. Mr. Rajiv Srivastava Ms. Gargi Srivastava Ms. Garima Srivastava for R-2 Mr. C.K. Rai Mr. Umesh Prasad Mr. Neetish Kr. Pandey for R-3

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI :

1. The Appellant has filed the present appeal challenging Order dated 23/11/2015 passed by the Uttar Pradesh Electricity Regulatory Commission in Petition Nos.871 and 891 of 2013 filed by Respondents 1 and 2 respectively.

2. The Appellant is a consumer in the State of Uttar Pradesh who had participated in the public hearing dated 05/10/2015 held by the State Commission. He was present and had put forth his submissions as an objector in the present case. Respondent No.1 - M/s Lanco Anpara Power Limited ("**Lanco**") is a Generating Company, within the meaning of Section 2(28) of the Electricity Act, 2003 ("**the said Act**") and is having a generating station, Anpara C-Project with a total capacity of 1200 MW (2x600 MW) in the State of Uttar Pradesh. Respondent No.2 - Uttar Pradesh Power Corporation Limited ("**UPPCL**") is the Holding company/State Utility in Uttar Pradesh engaged in the business of bulk purchase of electricity for and on behalf of the distribution licensees in the State of Uttar Pradesh. Respondent No.3 is the Uttar Pradesh Electricity Regulatory Commission ("**the State Commission**"), who has passed the order impugned in this appeal.

3. In pursuance of a Competitive Bid Process initiated by the UPPCL under Section 63 of the said Act, Lanco entered

into a PPA dated 12/11/2006 (as amended by the Supplementary Agreement dated 31/12/2009) with UPPCL for generation and supply of power of 1000 MW (subsequently increased to 1100 MW) from Anpara C Project on build, own, operate and maintain basis.

4. On 28/01/2013, Lanco filed Petition No.871 of 2013 under Section 86(1)(f) of the said Act before the State Commission with the following prayers:

- “(a) To direct Respondents to clear all outstanding dues under the PPA till date;*
- (b) To Pass an Order determining new tariff for the supply of power from the Anpara C Plant to Respondents till the successful completion of the buy-out of the Plant;*
- (c) In the alternative, pass an Order determining new tariff for the supply of power from the Anpara C Plant to Respondents, instead of a buy-out of the Plant keeping in view the viability and sustainability of the Plant after taking into account the accumulated losses of the Plant till date;*
- (d) Pass any other Order which may be consequential upon prayer (a), (b) and/or (c) and*

any other Order as this Hon'ble Commission may deem fit."

The prayers were made primarily on the grounds namely (a) material deviation from the Request for Proposal ("**RfP**") conditions in respect of coal and (b) failure of buyers to institute payment security mechanism.

5. On 24/01/2013 and 11/02/2013, Lanco issued termination notices to UPPCL in terms of Article 15.4.6 of the PPA.

6. On 21/05/2013, UPPCL also filed a Petition being Petition No.891 of 2013 under Section 86(1)(f) of the said Act challenging the termination notice dated 24/01/2013 and buy out notice dated 11/02/2013 issued by Lanco. By order dated 23/05/2013, the State Commission clubbed both the petitions and decided to hear them together.

7. By order dated 31/01/2014, the State Commission framed the following issues for consideration.

- “(i) Whether the solution within the terms of PPA can be explored with the sincere efforts of all the parties and the recourse of termination may be discussed subsequently, if required?”*
- “(ii) Whether it would be acceptable to both the parties if any “Compensatory Tariff” is allowed within the PPA?”*

8. Relying on the Order dated 02/04/2013 passed by the Central Commission in Petition No.155 of 2012 (**Adani Power Limited, Ahmedabad v. Uttar Haryana Bijli Vitaran Nigam Limited & Ors.**) and Order dated 21/8/2013 passed in Petition No.68 of 2012 (**Adani Power Maharashtra Limited v. Maharashtra Electricity Distribution Co. Ltd.**) by the Maharashtra Commission, whereby the Central Commission and the Maharashtra Commission respectively granted compensatory tariff to the petitioners before them in exercise of their regulatory powers, by its Order dated 28/4/2014, the State Commission decided that the compensatory tariff under the exercise of regulatory powers should be given to Lanco for the alleged hardship caused to Lanco. The State Commission by the same order constituted a

Committee for working out and recommending the compensatory tariff. In pursuance thereof and on the basis of recommendation given by the Committee, the State Commission passed the impugned Order dated 23/11/2015 deciding on the compensatory tariff payable by UPPCL to Lanco. Aggrieved by the order dated 23/11/2015, UPPCL has filed a Review Petition before the State Commission praying *inter alia* that the compensation awarded from the Commercial Operation date i.e. 10/12/2011 till Termination Notice dated 11/02/2013 be set aside.

9. In its **judgment dated 07/04/2016 delivered in Appeal No.97 of 2014 and other batch of appeals, the Full Bench of this Tribunal** has held that –

“The Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. If a case of Force Majeure or Change in Law is made out, relief provided under the PPA can be granted, under the adjudicatory power.”

10. The preliminary issue which arises in this appeal is whether the conclusion reached by the State Commission on the grant of compensatory tariff, over and above the tariff admissible under the PPA, in exercise of regulatory powers is valid and legal. It is the case of the Appellant that the present matter is covered by the aforesaid judgment of the Full Bench whereas it is the case of Respondent Nos.1 and 2 that the present case is not covered by the said judgment. Additionally, Respondent Nos.1 and 2 have also challenged the locus of the Appellant and contended that the appeal is not maintainable.

11. On 03/10/2016, we extensively heard Mr. M.G. Ramachandran, learned counsel appearing for the Appellant, Mr. C.S. Vaidyanadhan, learned senior counsel appearing for Respondent No.1/Lanco, Mr. Rajiv Srivastava, learned counsel appearing for Respondent No.2/UPPCL and Mr. C.K. Rai, learned counsel appearing for Respondent No.3/State Commission, on these issues. They also filed written submissions.

12. The gist of the submissions of the Appellant is as under:

- (a) This Tribunal in its Full Bench judgment dated 07/04/2016 held that the Regulatory Commissions have no general regulatory power to give compensatory tariff or to vary the tariff determined through competitive bid process dehors the PPA provisions. By the impugned order the State Commission has granted relief to Lanco in exercise of regulatory powers. Hence, this appeal is completely covered by the Full Bench judgment. The impugned order, therefore, deserves to be set aside.
- (b) The State Commission has based its order on the decision of the Central Commission **in Adani Power Limited v. Uttar Haryana Bijli Vitran Nigam Ltd in Petition No.155 of 2012** and the decision of Maharashtra Electricity Regulatory Commission in **Adani Power**

**Maharashtra v. Maharashtra State
Electricity Distribution Company Limited in
Petition No.68 of 2012.** Both these decisions

have been set aside by this Tribunal.

- (c) Any dispute between a generating company and a licensee will eventually have an impact on the consumer tariff when the licensee will seek to pass through any excess tariff paid to the generating company.
- (d) Adjudicatory powers are vested in the Central Commission [Section 79(1)(f)] or in the State Commission [Section 86(1)(f)] to safeguard the interest of the consumers. The State Commission does not act as an arbitrator while deciding a dispute between a generating company and a licensee. It continues to function only as an adjudicatory or a regulatory body.

- (e) The said Act makes a distinction between an adjudicatory function and the reference to the arbitration. In this connection Section 158 of the said Act is material.
- (f) The Appellant has locus to file the present appeal. He had participated in the proceedings before the State Commission and had filed objections to the claim of Lanco.
- (g) Section 94(3) of the said Act provides that the Appropriate Commission may authorise any person as it deems fit to represent the interest of the consumers in the proceedings before it.
- (h) The Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations 2004 provide for participation of consumer association or any group of consumers in any proceedings before it.

- (i) Lanco is attempting to confuse the issue by raising the plea of privity of contract. The privity of contract does not arise in this case to deny the Appellant the entitlement to challenge the decision of the State Commission.
- (j) The objective for vesting the adjudicatory powers in the State Commission is to safeguard the consumer interest. Reliance is placed *inter alia* on the following judgments of the Supreme Court.
- (i) **West Bengal Electricity Regulatory Commission v. CESC Ltd.**¹
- (ii) **PTC India Ltd. v. Central Electricity Regulatory Commission**²
- (iii) **BSES Ltd v. Tata Power Co. Ltd. & Ors.**³
- (k) The impugned order does not deal with the termination of the PPA. The present appeal

¹ (2002) 8 SCC 715

² (2010) 4 SCC 603.

³ (2004) 1 SCC 195

does not directly or indirectly raise any issue relating to the termination of the PPA.

- (l) The impugned order does not involve the issue of termination of the PPA.
- (m) The issue of termination of the PPA though was part of the initial pleadings, Lanco had not raised the said issue at any time after the order dated 28/04/2014. Lanco did not file any appeal at any time in regard to the issue of termination of the PPA being not considered by the State Commission.
- (n) Order dated 28/04/2014 of the State Commission records that Lanco itself was willing to operate the project provided a new tariff is worked out for the project keeping in view the viability of the project. The issue of termination was given up at that stage and was not raised at all thereafter.

- (o) In any case issue regarding termination is irrelevant for the decision on the appeal namely that the State Commission has no general regulatory powers to grant compensatory tariff.
- (p) The issue of Change in Law was rejected by the State Commission in the order dated 28/04/2014. Lanco has not raised challenge to the same in any appeal. It is raised for the first time in the written submissions. In any case this Tribunal in the Full Bench judgment has held that the New Coal Distribution Policy does not constitute Change in Law.
- (q) In view of the above the impugned order is liable to be set aside.

13. Gist of written submissions of Lanco is as under:

- (a) This case is not covered by the Full Bench judgment as it is clearly distinct from it. Contracts forming the basis of transactions in two cases are different. Bid document and the PPA in the instant case are different from the case which was before the Full Bench. Full Bench judgement deals with the bids where fuel sourcing and technical specifications were left to the choice of project developer whereas in this case the bid was invited for site and fuel specific project wherein technical specifications provided by the buyer were required to be followed for the project and source of coal was given from specific mines of Northern Coal Fields Ltd. with prescribed infrastructure.
- (b) The underlying facts on which disputes have arisen in two cases are completely different. In the Full Bench judgment the developers had approached the Central Commission due to the

change in assumptions made by them at the stage of bidding. In this case Respondent No.1's grievance arises out of the fact that specific representations made in the RfP have been belied due to subsequent developments as a result of which, the generation of the project became unviable.

- (c) Unlike in the Full Bench judgment the beneficiary utility in the preset case has accepted the grounds on which Respondent No.1 had raised its grievance.
- (d) In the present case PPA entered into between UPPCL and Lanco stands terminated. Therefore, the question of applicability of Section 62 qua Section 63 PPA does not arise.
- (e) The reliefs sought in both the cases are different.

- (f) UPPCL had insisted on continuing procurement from the project post termination on the ground that it was cheaper than the other source and in view of the power crisis in the State. It was in those circumstances that the State Commission worked out an additional/incremental amount termed in the impugned order as compensatory tariff.
- (g) Distinct facts led Respondent No.1 to approach the State Commission in its adjudicatory jurisdiction raising the dispute against UPPCL.
- (h) The State Commission upheld the validity of termination notice issued by Respondent No.1 and solution was worked out by the State Commission considering the stalemate caused due to non exercise of buy-out option by UPPCL. The State Commission has worked out the solution in exercise of its adjudicatory power after upholding the termination of PPA.

- (i) Barring mechanism of having an external expert committee there is no parity between order passed by the Central Commission and the impugned order.

- (j) Under Section 86 (1)(f) of the said Act the State Commission is empowered to adjudicate any disputes that may arise between licensees and generating companies. Hence, the State Commission has proceeded to work out a solution in its adjudicatory power. In the circumstances no parity can be drawn between Full Bench judgment and the present case.

- (k) The State Commission has exercised adjudicating powers under Section 86(1)(f) to resolve contractual disputes between the generators and licensees under the PPA. Hence, the Appellant has no locus.

- (l) The State Commission in its role as an alternate to the Civil Court has adequate powers to deal with the contractual dispute between the generating company and the licensee under Section 86(1)(f) of the said Act.
- (m) Under Section 86(1)(f) of the said Act, the State Commission can refer any dispute to arbitration. A consumer cannot be involved in such adjudication (See: **Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. & Ors.**⁴).
- (n) The State Commission has acted as an arbitrator and proceeded to resolve the contractual disputes between Lanco and UPPCL. Only parties to an arbitration agreement can be part of the arbitration proceedings. [See: **Sukanya Holdings (P) Ltd.**]

⁴ (2013) 1 SCC 641

**v. Jayesh H. Pandya & Anr.⁵, Gujarat Urja
Vikas Nigam Limited v. Essar Power Ltd.⁶,
S.N. Prasad v. Monnet Finance Ltd. &
Ors.⁷ and Deutsche Post Bank Home
Finance Ltd. v. Taduri Sridhar⁸]**

- (o) A stranger to a contract is not entitled to sue in a contractual dispute between two parties
(See: M.C. Chacko v. State Bank of Travancore⁹)
- (p) Where the grounds for termination of PPA have been admittedly met and conceded by the counter-party, the Appellant does not have any locus as a stranger to the PPA to raise issues challenging the validity of the impugned order on the ground that it did address the issue of termination or the termination was not proper.

⁵ (2003) 5 SCC 531

⁶ (2008) 4 SCC 755

⁷ (2011) 1 SCC 320

⁸ (2011) 11 SCC 375

⁹ (1969) 2 SCC 343

- (q) Clause 13.3 of the PPA provides that a Change in Law qualifies as a Direct Indian Political Event and the consequences of the Indian Political Event (which includes a Change in Law) have been provided under Clause 13.1.1 (b), which *inter alia* provides that Lanco shall be entitled to apply for reliefs under and in accordance with Clause 14 in relation to increased costs or reductions in revenue. In this connection, Article 14.3 is material.
- (r) From the above, it is evident that the PPA envisages that in case an Indian Political Event occurs–
- i) The Buyer and the Seller shall endeavour to agree to a revision in the Monthly Tariff Payment;

- ii) The Seller should be placed into the same financial position as it would have been but for and immediately prior to the occurrence of the Change in Law.
 - iii) The impact of Change in Law will be restricted to the extent of any variation in costs of revenue, that are directly attributable to such Change in Law.
- (s) From a bare perusal of the above, it is clear that even as per the Full Bench judgment of this Tribunal reliefs could have been granted to Lanco as per terms of the PPA on account of the changed circumstances, had the State Commission allowed UPPCL's petition challenging the grounds of termination of PPA, and had proceeded on the basis that the PPA was not terminated.

14. The gist of the written submissions of Respondent No.2 (UPPCL) is as follows:

- (a) The Appellant is a rank outsider who was not a party before the State Commission. He is an individual consumer. The Appellant has not indicated as to how he is adversely affected by the impugned order. Merely because the Appellant participated in the public hearing rules of *locus standi* cannot be relaxed. The Appeal, therefore, be dismissed as not maintainable.

- (b) An individual consumer who is genuinely interested in espousing the cause of electricity consumers in the State of UP has got remedy of filing a PIL before the High Court and not an appeal before this Tribunal.

- (c) Review Petition filed by Respondent No.1 is pending before the State Commission. Hence, hearing of the appeal be deferred.
- (d) The impugned order is passed in exercise of adjudicatory functions of the State Commission under Section 86(1)(f) of the said Act in the overall interest of the parties.
- (e) The State Commission has concerned itself with mitigating financial hardship of Respondent No.1.
- (f) The case of Respondent No.1 as contained in the termination notice was not for seeking compensatory tariff not admissible to a generating company under Section 63 of the said Act but it was for claiming what it should have received had provisions of RfP and PPA been complied with scrupulously.

(g) The order dated 23/11/2015 is to be appreciated in the background of peculiar facts and circumstances of the case.

15. After we heard the counsel, further written submissions were filed by the parties. We again extensively heard counsel for the parties. We must give gist of their further submissions.

16. Mr. Vaidhyathan learned senior counsel appearing for Lanco took us to **Gujarat Urja Vikas Nigam Limited** where the Supreme Court has observed that whenever there is a dispute between a licensee and the generating companies only the State Commission or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such dispute, whereas all other disputes (unless there is some other provision in the said Act) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act 1996 (“**the Arbitration Act**”). The Supreme Court has further observed that this is also evident from Section 158 of

the said Act. The Supreme Court has further gone on to say that except for Section 11 all other provisions of the Arbitration Act will apply to arbitrations under Section 86(1)(f) of the said Act (unless there is a conflicting provision in the said Act in which case such provision will prevail). The Supreme Court has clarified that it is only the authority which can adjudicate or arbitrate disputes under the said Act will prevail over Section 11 of the Arbitration Act. Counsel submitted that it is clear from the above observations that while passing the impugned order the State Commission has acted as an arbitrator and proceeded to resolve contractual disputes between Lanco and UPPCL. Relying on **Sukanya Holdings** and other judgments of the Supreme Court to which we have made a reference hereinabove, counsel submitted that only parties to an arbitration agreement can be part of the arbitration proceedings. A third party like the Appellant cannot participate in the proceedings and, therefore, the Appellant has no locus. Counsel further submitted that the argument of the Appellant that Section 86(1)(f) itself makes a distinction between the adjudicatory function and the matter

being referred to arbitration; that once the State Commission decides to refer the matter to arbitration and decides on the person to whom the reference has to be made the arbitration proceedings will be governed by the Arbitration Act and that when the State Commission does not act as an arbitrator while deciding a dispute between a generating company and a licensee, but it continues to act as an adjudicator and a regulatory body is a flawed argument. Counsel submitted that this will result in a situation where a dispute is referred to the Arbitrator under Section 86(1)(f), a third party cannot be allowed to participate in the proceedings, but if the State Commission itself acts as an arbitrator as stated in **Gujarat Urja Vikas Nigam Limited** by the Supreme Court, even in dispute between licensees and generating companies a third party can be allowed to arbitrate. Counsel submitted that Section 86(1)(f) needs to be construed in a manner which will not render it unconstitutional. A wholesome construction needs to be put on it. Counsel relied on the judgment of the Supreme Court in **Maganlal Chhaganlal (P) Ltd v.**

Municipal Corporation of Greater Bombay and others¹⁰.

Counsel submitted that all the judgments cited by the Appellant emphasizing protection of consumer interest relate to tariff fixation. None of them relate to contractual dispute.

In **T.N. Generation and Distribution Corporation Ltd. v.**

PPN Power Generation Co. Pvt. Ltd.¹¹, the Supreme Court

has held that the adjudicatory jurisdiction is different from the regulatory jurisdiction relating to tariff fixation or advisory or recommendatory functions of the State Commission.

17. Without prejudice to the above submissions, counsel submitted that the matter should be fully heard and then course of action should be decided. This Tribunal cannot remand the matter at this stage. In this connection counsel relied on **UPSRTC v. Km. Mamta**¹² and **B.V. Nagesh & Anr. v. H.V. Sreenivasa Murthy**¹³. Counsel further

submitted that the Appellate Court can remand a matter under Order XLI Rule 23 of the Civil Procedure Code, 1908

¹⁰ (1974) 2 SCC 402

¹¹ (2014)11 SCC 53

¹² (2016) 4 SCC 172

¹³ (2010) 13 SCC 530

(“CPC”) only in cases where a decree is passed by the trial court disposing of the suit on a preliminary point. Under Order XLI Rule 23-A, the Appellate Court may remand the matter where it had been decided by the trial court otherwise than on a preliminary point, if re-trial is considered necessary by the Appellate Court. Counsel submitted that before such remand under Rule 23-A, the Appellate Court will have to deal with the decree of the trial court on merits taking into account the pleadings of the parties, oral and documentary evidence and applicable laws to determine and arrive at a conclusion whether the lower court’s order is legally sustainable or not. In this connection, counsel relied on **Municipal Corporation, Hyderabad v. Sunder Singh**¹⁴, **Ashwin Kumar K. Patel v. Upendra J. Patel & Ors.**¹⁵ and **Balkrishna Dattatraya Butte v. Dattatraya Shankar Mohite**¹⁶. Counsel further submitted that under Order XLI, Rule 25 of the CPC the Appellate Court may refer the case back to the lower court to determine any issue(s) or question of fact(s), which it appears

¹⁴ AIR 2008 SC 2579

¹⁵ AIR 1999 SC 1125

¹⁶ (1998-1) 100 Bom. LR 88

to the Appellate Court to be essential to the right decision of the suit on merits. He submitted that for so referring back the matter to the trial court, the Appellate Court has to arrive at a decision that the trial court has omitted to frame or try any issue/fact that is essential to rightly decide the case on merits. In this connection, counsel relied on **P. Purushottam Reddy & Anr. v. Pratap Steel**¹⁷ and **Jegannathan v. Raju Sigamani & Anr.**¹⁸. Counsel submitted that in the circumstances this Tribunal will have to hear the appeal on merits and not remit it.

18. Mr. Gopal Jain, learned senior counsel appearing for Respondent No.2 reiterated the written submissions filed by UPPCL. He adopted the submissions of Mr. Vaidyanathan, learned senior counsel appearing for Lanco. He added that while passing the impugned order, the State Commission has considered the interest of all stakeholders and found the best solution. The order is passed considering the overarching

¹⁷ AIR 2002 SC 771

¹⁸ (2012) 5 SCC 540

public interest. The choice is between the availability and affordability of power. The State Commission has adopted a fair and transparent process. Counsel submitted that under Section 111(6) of the said Act, this Tribunal can, for the purpose of examining the legality, propriety or correctness of any order made by the Appropriate Commission, call for the records of such proceedings and make such order as it thinks fit. Such a course ought to be adopted in this case. Counsel submitted that assuming that this Tribunal has power to remand a matter, in Regulatory Jurisprudence, this power is sparingly exercised. Counsel submitted that the impugned order merits no interference and the appeal, in fact, deserves to be dismissed after hearing it on merits.

19. In short, it is the submission of Lanco that when the State Commission adjudicates contractual dispute between a distribution licensee and a generating company under Section 86(1)(f) of the said Act, a consumer cannot be allowed to participate.

20. Now to examine this submission one has to first go to the Preamble of the said Act. It clearly states that the said Act is enacted *inter alia* to protect interest of consumers. That the consumer is a major stakeholder in the power sector can hardly be disputed. In this connection it is necessary to refer to Section 94(3) of the said Act. It reads as under:

“The Appropriate Commission may authorize any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.”

In our opinion this provision will apply to Section 86(1)(f) of the said Act as well. When Section 94(3) or any other provision of the said Act does not exclude proceedings under Section 86(1)(f) from the purview of Section 94(3) we cannot infer such exclusion. Besides it is not unlikely that a dispute which may ostensibly be described as contractual dispute may have wide ramifications and decision of the State Commission may have an adverse impact on the consumer interest. It is precisely for this reason that the legislature has made a provision for consumer participation in Section 94(3).

21. In this connection it would be advantageous to refer to the regulations framed by the State Commission under Section 181 of the said Act. The said Regulations are titled as “Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations 2004” (**“the said Regulations”**). Regulations 17 and 18 of the said Regulations need to be quoted:

“17. It shall be open to the Commission to permit any association or other bodies corporate or any group of consumers to participate in any proceedings before the Commission on such terms and conditions including in regard to the nature and extent of participation as the Commission may consider appropriate.

18. The Commission may, as and when considered appropriate, notify a procedure for recognition of association, groups, forums or bodies corporate as registered consumer association for the purpose of representation before the Commission.”

These regulations are in tune with the purport, intent and provisions of the said Act. We are unable to exclude Section 86(1)(f) from the purview of these regulations.

22. The importance of protection of consumer interest has been emphasized by the Supreme Court in several cases to which we have made a reference hereinabove. In **CESC Ltd.**, the Supreme Court was considering a situation where the High Court had denied the right of hearing to a consumer in the matter pertaining to tariff determination. The Supreme Court noted the relevant provisions of the Electricity Regulatory Commission Act 1998, the relevant rules and regulations which provided a right of hearing/representation to the consumers and held that the High Court was in error in denying the right of hearing to the consumers. Several judgments of the Supreme Court and of this Tribunal are cited in support of the consumers' right of hearing/representation. It is not necessary to refer to all of them. The observations of the Supreme Court cannot be overlooked on the ground that they were made in cases pertaining to tariff determination. Moreover, as stated by us earlier, even a decision in a contractual matter can have repercussions on the tariff. It can have adverse impact on consumer interest. It is precisely for

this reason that the said Act makes unequivocal provision for consumer participation in proceedings before the Appropriate Commission. If the legislature wanted to deny the consumer the right to participate in proceedings under Section 86(1)(f) of the said Act, it would have said so. We cannot add anything to the provisions of the said Act so as to deny the consumer his right to participate in the proceedings before the State Commission.

23. In **Gujarat Urja Vikas Nigam Ltd.** this issue was not argued before the Supreme Court. The Supreme Court has nowhere said that a consumer cannot participate in the proceedings under Section 86(1)(f) before the State Commission. Judgments cited by Lanco have no application to the facts of this case in view of the object and the provisions of the said Act and the said Regulations.

24. Apart from the above, it must be noted that the Appellant is a consumer in the State of Uttar Pradesh. We are informed that he is a member of the State Advisory Committee

constituted by the State Commission. He had participated in the proceedings before the State Commission. He had filed objections to the claim of Lanco. His presence is noted in the impugned order. It is his case that the relief of compensatory tariff granted to Lanco will ultimately put additional burden on the consumers. He is, therefore, a 'person aggrieved' within the meaning of Section 111 of the said Act. It is not possible for us to hold that the Appellant has no locus. The alleged privity of contract between Lanco and Respondent No.2 cannot disentitle the Appellant-consumer from filing the appeal. We reject the submission that the Appellant has no locus.

25. We must refer to the judgment of the Supreme Court in **Maganlal Chhaganlal (P) Ltd.** on which reliance is placed by Lanco. In our opinion the said judgment is not applicable to this case. In that case, the principal point for consideration was that as there were two procedures available to the Bombay Municipal Corporation and the State Government, one by way of a suit under the ordinary law and the other under either of the two Acts i.e. the Municipal Corporation Act

and the Bombay Government Premises (Eviction) Act 1955, which is harsher and more onerous than the procedure under the ordinary law, the latter is hit by Article 14 of the Constitution in the absence of any guidelines as to which procedure may be adopted. The writ petitions were dismissed by the Supreme Court. Constitutional validity of Section 86(1)(f) cannot be challenged before us. If Lanco wants to challenge constitutional validity of Section 86(1)(f) on the ground that if it is treated as providing two remedies, it would violate Article 14 of the Constitution of India and that there are no guidelines, its remedy is elsewhere.

26. The material question involved in this appeal is whether the State Commission could have, in purported exercise of its general regulatory powers, granted compensatory tariff to Lanco in the teeth of the Full Bench judgment of this Tribunal dated 07/04/2016 in Appeal No.100 of 2013 and connected matters. It bears repetition to state that in the Full Bench judgment, this Tribunal has held that the Regulatory

Commissions have no general regulatory powers to give compensatory tariff or vary the tariff determined through a competitive bid process de hors the provisions of the PPA. The impugned order has done what the Full Bench judgment expressly prohibits. It is contrary to the Full Bench judgment. On that ground alone the impugned order must be set aside.

27. Moreover, the State Commission has proceeded to decide the matter relying on the decision of the Central Commission **Adani Power Limited v. Uttar Haryana Bijli Vitran Nigam Ltd** in **Petition No.155 of 2012** and the decision of the Maharashtra Electricity Regulatory Commission in **Adani Power Maharashtra v. Maharashtra State Electricity Distribution Company Limited** in **Petition No.68 of 2012**.

Both these decisions have been set aside by this Tribunal vide order dated 07/04/2016 (Full Bench judgment) and following the said order, by the order dated 11/05/2016 respectively. The impugned order, therefore, will have to be set aside on this ground also.

28. We are not inclined to go into the question of privity of contract raised by Lanco because as earlier noted, the central issue is whether the State Commission was right in granting compensatory tariff to Lanco in exercise of its regulatory powers. Once this Court has taken a view that such a course is not permissible, the impugned order which has taken recourse to regulatory power to grant compensatory tariff will have to be set aside. Secondly, as earlier noted, the two orders, on the basis of which the impugned order is passed, have been set aside by us.

29. It is submitted by Mr. Vaidyanathan, learned counsel appearing for Lanco that this Tribunal cannot remand this matter. It will have to be finally heard. Relevant provisions of the CPC have been pointed out to us. Our attention has also been drawn to the judgments of the Supreme Court. We are unable to agree with Mr. Vaidyanathan that this matter cannot be remanded. We have already noted that the basis of the impugned order is illegal. In exercise of purported regulatory powers, the State Commission could not have

granted compensatory tariff to Lanco. It must be remembered that Section 120 of the said Act states that the Appellate Tribunal shall not be bound by the procedure laid down by the CPC but shall be guided by the principles of natural justice and, subject to the other provisions of the said Act, the Appellate Tribunal shall have power to regulate its own procedure. Therefore, in a given case, if this Tribunal feels that remand is the only proper course, it can remand the matter. In our opinion, the judgments cited by counsel for Lanco on the question of remand have no application to the peculiar facts of this case. Mr. Ramachandran submitted that the matter should not be remanded but the appeal deserves to be allowed. It is not possible for us to accept the submission of Mr. Ramachandran because the State Commission will have to hear the matter afresh on merits. In our opinion, the State Commission must consider the submissions of all the parties on merits and decide the matter in the light of the Full Bench judgment of this Tribunal.

30. In the circumstances, the impugned order is set aside and the matter is remanded to the State Commission with a direction to decide the same afresh after hearing the parties and having regard to the Full Bench judgment of this Tribunal dated 07/04/2016, within a period of four months from the date of receipt of this order. We make it clear that, on the merits of the case, we have not expressed any opinion.

31. The appeal is disposed of in the aforestated terms.

32. In view of disposal of the appeal, all connected IAs are also disposed of.

33. Pronounced in the Open Court on this **30th day of November, 2016.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

REPORTABLE / \surd NON-REPORTABLE