

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

APPEAL NO. 166 and 168 of 2009

Dated: 4th March, 2010.

**PRESENT : HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. H.L. BAJAJ, TECHNICAL MEMBER**

APPEAL NO. 166 of 2009

In the matter of:

**CESC Limited.
CESC House
Chowringhee Square
Kolkata-700001**

...Appellant

Versus

**Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001.**

... Respondents

**Counsel for the Appellant : Mr. M.G. Ramachandran
Mr. Avinash Menon**

**Counsel for the Respondent: Mr. T.R. Andhyarjuna, Sr. Advocate
Mr. Buddy A. Ranganadhan.
Mr. Sumanta Ghosh &
Mr. Arjit Maitra for R 1.**

APPEAL NO. 168 of 2009

**West Bengal State Electricity Dist. Co. Ltd.
Vidyut Bhawan, Bidhannagar Block-DJ
Sector –II, Bidhannagar
Kolkata- 700091**

... Appellant

Versus

**Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001.**

... Respondent

**Counsel for the Appellant(s) : Mr. P.S. Narsimha, Sr. Advocate with
Mr. Vishal Anand &
Mr. Sakya Chaudhari**

**Counsel for the Respondent: Mr.T.R.Andhyaryjuna, Sr. Advocate
Mr. Buddy A. Ranganadhan.
Mr. Sumanta Ghosh &
Mr. Arjit Maitra for R.1.**

**Per Hon'ble Mr. Justice M. KARPAGA VINAYAGAM,
Chairperson**

JUDGMENT

**1. Since the impugned order is common, we deem it fit to
render this common judgment in both these Appeals, i.e. in
Appeal No. 166 of 2009 and 168 of 2009.**

2. Aggrieved by order dated 11.9.2009 passed by the Central Commission fixing the ceiling in tariff in the suo motto action the Appellant CSES Ltd. has filed this Appeal No. 166 of 2009.

3. The necessary facts of this Appeal are as follows:-

(i) CESC Ltd., the Appellant herein is engaged in the generation of Electricity. It also supplies the electricity in the licensed area in Kolkata and its surroundings.

(ii) On 1.9.2008 the Central Commission published a paper titled “measures for restricting the price of electricity for short term sale and trading” giving various suggestions.

The said staff paper was placed for the comments of various stakeholders. The Appellant also submitted its comments with regard to the suggestions mentioned in the staff paper.

The public hearing was held on 29.9.2008. The same was attended by the various stakeholders including the Appellant.

(iii) On 17.12.2008 the Central Commission passed an order clarifying and analyzing the suggestions made in the staff paper as well as the views expressed by the various stakeholders. Ultimately the Central Commission through the said order turned down the proposal made in the staff paper to put price cap for inter-state short term sale of electricity.

(iv) When the matter stood thus, the Central Commission issued yet another public notice on 27.8.2009 expressing its intention of considering the analysis of regularizing the measures to restrain escalation of price of electricity traded in the bi-lateral market so as to protect the interest of the consumers. For this purpose, the draft order containing the proposal of the Central Commission had also been annexed along with public notice with proposed fixation of cap for the minimum and maximum price for sale or purchase of electricity. The Central Commission through the said

notice called upon the views and suggestions of the parties. Accordingly the Appellant also submitted its comments on 7.9.2009. On 8.9.2009 public hearing was held. The Appellant contended before the Central Commission that price ceiling can not be introduced by the Central Commission by invoking the proviso to Section 62 (1) (a) of the Act National Electricity Policy and Tariff Policy.

(v) Despite this objection, the Central Commission passed the impugned order dated 11.9.2009 directing for the inter-State day ahead transaction fixing the minimum price as Rs. 0.10/kWh and maximum ceiling of price of Rs. 8.00 /kwh. The Central Commission also made it clear in the said order that the fixation of minimum and maximum price shall apply only for a period of 45 days from the date of the order dated 11.9.2009.

(v) Challenging the same the CESC Limited, the Appellant has filed this Appeal No. 166 of 2009.

APPEAL NO. 168 of 2009

4. West Bengal State Electricity Distribution Company Limited is the Appellant in this Appeal No. 168 of 2009. Challenging the order dated 11.9.2009 passed by the Central Commission the Appellant has filed this Appeal.

5. The necessary facts are as follows:-

- i) The Appellant is a Distribution Company having its office situated in Kolkata. On 29.8.2008 the Central Commission issued a public notice circulating a draft order on a suo motto action for imposing a ceiling on price of sale and purchase of electricity through bi-lateral agreements and on power exchanges. The said public notice invited objections on the draft order. Public hearing was held on 1.9.2008. The Appellant also participated and made**

its detailed submissions pointing out that Central Commission has no jurisdiction to impose ceiling on price of generating companies and Distribution Companies other than those covered under Section 79 (1) (a) (b).

- ii) It is also objected by the Appellant stating that the power to be exercised under Section 62 (1) (a) only of the Electricity Act when an emergent situation of short supply faced by the distribution licensee and the draft order of the Central Commission did not record its satisfaction of the actual shortage of supply. Despite this objection, without any application of mind, the Central Commission on 11.9.2009 passed the impugned order prescribing the maximum and minimum ceiling of tariff applicable to the bi-lateral transactions and those of power exchange. Hence this Appeal No. 168 of 2009**

has been filed challenging the impugned order by the Appellant West Bengal State Electricity Distribution Company.

6. The grounds urged by both the learned counsel appearing for the Appellants in both the Appeals are more or less common.

They are as follows:

- (a) The impugned order has been passed by the Central Commission in exercise of the power under proviso to Section 62 (1) (a) of the Act. This proviso allows the Appropriate Commission to fix the minimum and maximum ceiling price only for the generating company and the licensee in case of shortage of supply of electricity. This will not apply to the distribution company and the licensee. Under this section the distribution licensee can approach only to the State Commission which is the Appropriate Commission for**

imposing minimum and maximum ceiling of price for sale and purchase of electricity and not to the Central Commission.

- (b) The functions of the Central Commission are prescribed under Section 79 under clause (a) to (k) only. Under this section Central Commission has got powers to deal with the fixation of tariff for electricity generated by the generating company owned by Central Government or the company having composite scheme for sale of electricity in two or more states and the issue of inter-state transmission license and fixing the trading margin on inter-state trading only. No other jurisdiction is vested with the Central Commission. There is no power for Central Commission to compel the distribution licensee like the Appellant to purchase the power from such a**

generating company as the said power is vested with the State Commission.

- (c) Under Section 64 (5) of the Act, when there is inter-state supply of electricity with transmission or wheeling, it is the State Commission which will have jurisdiction in respect of distribution licensee. In other words, even in the case of inter-state supply, the Act provides that the place of distribution licensee who purchases the electricity determines the jurisdiction of the concerned State Commission and the Central Commission cannot have any jurisdiction.**
- (d) The proviso to Section 62 (1) (a) deals with the sale or purchase of electricity. It does not deal with the transmission or wheeling. The proviso of Section 62 (1) (a) can not be interpreted to confer jurisdiction to the Central Commission on the areas which the Act**

has specifically kept out of its power and functions under Section 64 (5) of the Act.

(e) The proviso to a substantive section only embraces such an area which is covered by the main provision.

It means that the proviso of this section is exception to the main section in which it has been enacted by the main provision and not to any other provision.

(f) The conditions for the invocation of the proviso to Section 62 (1) (a) are two fold; (1) The existence of the shortage of supply of electricity (2) unreasonable prices. Admittedly, these conditions have not been complied with in the impugned order.

(g) Section 66 of the Act does not apply to the present case. This section deals with the permission of development of market in power but proviso to Section 62 (1) (a) permits determination of price

through market forces. So the two can not be read together.

On these grounds, the elaborate arguments were advanced by Mr. M. G. Ramachandran, learned counsel appearing for the Appellant in Appeal No. 166 of 2009 and Mr. P.S. Narsimha, Learned Senior Counsel appearing for the Appellant in Appeal No. 168 of 2009.

7. In reply to the above grounds Mr. T. R. Andhyarjuna, Learned Senior Counsel appearing for the Central Commission would make the following submissions in justification of the impugned order passed by the Central Commission:

- (i) Section 62 is a section for determination of the tariff by the Appropriate Commission. In this case the Central Commission has passed the impugned order by exercising the powers under the proviso to Section**

62(1)(a). This order fixes the minimum and maximum reasonable prices of electricity for the inter-state day-ahead transaction and this will be applicable for both the power exchanges and bi-lateral market. Such a power can only be exercised by the Central Commission as the Appropriate Commission under proviso to Section 62(1)(a). The State Commission has only general functions relating to electricity including tariff on transaction within the state under Section 86 of the Act. On the other hand the Central Commission under Section 79 has functions relating to the inter-state transactions and inter states transmission of electricity.

(ii) In addition to these powers as referred to above, Section 79(1)(k) enables the Central Commission to discharge such other functions as may be assigned under any other provisions of the Act. This could

include the power under Section 62(1)(a) proviso. Under this proviso the Central Commission can regulate the inter-state supply of electricity in case of shortage of electricity by fixing the minimum and maximum ceiling of prices. This power cannot be exercised by the State Commission. Further this proviso cannot be limited to the supply of electricity by generating company to a Distribution licensee alone, as it refers to supply of electricity in pursuance of an agreement entered into between the Generating company and the licensee or agreement entered into between the licensees. Therefore, the proviso to this section is a substantive enactment.

- (iii) In addition to these powers, Section 66 of the Act also gives power to the Appropriate Commission to promote development of market including any power. The shortage in supply which raises the prices of**

electricity unreasonably can be the subject matter of promoting the development of market, including trading for matters relating to inter-state transaction.

(iv) The proviso to Section 62(1)(a) is a special proviso in the statute. It can be invoked only in abnormal situations of the shortage of supply of electricity and in case of price rise. The words “in case of shortage of electricity” and “to ensure reasonable price of electricity” indicates the exigent situation. However, this proviso can be applied for a short duration. The objective behind the proviso is to ensure the reasonable price of electricity when there is shortage of supply of electricity. In the impugned order the Central Commission has explained the abnormal situation of shortage of electricity as well as this escalation of the price.

(v) According to the Appellants, the power of determination of tariff for any inter-state supply or transmission or wheeling is within the jurisdiction of the State Commission under Section 64(5) of the Act and the said power is not within the jurisdiction of the Central Commission. This submission also is erroneous. Section 64(5) deals with an exceptional process of determination of tariff for any inter-State supply between two consenting parties who specifically apply to the State Commission for determination of tariff. On the other hand, Section 62(1)(a) proviso deals with the abnormal situation of shortage of electricity and the increase of prices and in that situation the Appropriate Commission has to take suitable steps to tackle the situation by fixing the minimum and maximum prices to ensure reasonable price of electricity. Therefore, the determination of

tariff under Section 64(5) by the State Commission has nothing to do with the fixing of minimum and maximum prices by which the electricity can be purchased and sold in the abnormal situation.

On these grounds, the learned senior counsel for the Central Commission submitted that the impugned order is well justified.

8. We have heard the learned counsel for both the parties. We have also given our anxious consideration to their rival contentions and perused the records and the written submissions.

9. The only question which arises for consideration in this case is whether in terms of Section 62(1)(a) proviso or any other provisions under the Act the Central Commission has got any jurisdiction to fix minimum and maximum ceiling of price for

inter-state sale or purchase of electricity on the ground that there exists scarcity of electricity supply with reference to the transaction of power exchanges or inter-state transactions.

10. Before dealing with this question, let us now refer to the relevant finding and consequent direction of the Central Commission in the impugned order. This is quoted below:

“15. The above circumstances during the shortage of supply of electricity in the country further justifies the fixation of caps for the minimum and maximum prices of sale of purchase of electricity in the bi-lateral markets and the power exchanges.

“16. Therefore, to ensure the reasonable price of electricity in the period of present shortages, we direct that with immediate effect for inter-state day-ahead transaction the minimum tariff or bidding prices as the case may be shall be Rs. 0.10 kWh and the maximum ceiling of tariff or bidding

price as the case may be shall be capped at Rs. 8 per kWh.

This shall be applicable to both power exchanges and bilateral marketing. The minimum and maximum ceiling of tariff as aforesaid shall apply for a period of 45 days from the date of this order.

11. The above direction would indicate that the order has been passed by the Central Commission fixing the minimum and maximum prices of sale and purchase of electricity for bilateral markets in the power exchanges and the same has been passed under section 62(1)(a) proviso that too only for 45 days. Let us now quote the section 62(1)(a) proviso.

“Section 62. Determination of Tariff: (1) – The Appropriate Commission shall determine the tariff in accordance with the 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 the generating company and a licensee or between licensees for a period not exceeding one year to ensure reasonable prices of electricity”

12. According to the Learned Senior Counsel appearing for the Central Commission, the Central Commission has fixed the minimum and maximum prices quoting the various instances showing shortages of supply and escalation of prices of electricity, has exercised power under section 62(1)(a) proviso and as such it has got jurisdiction.

13. According to the Learned Counsel for the Appellants, under the Act the Central Commission can exercise the jurisdiction only in relation to some of the entities as mentioned in section 79 and not to all the utilities or entities. Under section 64(5) the State Commission alone

has got the jurisdiction in respect of Distribution Licensee for the inter-State supply of electricity. Section 62(1)(a) proviso will not apply to a Distribution Licensee like the Appellant and at any rate the proviso to section 62(1)(a) is merely an exception to the main section and the said exception cannot embrace the area which is not covered by the main section.

14. It cannot be debated that the Central Commission has got the functions relating to the regulations of the inter-State transaction of electricity as provided in Section 79 of the Act. Similarly, the State Commission has got the functions relating to electricity including tariff for transactions within the State under section 86 of the Act.

15. The stand of the Central Commission is that the Central Commission has exercised powers to fix the minimum and maximum prices under section 62(1)(a) proviso. A reading of the above proviso, as referred to above, would specify only to the Appropriate

Commission. It does not specify as to whether it is the Central Commission or the State Commission. Therefore, it shall be construed that whenever the powers are exercised with reference to the section 79, in regard to the inter-state transaction the Central Commission will be the Appropriate Commission to use the section 62(1)(a) proviso. Similarly, whenever the State Commission exercises the powers under section 86 of the Act, with reference to intra-state transactions it may invoke the proviso to section 62(1)(a) to fix the minimum and maximum prices as Appropriate Commission.

16. It is strenuously contended by the Learned Senior Counsel for the Appellants that the Central Commission cannot exercise the power under section 62(1)(a) proviso as there is no other provision in the Act which has specifically conferred such power to the Central Commission.

17. Let us now look into section 79 which reads as under:

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

- (a) to regulate the tariff of generating companies owned or controlled by the Central Government;**
- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies entered into or otherwise have a composite scheme for generation and sale of electricity in more than one State;**
- (c) to regulate the inter-State transmission of electricity;**
- (d) to determine tariff for inter-State transmission of electricity;**
- (e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;**
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with**

clauses (a) to (d) above and to refer any dispute for arbitration;

- (g) to levy fees for the purpose of this Act;**
- (h) to specify Grid Code having regard to Grid Standards;**
- (i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;**
- (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;**
- (k) to discharge such other functions as may be assigned under the Act.**

18. Under section 79(1)(a), the Central Commission can regulate the tariff of generating companies owned or controlled by the Central Government.

19. Under section 79(1)(b), the Central Commission has got the powers to regulate the tariff of generating companies other than those

owned or controlled by the Central Government, if such generating companies enter into a composite scheme for generation and sale of electricity in more than one State.

20. Under section 79(1)(c), the Central Commission has power to regulate the inter-State transmission of electricity.

21. Under section 79(1)(d), the Central Commission has the power to determine the tariff for inter-State transmission of electricity.

22. Under section 79(1)(e), the Central Commission has got the powers to issue license to a person to function as a Transmission Licensee with respect to their inter-State operations.

23. Under section 79(1)(j), the Central Commission has the power to fix the trading margin in inter-State trading of electricity.

24. So, all these provisions would confer powers to the Central Commission to regulate the tariff, in regard to the inter-State transmission and to fix the trading margin in the trading with reference to inter-State supply of electricity. Thus, it is clear that all the aforesaid transactions could be dealt with only by the Central Commission under section 79.

25. In this context, it would be appropriate to refer to one more provision which is section 79(1)(k). According to this provision, the Central Commission shall discharge such other functions as may be assigned to it under any other provision of this Act. According to the Learned Senior Counsel appearing for the Central Commission, section 79(1)(k) enables the Central Commission to exercise the powers under section 62(1)(a) proviso as the same is included in section 79(1)(k).

26. As indicated above, the Central Commission is the Appropriate Commission which can regulate inter-State supply of electricity that too in the case of shortage of electricity i.e. in the exigent situation the Central Commission can fix the minimum and maximum ceiling of prices by exercising the said power. Hence, the power to regulate shortage of supply in respect of inter-State transactions cannot be exercised by State Commission as it has no power in respect of inter-State transactions.

27. It is not correct to contend that the proviso to section 62(1)(a) shall be limited to the supply of electricity by generating company to a Distribution Licensee alone as rightly pointed out by the learned senior counsel for the Central Commission. The perusal of the above section, as is evident from the terms of the proviso, it is clear that it does not limit itself to the tariff for supply of electricity by generating company to a Distribution Licensee alone. On the contrary it refers to supply of electricity in pursuance of an agreement entered into

between the generating company and the licensee or between licensees. Under section 14 of the Act, the licensees include Transmission Licensee, Distribution Licensees and traders. Therefore, we find force in the contention urged by the Learned Senior Counsel for the Central Commission that as envisaged under section 79(1)(k), the Central Commission can exercise its powers under section 62(1)(a) proviso on the basis of the prevailing circumstances which reflected shortage of electricity as well as escalation of prices, to fix the minimum and maximum ceiling of prices.

28. Further, the impugned order specifically states that the fixation of the prices would be applicable to inter-State transactions and bilateral markets. Admittedly, the power exchanges are all inter-State transactions. The National Power Exchanges were granted permission to set up and operate under the guidelines issued by the Central Commission. The by-laws, Rules and Business Rules of Power are to be approved by the Central Commission. The Prices Discovery

Methodology has to be approved only by the Central Commission. The case of collective transactions in day ahead market on Power Exchange is double-sided closed bid option. Similarly, the Power Exchanges have to comply with the Central Commission regulations. As per the regulations, any participant on Power Exchange which is a State utility for inter-State entity has to obtain a No Objection from the State Load Dispatch Centre. It is due to the concurrence given by the SLDC that the State/distribution network has the required transfer capability for transfer of power from the State grid. This concurrence is given for the inter-State transactions.

29. The proviso to section 62(1)(a) has to be considered as a special provision in the statute. It can be invoked by the Appropriate Commission only in abnormal situation of shortage of electricity and escalation of price rise. The words “in case of shortage of electricity” and “to ensure reasonable prices of electricity” would indicate an exigent situation. This proviso can only be applied for certain

duration. The objective behind this proviso is to ensure reasonable prices of electricity at least for the short duration.

30. In the impugned order it is noticed that the Central Commission has clearly explained the abnormal and exigent situation of shortage of supply of electricity as well as escalation of prices. Further, the Central Commission relied upon the Load Generation Balance Report. The steep increase in electricity prices has also been explained in detail in the impugned order based on the monitoring by the Central Commission of the bilateral markets and day ahead transactions of power exchanges. As a matter of fact, the Central Commission has, in the impugned order, specifically mentioned that the prevailing high prices, even for a short period, would not only be harmful to consumers but also would erode the buyers confidence in the market's capability.

31. As correctly submitted by the Learned Senior Counsel for the Central Commission, there is no embargo preventing the Central Commission to exercise the proviso under section 62(1)(a) especially when section 79(1)(k) confers powers on the Central Commission to discharge such other functions as may be assigned to it under this Act. Under these circumstances it can be safely concluded that this would bring in the functions under proviso to section 62(1)(a).

32. The Learned Senior Counsel for Appellants would strenuously contend that section 62(1)(a) is only exception and it cannot embrace the area not covered in the main section and as such proviso cannot be said to be a substantive section. As indicated above, this proviso is a special provision conferring powers to the Appropriate Commission for fixing the minimum and maximum prices for transactions between generating companies and the licensees or between the licensees. It is not in dispute that this proviso deals with the specific situation of shortages which is not referred to in the main section 62(1)(a). But, the

proviso has to be construed as a special provision for the following reasons:

- (i) Ex facie, the view that a proviso cuts an exception to the main provision/ enactment cannot be applied to section 62(1)(a) proviso since subject matter of proviso cannot and does not carve out any exception to the main provision.**
- (ii) The scope of the proviso is not limited to sale or purchase between generating company and a Licensee alone. Similarly, this proviso covers the tariff for supply of electricity by a generating company to a Distribution Licensee especially when the proviso refers to the sale or purchase of electricity in pursuance of an agreement between the generating company and the licensees. The term 'licensee' includes not only Transmission Licensee or trading licensee but also Distribution Licensee. Hence, the contention that proviso is not of the substantive nature cannot be accepted.**

33. In this context, let us refer to the various decisions rendered by the Hon'ble Supreme Court cited by both the learned counsel. The learned counsel for the Appellant would cite the following decisions in order to substantiate their plea that the proviso cannot be read in isolation and that the proviso to a particular provision or statute can only embrace such fields which is covered by the main provision:

- a) 1955 2 SCR 483 “Mr. Ram Narain and Sons Ltd. Vs. Commissioner of Sales Tax and Ors.”**
- b) 1964 5 SCR 253 “ State of Orissa Vs. Debaki Debi & Ors.”**
- c) (1964) 8 SCR 36 “ Commissioner of Income Tax, Kerala and Coimbatore Vs. P. Krishna Warriar”**
- d) (1965) 1 SCR 276 “State of Rajasthan Vs. Leela Jain & Ors.”**
- e) (1966) 1 SCR 367 “ Ishvaerlal Thakorelal Almaula Vs Motibhai Nagjibhai”**

- f) (1968) 1 SCR 148 “ Commissioner of Commercial Taxes, Board of Revenue, Madras & Anr. Vs. Ramkishan Shrikishan Jhaver etc.”**
- g) (1976) 1 SCC 128 “ Dwarka Prasad Vs. Dwarka Das Saraf”**
- h) (1985) 1SCC 591 “ S. Sundaram Pillai & Ors. Vs. V. R. Pattabiraman & Ors.”**
- i) (1985) 1 SCC 279 “Motiram Ghelabhai Maniram Motiram Vs. Jagan Nagar & Ors.”**
- j) (1990) 4 SCC 453 “ Union of India Vs. Paras Laminates (P) Ltd.”**
- k) (2005) 2 SCC 271 “ Nathi Devi Vs. Radha Devi Gupta”**
- l) (1974) 2 SCC 687 M.A. Rasheed and Ors. Vs. State of Kerala”**

34. On the other hand the learned Senior Counsel appearing for the Central Commission would cite the following authorities

to show that proviso which is of a special nature has to be construed as a substantive provision:

- 1. (1965) 1 SCR 276 “State of Rajasthan Vs. Leela Jain”**
- 2. (1966) 1SCR 367 “ Ishwarlal Thakorelal Almauloa Vs. Motibhai Nagibhai”**
- 3. (1964) 8 SCR 36 “ Commissioner of Income Tax, Kerala and Coimbatore Vs. P. Krishna Warriar”**
- 4. (1968) 1 SCR 148 “ Commissioner of Commercial Taxes, Board of Revenue, Madras & Anr. Vs. Ramkishan Shrikishan Jhaver etc.”**
- 5. (1985) 1 SCC 279 “Motiram Ghelabhai Maniram Motiram Vs. Jagan Nagar & Ors.”**

35. The crux of the principles and the ratio laid down in the above authorities cited by learned counsel for both the parties are:

A. It is cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other.

B. It is not an inflexible rule of construction that a proviso in a statute should always be read as a limitation upon the effect of the main enactment. Generally the natural presumption is that but for the proviso the enacting part of the section would have included the subject matter of the proviso; but the clear language of the substantive provision as well as the proviso may establish that the proviso is not a qualifying clause of the main provisions; but is in itself a substantive provision.”

C. “It is true that the proviso is an exception to the main part of the section; but it is recognized that in exceptional cases a proviso may be a substantive provision itself.”

D. “It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. ‘Words are dependent on the principal enacting words’, to which they are tacked as a proviso.”

E. “Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment.”

F. “But it is not an inflexible rule of construction that a proviso in a statute should always be read as a limitation upon the effect of the main enactment, but the clear language of the substantive provision as well as the proviso

may establish that the proviso is not a qualifying clause of the main provisions, but is in itself a substantive provision.”

These principles would support the plea of the learned Senior Counsel for the Central Commission

36. According to the Appellant, under section 64(5) of the Act, determination of tariff for any inter-State supply or transmission or wheeling is within the jurisdiction of the State Commission. This submission also is erroneous. Section 64(5) deals with an exceptional process of determination of tariff for any inter-State supply, transmission or wheeling between 2 consenting parties who specifically apply to State Commission for determination of tariff. On the other hand, section 62(1)(a) proviso deals with the abnormal situation of shortage of electricity and the steps that the Appropriate Commission may take to tackle the same by fixing the minimum and maximum prices to ensure reasonable prices of electricity.

37. That apart, Section 64(5) of the Act begins with a Non-obstante clause which refers specifically to Part-X of the Act. This shows that it is an exception to the usual division of inter-State and intra-State functions between the Central Commission and the State Commission. As stated above, section 64(5) contemplates a joint application to be made by the two consenting parties, i.e. (1) a specific seller and (2) a specific buyer to the State Commission for determination of tariff for any inter-State supply. On the contrary Section 62(1)(a) proviso deals with the buyers and sellers of electricity generally and the actions which the Appropriate Commission may resort to in the abnormal situation to ensure reasonable prices of electricity. As such the determination of tariff under section 64(5) has nothing to do with the fixing the minimum and maximum prices at which electricity can be bought and sold in the shortage situation.

38. In this case, through the impugned order, the Central Commission imposes a price cap only for day ahead inter-State transactions and that too for a short period of 45 days. This cannot be done by the State Commission under the powers under section 64(5) of the Act. Further it is noticed that this period of 45 days had already expired.

39. The Learned Senior Counsel for the Appellants relied upon Rule 8 of the Electricity Rules. The relevance on Rule 8 of the Electricity Rules by the Appellant is misconceived. Rule 8 would apply to determination of tariff and power procurement process. Rule 8 cannot prevent the Central Commission from exercising the power of fixing minimum and maximum prices of power in the abnormal situation of shortage.

40. This can be viewed from yet another angle. The Central Commission alone would be in a position to take an overall Pan-Indian

view of the electricity sector in whole of India. Each State Commission is necessarily concerned with the regulation of electricity sector in respect of that State. In other words, each State Commission would be expected to take regulatory action on the basis of the peculiar problems, challenges prevalent in that State but if country as a whole is suffering from shortage of electricity and the escalation of prices is very high, it is only the Central Commission which can be in a position to take an overall view of the situation and take necessary remedial measures accordingly.

41. In addition to this power, the Learned Senior Counsel appearing for the Central Commission would rely upon section 66 of the Electricity Act which gives powers to the Commission to promote development of market in power including the trading in power. It is contended by the Learned Senior Counsel for the Appellant that section 66 of the Act would not apply to the present case as it is contrary to section 62(1)(a). We need not go into this aspect in view of

the fact that we are convinced that the Central Commission has got the jurisdiction to fix the minimum and maximum prices to deal with the abnormal situation of shortage of electricity and the escalation of the price rise, under section 62(1)(a) proviso the power of which is available to Central Commission as conferred under section 79(1)(k) of the Act.

42. In view of the above said reasons, we conclude that the power of fixing price cap for the inter-State transactions are within the jurisdiction of the Central Commission and not of the State Commission.

43. Therefore, we do not find any merit in these Appeals. Consequently both the Appeals are dismissed. No costs.

**(H.L. Bajaj)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

Dated : 4th March, 2010.

INDEX: REPORTABLE/NPN-REPORTABLE