BEFORE THE APPELLATE TRIBUNAL FOR ELECTRCITY

(APPELLATE JURISDICTION)

Appeal No. 140 of 2010

Dated : 28th January, 2011

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

In the matter:

Kanan Devan Hill Plantations Company Pvt. Ltd.
KDHP House,
Munnar – 685612

…Appellant

Versus

1. Kerala State Electricity Regulatory Commission
   C.V. Raman Pillai Road, Vellayambalam,
   Thiruananthauram – 695010
   Kerala

2. Kerala State Electricity Board
   Vydhuthi Bhavan, Pattom,
   Thiruananthauram – 695010
   Kerala

…Respondent(s)

Counsel for the Appellant :Mr. Joseph Kodianathara, Sr. Advocate
Mr. Biju P. Raman, Mr. M.P. Vinod
Ms. Usha Nandini

Counsel for the Respondent:Mr. M.T. George,
Mr. Ramesh Babu M.R.
Mr. Sreenivasan & Ms. Nitya
Ms. Smitarani M.R.

JUDGMENT

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

The Appellant who is a successor in interest of M/s. Tata Tea Ltd. and a Licensee under Section 14 of the Electricity Act, 2003 for the purpose of distribution of electricity in its licensed area, namely, Munnar in the State of Kerala preferred this Appeal against the order dated 25.5.2010 passed by the Kerala Electricity Regulatory Commission (KERC) Respondent No.1 whereby the tariff of the Appellant who, according to the Appellant, was consuming for itself less than 50% of the total energy purchased by it from the Kerala Sate Electricity Board (Board), Respondent No. 2, was passed with retrospective effect from 1.12.2007.

2. The facts are these:

Transfer of interest of M/s. Tata Tea Ltd., a distribution licensee in favour of the Appellant was effected on 9.1.2007 and the order therefor was passed on 26.3.2007. On 4.7.2007, the Board who is the

Respondent No. 2 filed a Tariff Petition before the Kerala State Electricity Regulatory Commission for the year 2007-08. In the Tariff Petition the Board sought for determination of tariff for those licensees who consume for self more than 50% of the total purchase from the Board. Since the Appellant's own consumption was less than 50% of the total energy purchased from the Board, the Tariff Petition did not include the Appellant. Para 20 of the Tariff Petition filed by the Board is produced hereunder:

> ***20. "Bulk Supply It is submitted that the Board had been providing energy at grid tariff to the licensees who supply energy to consumers within their territorial jurisdiction. As per the grid tariff notification and the tariff notifications issued thereafter a licensee is eligible for grid tariff, if and only if, they supply more than 50% of the energy availed by them to the ordinary consumer consisting of domestic, agriculture, industry, etc. Categories. In other words, the consumption of the licensee shall not be more than 50% of***

the total energy availed by them. Subsequently, consumers like Technopark, KINFRA Industrial Park, Cochin Port Trust, Cochin Shipyard, Special Economic Zone, etc. were also given the status of licensee for providing electricity to the industrial units working in those parks and zones. In fact they are not supplying energy to any agricultural consumers or domestic consumers or similar other down trodden segments of society. The category of consumers under them are only industrial and commercial consumers. Therefore grid tariff specially determined for such licensees in order to cater to the needs supplying energy to the common man at concessional as determined by the Government shall not be made applicable to the industrial parks, technoparks, special economic zones etc. These technoparks and industrial parks supply energy to their consumers at LT level for which they charge at their own rates. In view of the above facts, they can only be classified as bulk consumers and they shall be charged at HT or EHT rates in accordance with the level at which they avail energy"

3. In terms of Section 64(2) of the Act, the Commission issued abridged notification dated 7.9.2007 publishing the gist of the Tariff Revision Petition of the Board and calling for objections to the same. In the said notification, which is Annexure III to the Memo of Appeal, Sl. No. 4 is dealing with licensees with consumption more than 50% of the total purchase from Kerala State Electricity Board and there is no mention of those licensees, like the Appellant, whose self consumption is less than 50% of the total purchase from the Board. Thus, according to the Appellant, no change in the tariff was proposed in the case of the Appellant who is a 11KV licensee with self consumption at less than 50%. However, in the said notification, the existing tariff with respect to energy charges of 11 KV licensee was shown at 2.75 per unit which was the existing tariff of licensees with self consumption more than 50% (G-II) and this was sought to be increased to Rs.3/- but the Commission sanctioned a tariff of Rs. 2.85 paise per unit with

effect from 1.12.2007. At that point of time, existing tariff for energy charges of the Appellant was only Rs.2.15 and the proposed increase for the Appellant would have been 0.85 paise per unit and sanctioned increase 0.70 paise per unit. If the proposed increase was applicable to the Appellant, the additional revenue with respect to the Appellant would have been more than Rs. 3 crores and the percentage of increase in the case of the Appellant would have been more than 33% as against 8.32% increase proposed in the notification of 7.9.2007. In Form T-2 the Board made proposal with respect to only 11KV licensee with contracted demand at 12 KVA while the Appellant's contracted demand was at 7 KVA. Now, a public hearing was held but it was not necessary for the Appellant to attend the hearing in view of the notification having not covered the Appellant. Alarmingly, the Commission by order dated 26.11.2007 abolished the distinction between licensees owning self consumption at less than 50% and the licensees having self-consumption at more 50% in consequence of

which, the order dated 26.11.2007 was made to cover the Appellant also although the Tariff Petition along with the notification dated 7.9.2007sought for increase of tariff for the licensees with self consumption of more than 50%. Necessarily, the Appellant filed a Review Petition challenging the order dated 26.11.2007 on 25.1.2008 which however was dismissed by order dated 15.2.2008. Then the Appellant filed a Writ Petition before the Hon'ble Kerala High Court being Petition No. (C) 4963/2008 and after hearing the parties, the High Court by Judgment and order dated 12.3.2008 allowed Writ Petition making a thorough interpretation of Section 64(3)(a) of the Act. The Commission preferred Writ Appeal before the Division Bench of The High Court being Writ Appeal No. 1158 of 2008 against the order of the Hon'ble Single Judge dated 12.3.2008 but the Division Bench of the High Court dismissed the Appeal of the Commission by judgment and order dated 5.6.2008. Still then, the Board was issuing bills in terms of the Commission's order dated 26.11.2007 which necessitated

the Appellant again to file a Writ Petition being WP (C) 17365 of 2008 before the Hon'ble High Court and got the relief by order dated 9.7.2008.(Annexure IX) Now, as late as 16.10.2009, the Board filed a petition for revision of tariff before the Commission praying for inclusion of the Appellant in the tariff order dated 26.11.2007 which was made effective from 1.12.2007. The Commission on 11.11.2009 communicated to the Appellant of such filing of the Petition by the Board for revision of tariff in the case of the Appellant with effect from 1.12.2007. On 20.11.2009, the Appellant filed objections to the Board's Petition dated 16.10.2009. On 2.3.2010 the Board issued notification containing the tariff petition of the Board so as to include the Appellant. A copy of the notification was sent to the Appellant on 25.3.2010. On 20.4.2010, the Appellant filed additional objections and then followed the Commission's impugned order dated 25.5.2010 which is the subject matter of the present appeal.

4. According to the Appellant, the order impugned is violative of the provision of Sections 61 to 64 of the Act and the Tariff Regulations 2003 which were framed under Section 181(1) of the Act. Scope and ambit of the Tariff Petition filed by the Board was not intended to touch the Appellant and accordingly, the notification dated 7.9.2007 issued by the Commission and the tariff order dated 26.11.2007 were quashed by the Hon'ble High Court in the Writ petition as also in the Writ Appeal so much so that after allowing the Writ Petition nothing survived with the Commission so as to determine the tariff again on the basis of the Tariff Petition dated 4.7.2007 and also the notification dated 7.9.2007. The jurisdiction of the Commission to entertain a fresh Tariff Petition so as to include the Appellant was totally lost by the disposal of the Writ Petition filed by the Board particularly when the Tariff Petition and its Annexure filed by the Board on 4.7.007 sought to exclude the Appellant. The Commission acted illegally by bringing the Appellant within the purview of its order dated

26.11.2007 and that too with retrospective effect from 1.12.2007. Furthermore, no reason was set out on merit or any details or figures as were mandated by the Regulatory Commission were filed while seeking to amend the Appellant's tariff. The Regulatory Commission had directed the Board to forward the proposal for bulk supply tariff with respect to the Appellant with supporting data but the Tariff Petition as against the Appellant which was filed about two years after the order dated 26.11.2007was passed did not contain any details. The Appellant's objections and additional objections were overlooked. The Commission committed error in holding that what the Board asked for with regard to the Appellant in the mater of its inclusion was an amendment to the tariff order which was already issued, but in fact it was not a mere tariff amendment order for inclusion of the Appellant with retrospective effect from 1.12.2007 through the Petition of the Board dated 16.10.09. Regulation 4 of the Tariff Regulations, 2003 specifically states that a Petition has to be filed 4 months

before the intended date of implementation of the "amended tariff." The Commission itself maintained a distinction between the licensees with self-consumption of more than 50% and with those having self-consumption at less than 50% by issuing the notification which is Annexure III. Still, the categories between G1 and G 2 categorization was done away with. The details which were supplied by the Board in its Tariff Petition were with respect to the licensees with self consumption at more than 50%. Thus the tariff order for the Appellant for the period 2007-08 which was passed on 25.05.2010 with retrospective effect from 1.12.2007 is illegal.

5. The Respondent No. 2, Kerala State Electricity Board in its counter affidavit contended inter alia that the Power Purchase Agreement executed by the Appellant on 1.1.1991 was valid upto 31.12.1994 whereafter the Appellant did not execute any Power Purchase Agreement with the Board even though the Commission directed the Appellant to that affect in an earlier proceedings. The

tariff for retail consumers in the State of Kerala was revised with effect from 1.12.2007 but the Appellant has been charging as per the Agreement dated 1.1.91. The Commission by order dated 15.2.2008 dismissed the Review Petition of the Appellant holding that there is no merit in the contentions raised by the Appellant for the reason that in earlier proceedings M/s. Tata Tea Ltd, the predecessors of the Appellant objected to the categorization of licensees under GI and G II. It was the predecessor of the Appellant who stated that the tariff revision ordered unilaterally by the Board and change of grid tariff category was not permissible in accordance with Section 46 of Electricity (Supply) Act, 1948 and it was illegal. The Commission noted that the Appellant, the successor of Tata Tea Ltd had maintained that the grid tariff revision order of the Board dated 2.4.2003 and categorization of consumers into GI and G II are illegal. From 28.4.2003 onwards in view of the decision of the Commission in Petition No. DP-1 filed by Technopark against the grid tariff revision order notified by the Board

vide Board order No.(OM) No. 426/03/TRAC/TO-1/2002 dated 2.4.2003 it was directed that the categorization into categories G-I and G II has to be kept in abeyance. The Commission would take a decision of the categorization only after receipt of the actual data regarding the details of power supply system and type of consumers in respect of each licensees. Hence the appellant was well aware from 28.4.2003 onwards that there was no categorization as G I and G II i.e. 50% above and 50% below of self consumption by licensees. The order dated 26.11.2007 was not disturbed by the High Court on merit, it was disturbed so far as the Appellant is concerned on the ground that the Appellant should be given opportunity of being heard. The Commission issued a common voltage level tariff through revision order dated 26.11.2007 applicable to all classes of consumers including the licensees/bulk suppliers. All licensees operating in the State of Kerala including Trissur Municipal Corporation maintained and run by local self governing body had accepted the tariff revision

order of the Commission and have been remitting the charges as approved without any grievance. It is further contended that the Hon'ble Supreme Court in KSEB Vs MRF, reported in (1996 (1) SCC 597 (KSEB Vs MRF) which was a case where tariff determined by the Electricity Board on revision for the electricity supplied in the years 1980, 1982 and 1984 was struck down by the Hon'ble High Court in exercise of the writ jurisdiction has held in the appeal filed by the Board while sustaining the validity of the tariff revision made by the Electricity Board that " the Board's entitlement to draw bill on the basis of upward revision and consequential enforceability of payment to such bills by the consumers revived with full force after the decision of the Supreme Court upholding the upward revision. Hence it would not be correct to contend that although the company or for that matter other consumers were required to pay on the basis of revisions of tariff from the dates when such revisions became effective, liability for such payment would accrue only from the date of pronouncement of the

judgment by the Hon'ble Supreme Court, upholding upward revisions and not from any date prior to that. If the upward revisions are held as valid enforceability of such upward revisions being consequential to such revisions, though it had remained un-enforceable for some period on account of the decisions of the Hon'ble High Court cannot but revive from the date of upward revisions. In the present case, the appellant company though have liability to pay on the basis of the revised tariff w.e.f. 1.12.2007 did not make the payment in view of the directions issued by the Hon'ble High Court in W.P (C) No. 4963/2008. But as and when the directions issued by the Hon'ble High Court is complied with and the tariff order dated 26.11.2007 had been made applicable to the Appellant company after curing all the deficiencies they are bound to pay the revised tariff w.e.f. 1.12.2007 and the question of retrospectivity does not arise. Moreover, the appellant company is an ongoing business concern and must have utilized money saved on account of the decision of the Hon'ble High Court

gainfully in its commercial activities. On the other hand, the Board had to suffer financial loss because of the decision of the Hon'ble High Court. In such circumstances, it would be lawful conforming to equity and well established principle of restitution for the Board to claim interest on the unpaid portion of the bill drawn on the basis of revised tariff as rightly held by Hon'ble Supreme Court. It is further stated by the Board that if the figures of ARR and ERC for the years 2007-08 and 2009-10 is taken into account it will be revealing that the Appellant was having surplus revenue all through and after the revision order dated 26.11.2007 which came into force w.e.f. 1.12.2007 the Commission revised the tariff for all the consumers of the Appellant w.e.f. 1.2.2008 by the order dated 31.1.2008 thereby equating the charges for the consumers of the Appellant with KSEB.

6. The Commission in its written submission has contended that the impugned order of the Commission was issued

after complying with all the legal formalities including the direction of the Hon'ble Kerala High Court. It is contended that under the Act 2003, the tariff for electricity is to be fixed on cost plus basis and once it is so fixed it is applicable to all the consumers unless the same falls under the separate distinguishable class. The Appellant is a bulk consumer and it is bound to pay the same tariff which other bulk consumers are paying and there was no reason as to why it should be having a lesser tariff than other bulk consumers. Hon'ble High Court permitted the Commission to proceed further in the matter of determination of tariff of the Appellant. The Commission issued notice afresh, heard parties and passed the impugned order which was made effective from 1.12.2007. What is important is that the Appellant's contention that it is a separate category because of its own consumption being less than 50% has no relevance in view of the fact that the provisions of Section 62 (3) and Section 45(4) of the Act rejected such classification and, therefore, the Commission

was justified in making its own impugned order dated 25.5.2010 effective with effect from 1.12.2007. The Commission did not categorize bulk consumers into G1 and G 2 and this was done by the Board in the earlier tariff policy which was made without referring to the Commission. The Commission further contended that the tariff of the consumer was revised with effect from 1.12.2007 with justifiable reason and there was no reason to exclude the Appellant from the purview of revision and it is not a case of fixing the tariff with retrospective effect . It is actually a case of re-issuing the tariff order in compliance with the law. When the Commission has power to revise the tariff it has also the power to revise it retrospectively unless there is specific prohibition in this regard. So far as the details are concerned, such details were available with the earlier petition and the Appellant is aware of the details. Further proceeding for revision of tariff was initiated by the Commission only on the point that the Appellant did not avail itself of opportunity to raise its contentions in

the earlier proceedings for which the revision of tariff was made. Therefore, the Appeal is bereft of substance.

7. On the basis of pleadings of the parties, the following issues raised for consideration:

a) Whether the order dated 25.5.2010 is violative of the provisions of the law as alleged by the Appellant.

b) Whether the Commission is right in Law to include the Appellant within the scope and ambit of its tariff order dated 26.11.2007.

c) Whether the Commission was right in making the order retrospective from 1.12.2007.

d) Whether the Commission was justified in doing away the distinction between licensees with self consumption of more than 50% and licensees with self consumption at less than 50%.

e) Whether the details and data required to cover the Appellant was provided by the Board in the Tariff Petition dated 16.10.2009.

8. Before proceeding to consider the issues which are inter-linked and inter-woven with one another it is worthwhile to place on record certain facts and documents which are not disputed.

9. Annexure I which is not so much of importance are the two notifications dated 9.1.2007 and 26.3.2007 whereby the distribution license was transferred and granted to the Appellant following transfer of the business by Tata Tea Ltd. to the Appellant. What is important now is the Tariff Petition of the Board dated 4.7.2007 (Annexure II) whereby the Board prayed for changes in the tariff in terms of the proposal. Para 20 of the tariff petition which has been reproduced at the beginning of the memorandum of appeal refers to the fact that as per the grid tariff notification and the tariff notifications issued thereafter a licensee is eligible to grid tariff, if and only if, its supply is more than 50% of the energy available by them to the ordinary consumers consisting of the categories such as domestic, agriculture, industry, etc.

Herein lies the core of the issue. According to the Appellant, this tariff petition was unintended to envelope the Appellant because it was the licensee with self-consumption at less than 50%. We shall consider this aspect of the matter in the sequel. However, Annexure III dated 7.9.2007 to the Memo of the Appeal is the notification containing the gist of the tariff proposal of the Board and Sl.No.4 of this notification covers the licensees with self -consumption at more than 50% of the total energy purchased from the Board. In this notification there is no particular mention of the licensees with self consumption at less than 50% of the total energy purchased from the Board. Annexure IV and V are the tariff order and tariff schedule dated 26.11.2007 which incidentally covered the licensees like the Appellant also. On 25.1.2008 the Appellant filed a Review Petition against the order dated 26.11.2007 and the Commission upon hearing dismissed the Review Petition of the Appellant by the order dated 15.2.2008(Annexure VI) and the Commission forwarded to the Appellant a copy of

this order on that date itself. We will discuss this order a little later, but it is important to note that against the order dated 15.2.2008 whereby the Appellant's review petition was dismissed the Appellant moved the Kerala High Court with Writ Petition, WP (C)4963 of 2008 and the Hon'ble Single Judge of the High Court in its judgment and order (Annexure VII) noted that in notification dated 7.9.2007 tariff category was prescribed identifying the licensees with self consumption at more than 50% of the total energy purchased from the Board but the licensees with self consumption at less than 50% was not dealt with in that notification. Hon'ble High Court observed that ***"Section 64 (3) requires that the Commission shall deal with the application for determination of tariff only after considering all suggestions and objections received from the public. In doing so, the Commission has the power to issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order."*** The High Court further observed that **"**

Petitioner being the distribution licensee, who is also a consumer stated to be with self consumption less than 50% which fact is admitted by KSEB did not place any suggestion or objection to exhibit -P6 because that notification did not touch any licensee with self consumption less than 50%." In para 4 of the judgment the High Court held:***"whatever be the exercise undertaken after exhibit P4, the fact remains that the decision contained in exhibit P4 in so far as it effects the Petitioner, is beyond the purview of the terms of Ext. P6. On this short ground, the impugned Ext. P4 has to go."*** In the concluding part of the order The High Court says `` ***without prejudice to the right of the Regulatory Commission or KSEB to do so, Ext. P4 in so far it affects the petitioner as a licensee, in exercise of what is stated in Ext. P6, is quashed leaving the parties with liberty to proceed further, having regard to what is stated in this judgment. As a consequence, Ext. P 15 and P 16 would stand***

quashed without prejudice to what is stated above"

Thus the writ petition was allowed but against the judgment of the Hon'ble Single Judge the Commission preferred a writ appeal No. 1158 of 2008 before the Division Bench of the High Court which also by the judgment and order dated 5.6.2008 dismissed the appeal (Annexure VIII). It is not necessary to refer to the reasonings of the Division Bench because they are the same as assigned by the Hon'ble Single Judge. The Annexure X is the tariff petition of the Board dated 16.10.2009 in so far as the Appellant is concerned. In this tariff petition the Appellant has been sought to be included in the tariff order dated 26.11.2007 with retrospective effect from 1.12.2007. This petition refers to the High Court's order and contains the prayer that the petitioner may be covered by tariff order dated 26.11.2007 with effect from 1.12.2007. Annexure XI to the memorandum of appeal is the objections of the Appellant dated 20.11.09 and Annexure XIV is additional objections dated 20.4.2010 to the tariff

petition of the Board dated 16.10.2009. The order impugned dated 25.5.2010 is Annexure XV. Annexure XVI is the Kerala State Electricity Regulatory Commission (Tariff) Regulations, 2003.

10. Mr Joseph Kondianthara, learned Senior Advocate for the Appellant at the outset of his argument surveyed the orders of the High Court of Kerala in writ petition and writ appeal in support of his principal point that the proceedings of the Board in respect of the Appellant in the matter of determination of tariff on the prayer of the Board commenced only on 16.10.2009 when the Board filed a petition therefor and not prior to that because the Division Bench of the Kerala High Court quashed the order dated 26.11.2007(which was exhibit P4 before the High Court) and held that Ext. P4 should not be related to the Appellant in view of the fact that the said exhibit P4 was based on P-6 which was the notification of the Commission (Appendix III) dated 7.9.2007 wherein the Commission did not notify that the proposal of revision of

tariff was intended to be applicable to the licensees with self consumption at less than 50% of the bulk purchase from the Board as the Appellant admittedly was omitted from the Board's tariff petition dated 4.7.2007. Therefore, in terms of the order of the High Court which the Commission has itself noted in para 1.4 of its impugned order dated 25.5.2010 the Board was directed by the Commission to forward a proposal for bulk supply tariff for the Appellant for supplying power from the Board at 11 KV with supporting data for arriving at that tariff order so that once the tariff was approved by the Commission, the Board can enter into PPA with the Appellant. It is argued that the Board made an application on 16.10.09 which was more than two years after the judgment of the Division Bench of the Hon'ble High Court dated 5.6.2008 was pronounced and equally more than two years later than the letter dated 3.7.08 of the Commission directing the Board to file proposal with supporting data reached the Board. But Kerala State Electricity Regulatory Commission (Tariff) Regulations,

2003 clearly contemplated that an application for tariff has to be filed with supporting data, facts and figures which is in the instant case was not accompanying the petition of the Board dated 16.10.09. The Commission's order is assailable on the ground that the tariff revision was unwarranted under the law in the absence of relevant materials justifying such revision, Learned Sr. Counsel referred to the decisions in ***UP State Electricity Board, Lucknow Vs State Board Mussoorrie and others reported in AIR 1985 SC 883, PTC India ltd. Vs CERC reported in AIR 2010 SC 1338 and A. K. Roy and Anr. Vs State of Punjab & Ors reported in AIR 1986 SC 2160.*** The second limb of the argument of the learned Counsel for the Appellant is concerned with retrospectivity of the order impugned and unexplained delay on the part of the Board. We have been taken to the Regulations 4(2) of the Tariff Regulations 2003 wherein there is Proviso that ***"the application for amendment of tariff shall be filed not later than 4 months before the intended date of***

implementation of said amended tariff". The third branch of the argument of the Appellant is that the Board in its Tariff Petition dated 4.7.2007 never intended that the bulk consumers who themselves consume less than 50% are to be visited with revision of tariff because in column 4 of their original petition the Board wanted tariff revision as against those licensees who themselves consume more than 50% of the total purchase from the Board. It is therefore clear that the Commission was not justified in doing away with distinction between the categories such as G I and G II and it blindly made the tariff order dated 26.11.2007 applicable equally to all and made it so clear by the impugned order dated 25.5.2010 and that too with the restrospectivity from 1.12.2007. When the first notification dated 7.9.2007 was quashed by the High Court it was implied that the High Court disapproved of the treatment meted out to the Appellant alike with the other category of licensees who are factually distinguishable from the Appellant. In law abolition of the distinction between G-1 and G-II

categories is purely inconceivable because, it is argued, section 64, sub Section (3) (a) provides " ***Issue a tariff order accepting the application with such modification or such conditions as may be specified in that order"*** Even in the bills issued to the appellant even after December 2007. the Appellant has been classified as a category with a differential treatment. Based on geographic position of the consumers a distinction is permissible in terms of section 61 (d) read with Section 62 (3) of the Act. Further Sub-section (2) of section 62 provides: " ***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"***. It is argued that the Board did not furnish any separate details in respect of the Appellant in support of the plea of the abolition of the distinction. Even in the Commission's order dated 2.12.2009 passed on the Tariff Petition no.66/09 filed by the Board wherein the Board requested Commission to

enhance the tariff of the licensees by 25%, the Commission observed ***"An increase in bulk supply tariff is warranted if any licensee consumes higher profits, at the same time concerns of the licensee on financial viability should also have to be considered by the Commission".*** Prior to the tariff order effective from 1.12.2007 there was tariff order dated 1.12.2002 which was applicable to the Appellant and as such there has been no change in the Appellants billing to its consumers pre or post 1.12.2007, and as on the date status quo has been maintained . It is argued that the Board as also the Commission made misleading arguments before the Tribunal that the Tariff Order dated 26.11.07 (Annexure V) was taken into consideration while finalizing the Appellant ARR & ERC for the year 2007-08 onwards. The Appellant supplies electricity in the high range of Munnar in a difficult terrain to agricultural labourers and other low income families employed in the plantation and allied activities in Munnar. In the case of the Appellant, the consumer mix

principally comprises of agricultural labourers with extremely low consumption at subsidized tariff and also other HT consumers putting the Appellant at a disadvantage in addition to the difficult terrain of supply. Therefore, in view of Section 61(d) read with Section 62 (3) of the Act differential treatment to consumers based on their economical and geographical position is permissible.

11. Mr. Ramesh Babu M.R., the learned Counsel for the Respondent No.1 argued that tariff order of 2007 dated 26.11.2007 was passed upon consideration of the revenue gap in ARR and ERC of the year 2007-08 and also the cost of the generators and distribution of electricity by KSEB. The tariff order of 2007 was passed for all the consumers of KSEB including the bulk consumers and all the necessary procedures were followed before the order dated 26.11.2007 was passed. Under the Act the tariff for electricity is to be fixed on cost plus basis and the Appellant cannot claim any

distinction from the other bulk consumers without any reasons. The Appellant's contention that they are a distribution licensee with less than 50% of own consumption has no relevance because the Commission rejected such a classification as it is against sections 62(3) and 45(4) of the Electricity Act. The Commission did not categorize bulk consumers as G1 and GII and this distinction was made by the Board in its earlier tariff policy which was so made without referring to the Commission. Consequently, it is argued that it was not a case of fixation of tariff but it is a case of re-issue of tariff order after complying with procedures. The details for revision of tariff were available in the earlier petition dated 4.7.2007 and the Appellant is aware of the details because copy of the original proposal of the Board was also forwarded to the Appellant for their remarks. It is submitted that in ***Kanoria Chemical Industries Ltd. And Anrs. Vs State of UP and others reported in (1992) 2 SCC 124*** the Supreme Court upheld the retrospectivity of the revision of tariff. It is argued that

when the Tariff of all the consumers was revised with effect from 1.12.2007 with justifiable reasons there was no reason to exclude the Appellant from such revision. A post-facto compliance with the procedure is present in law. When the Commission has power to revise the tariff it includes the power to revise it retrospectively too unless there is specific prohibition in this regard.

12. The Kerala State Electricity Board adopted the arguments of the Commission and it is not worthwhile to repeat the same arguments once again. It is submitted that there is no provision in the Act that mandates that unless everybody concerned is heard no tariff order can be passed. Reference is made to Section 64(3) wherein it has been said that the tariff order shall be issued after considering all suggestions and objections with such modification within 120 days of the receipt of the application. The distinction between G1 and GII category was rightly abolished by the Commission in view of the law not recognizing any such distinction. The

Commission in the case of DP 1 filed by Technopark against the grid tariff held on 28.4.2003 that the categorization into two categories as G I and G II has to be kept in abeyance. Thus the Appellant was well aware from 28.4.2003 onwards that there was no categorization as G I and G II The retrospectivity of the order is permissible in terms of Section 64 (6) of the Act.

13. Having heard in details the submissions of the learned Counsel for the parties, we at the outset must place it on record that the High Court of Kerala neither in Single Bench nor in Division Bench prohibited the Commission from proceeding afresh in the matter of revision of tariff in so far as the Appellant is concerned. The High Court took cognizance of the situation that it was the Board which did not specifically seek for revision of tariff in so far as the Appellant is concerned because the Board has been maintaining distinction between the licensees with self-consumption of more than 50% and the licensees with self consumption at less than 50%. It is evident at

Sl. No. 4 of the tariff application of the Board that the Appellant was not specifically intended to be brought within the purview of the proposed revision of tariff. The of the gist of the tariff application of the Board and in that notification reference could not be found to the licensees with self consumption at less than 50% of the total purchase of the power from Board. The High Court accordingly quashed the order dated 26.11.2007 on the ground that the said order was beyond the purview of the notification. It is important to note that the notification dated 7.9.2007 was not necessarily quashed because it relates to other licensees. The Division Bench observed that the Commission can pass a fresh order in compliance with the procedure. Whether classification of G1 & G II was justifiable or not did not call for consideration before the High Court because the only point before the High Court was that the Board did not apply for revision of tariff for the Appellant category and, consequently with the notification dated 7.9.2007

whereby the Appellant-category was excluded the decision of the Commission was in violation of natural justice because the Appellant was not heard before the order dated 26.11.2007 that necessarily affected the Appellant was passed. From the order of the High Court as seen above, the proceedings in respect of the Appellant commenced only when the Board made application on 16.10.2009 urging the Commission to include the Appellant within the purview and ambit of the earlier order dated 26.11.2007 with retrospective effect from 1.12.2007. It is significant to note that shortly after the Commission's appeal before the Division Bench was dismissed on 5.6.2008, the Board did not make any application for revision of tariff as against the Appellant. It was the Commission which issued a letter on 3.7.2008 directing the Board to file a proposal for revision of tariff as against the Appellant and it was as late as 16.10.2009 that the Board came up with an application. Be that as it may, it is now settled that the Commission derives its power from the law itself to revise tariff but the law

mandates that before any tariff order is passed the persons likely to be affected by such order should be heard. It is this position of law, namely, Section 64(3) of Act which was taken cognizance of by the High Court and it was only because of non-compliance with the procedure that the order dated 26.11.2007 was quashed in so far as the Appellant is concerned.

14. Much has been debated as to the lack of sufficient material or so called supporting data behind which the proposal for revision of tariff in the case of Appellant was put forward before the Commission by the Board in its application 16.10.2009. Now before adverting to this aspect of the matter, it is important to remember once again that it was the Board that had been maintaining a distinction between the two classes of bulk consumers of more than 50% and less than 50% which is why in its application dated 7.9.2007 it omitted the case of the Appellant. It is the Commission's order dated 26.11.2007 that abolished this classification. Reasoning

has been assigned in its order dated 15.2.2008 where the Commission held at para 3.5 and 3.6 of the said order as follows: "***3.5 The Petitioner argued that the error on the face of record is by way of classifying the petitioner in the category along with licensees having self consumption more than 50%. Respondent KSEB has pointed out decision of the Commission dated 28.4.2003 on the petition DP-1 filed by Technopark against the grid tariff revision order notified by the Board vide B.O. N. (CM) No. 426/03/TRAC/TO1/2002 dated 2.4.2003. The Commission in its interim order held that in determining the Grid Tariff Revision notified on 2.04.2003, the KSEB has not conformed to the Government of Kerala decision of 11.10.2002 to fix the tariff in such a way that additional income that may accrue to the licensee by tariff revision is transferred to the Board. The commission holds that categorization of licensees for tariff purposes and the grid tariff revision by the Board are***

arbitrary and devoid of any commercial principle. As the revision was effected after the constitution of the Commission and without its approval, the revision is violative of subsection (1) of Section 22 of the Regulatory Commission Act in para 4.2 of the order the Commission stated that "The Commission seeks to keep in abeyance the classification of the licensees in two categories G I and G II by the Board, since these are based on mere presumptions on the character of the licensees supply systems and the type of consumers served by them. The Commission will take a decision on the categorization only after receipt of actual data regarding the details of power supply system and type of consumers in respect of each licensee" Hence it is clear that the Commission has not recognized the categorization of licensees in terms of GI and G II. Thus a revision on the tariff for bulk supply to the licensees are determined by the Commission on merits by following the principles

under Section 62 of the Act based on voltage of supply.

" 3.6 . It is pertinent to mention that in the course of the proceedings of disposing the petition DP-1, Tata Tea Limited, the predecessor of the petitioner had objected to the categorization of licensees on G I and G II. It is mentioned in para 2.4 of the order " The representatives of Tata Tea Ltd. Stated that the tariff revision ordered unilaterally by the Board after constitution of Electricity Regulatory Commission was illegal. They also stated that change of grid tariff category was not permissible in accordance with provisions of Sec 46 of Electricity (Supply) Act, 1948 and therefore it was illegal" In para 1.6.3 of the Order states that "Tata Tea Limited have stated that since the tariff revision was made without referring the mater to the Commission it was issued without jurisdiction and did not have the sanction of law and therefore unenforceable". Hence, it is clear that the

petitioner, the successor entity of Tata Tea Limited, had maintained that the Grid Tariff revision Order of KSEB and categorization of consumers into G I and G II are illegal."

15. Thus as regards abolition of the distinction between G-I and G-II categories the commission observed that it was appellant's predecessor who disapproved of such distinction. Neither in law nor on cogent facts exception can be taken to the abolition of distinction between G-I and G-II who were both bulk consumers. The learned counsel for the Appellant in support of maintenance of such classification referred to the Commission's another order, not relevant to this proceedings dated 02.12.2009 passed in tariff petition NO. 66 of 2009. The relevant observations of the Commission in that case which has been taken resort to the appeal is reproduced herein below:

"32. The distribution margin approach inter alia for regulation of distribution costs

except power purchase cost which needs to be addressed separately considering the loss level and consumer mix in each distribution area. The commission is of the view that uniform retail supply tariff would be preferable option within the State. In such a situation, licensees having better consumer mix could earn higher profit and vice versa. An increase in Bulk Supply Tariff is warranted if any licensee earn higher profits, at the same time the concerns of the licensees on financial viability should also be considered by the Commission. Hence, the Commission hereby orders that all the licensees shall file the ARR & ERC for 2010 - 11 in the month of December as provided in KSERC (Tariff) Regulations, 2003. The Commission would consider the ARR & ERC to determine the BST applicable to each licensee after following the due procedure. The proposal of KSEB on BST is deferred till then."

The above observation of the Commission in a different proceedings is of no avail as it does not justify the

maintenance of the distinction between the two. We have already observed that the mere submission that the Appellant supplies electricity in the high ranges of Munnar in a difficult terrain to agricultural labourers and other families with low income cannot be, fairly speaking, a ground of maintenance of two kinds of tariff in respect of licensees who were all bulk consumers. Respondent No. 1 also supplies electricity to other consumers located in difficult terrain but the State Commission has not differentiated the tariff of the consumers based on geographical position of any area. Thus the State Commission has not considered the factor of geographical position of the area for any consumer in the tariff determination. We cannot find fault in the findings of the State Commission if it in its wisdom choose not to apply one of the many factors, viz geographical position of the area, as mentioned in Section 62(3) of the Act. The Commission treated on equal footing all the suppliers who supply electricity in difficult areas of the State.

16. It is fair to remind ourselves that the High Court did not have any occasion to adjudicate on merit as to whether two classifications are or are not justifiable. The High Court simply observed that since notification dated 7.9.2007 did not cover the Appellant, it should be given an opportunity of being heard, if a fresh application is filed. We, however, do not find the reasons of the Commission to be unjustifiable and the same reasons have been reproduced in the impugned order dated 25.5.2010. Section 62 (3) of the Act which is quoted below clearly provides that subject to certain factors undue preference to any consumer s not permissible..

"(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preferences 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."

Again, Section 45(4) provides :`` Subject to the provisions of Section 62 in fixing charges under this section a distribution licensee shall not show undue preference to any person or class of person or discrimination against any person or class of persons"

Therefore, discrimination amongst the consumers of electricity except on the grounds referred to in the section 62(3) is prohibited in the law. Therefore, the Commission cannot be faulted with the abolition of distinction in its order dated 25.5.2010. The fact is that it was the Board which prior to the reform movement used to determine the tariff on the basis of a classification which has no relevance in the present context because a new statute has come into being and new parameters have been set up under which every authority has to act accordingly. Therefore, the argument of the learned

Counsel for the Appellant that till date the bills have been issued based on that classification is no ground to say that the classification has to be perpetrated perpetually . In fact, there has been assigned no convincing arguments with justifiable materials to establish such classification. As compared to the Appellant, it has been submitted that Trissur Municipal Corporation which has been consuming for self far less than the Appellant has been equated with the licensees with consumption for self at more than 50%. It has not been established either that the Appellant's area of supply is such that its cost of supply is far greater than that of the other licensees. It has also been rightly submitted by the Respondent that, truly speaking, the Appellant can not be said to be affected by the increase in tariff because the bulk supply tariff takes into account the power purchase cost of the Appellant which ultimately and invariably is passed on to the consumer though retail tariff, which also has been undertaken.

Accordingly, impugned order in so far as it is related to do away with the classification cannot be interfered with.

17. It leads to the second question as how far the tariff application dated 16.10.09 or for that matter impugned order dated 25.5.2010 is impeachable on the alleged ground of lack of supporting data in its tariff petition dated 16.10.09 submitted by the Board so far as the Appellant is concerned. In the notification dated 7.9.07 there were four categories namely power intensive industries, Railway traction, HT4 commercial and licensees with self consumption of more than 50% of the total purchase from KSEB at 11 KV, 66 KV and 110 KV. Now under serial number 1, i.e., Power intensive industries there fall EHT 66KV, EHT 110 KV and HT 1. In serial number 4, there fall licensees with 11 KV, 66 KV and 110 KV. It has been submitted by the learned Counsel for the Commission justifiably that no further details were required for establishing need for tariff revision in respect of the Appellant and all the details

were provided by the Board on 4.7.2007 which was notified by the Commission on 7.9.2007 and the said notification dated 7.9.2007 a copy of which was admittedly received by the Appellant, had not been quashed by the High Court and what was quashed was the order dated 26.11.2007 based on that notification. In fact, learned Counsel for the Appellant also could not point out what more details were required and which were not disclosed before the Commission by the Board. The tariff revision application of the Board which was initially filed is a 18 page document containing all the information and the notification dated 7.9.2007 was pregnant with series of data; the only missing thing was that the Appellant was excluded. The defect has been cured by filing a fresh application by the Board.

18. The learned counsel for the Appellant refers to certain decisions of the Supreme Court namely ***U.P. State Electricity Board, Lucknow Vs. City Board Masuri and Ors. reported in AIR (1985) SC 883, PTC India***

Ltd. Vs. CERC AIR 2010 SC 1338 and A.K. Roy and Anr. Vs. State of Punjab and Ors. AIR 1986 SC 2160.

All these decisions cited above are of no assistance in this case. The decision in UP State Electricity Board, Lucknow Vs. City Board Masuri AIR (1985) SC 883 is totally in a different context and has no manner of relevance here. In that case the question was whether there was or was not existence of any Regulation for determining the grid operation and it was held that when a regulation had existed the grid operation should be made accordingly. Here in this instant case tariff revision has been made in accordance with the Regulations. The decision in PTC India Ltd. Vs. CERC AIR (2010) SC 1338 is also to the same effect. The oft quoted decision in A.K. Roy and Anr. Vs. State of Punjab and Ors. (AIR 1986 SC 2160) that when a power is given to do a certain thing in a certain way the thing must be done in that way or not at all is misplaced on the facts and circumstances of the case.

19. The only point that remains to be deliberated upon is whether the commission was justified in making its order effective from 1.12.2007. The Appellant had no doubt strongly pointed out that immediately after disposal of the Writ Appeal the Board did not file any Tariff Petition before the Commission so as to include the Appellant within the purview of its order dated 26.11.2007, and even when on 03.08.2008 the Commission forwarded a letter to the Board to file a tariff revision petition in respect of the Appellant the Board maintained silence and long long after the Board received the letter from the Commission that an application was filed as late as 16.10.2009 before the Commission praying for tariff revision of the Appellant in the manner as was done in the order dated 26.11.2007 with effect from 01.12.2007. The learned counsel for the Board as well for the Commission refers to section 64(6) of the Act which provides that *"a tariff order shall unless amended, or revoked, continue to be in force for such period as may be specified in the tariff order"*. It is argued that this tariff

order can be in force prospectively as also retrospectively and the Supreme Court in ***Kannodia Chemicals and Anr. Vs. State of U.P. and Ors. (1992) 2 SCC 124*** upheld the retrospectivity of the tariff order. However, it is submitted that this Tribunal in a batch of Appeals namely ***Siel India, New Delhi Vs Punjab State Electricity Regulatory Commission reported in 2007 APTEL 931*** followed the Supreme Court Judgment referred to above. In the decision of the Supreme Court there are following observations:

" A retrospective effect to the revision also seems to be clearly envisaged by the section. One can easily conceive a weighty reason for saying so. If the section were interpreted as conferring a power of revision only prospectively, a consumer affected can easily frustrate the effect of the provision by initiating proceedings seeking an injunction restraining the Board and State from revising the rates, on one ground or other, and thus getting the revision deferred indefinitely. Or, again, the revision of rates, even if effected promptly by the Board and State, may prove infructuous for one reason or another. Indeed,

even in the present case, the Board and State were fairly prompt in taking steps. Even in January 1984, they warned the appellant that they were proposing to revise the rates and they did this too as early as in 1985. For reasons for which they cannot be blamed this proved ineffective. They revised the rates again in March 1988 and August 1991 and, till today, the validity of their action is under challenge. In this State of affairs, it would be a very impractical interpretation of the section to say that the revision of rates can only be prospective".

In the decision of this Tribunal also the retrospectivity was maintained. But it is fair to note that in the decision of the Tribunal the retrospectivity was for a period of 2 months and having regard to the short terms involved the Tribunal thought that the interest of the consumers will not be adversely affected by the retrospective operation of the tariff order. Undoubtedly, since the High Court allowed the Writ Petition there had to be fresh determination of tariff of the Appellant in accordance with the Regulations and the Act. High Court's order

cannot be interpreted to mean that the proposed order to be passed by the Commission was to be prospective only. The law is well settled that normally an order determining the tariff takes effect prospectively but the judicial pronouncements as we have noticed earlier make it clear that it can be enforced retrospectively. Section 64(6) gives authority to the Commission to regulate the period during which the tariff order has to subsist. It is true that Regulation 4(2) of the Tariff Regulation 2003 is in line with Sub-section (4) of Section 62 of the Act but the Regulation 4(2) provides that application for amendment of tariff shall be filed not later than 4 months before the intended date of implementation of such amended tariff. The original tariff revision application was filed on 04.07.2007 and it was pleaded subsequently that the revision of tariff was necessary immediately with a view to release an amount of Rs. 1598.61 crores. The Board however pleaded that in order to avoid the tariff shock it was only proposing normal changes in certain categories. This original application was in time. Then

followed spate of litigation culminating in the High Court's order dated 05.06.2008. It is true that Board in spite of having received the letter from the commission did not file any tariff revision application for the Appellant and it was filed only on 16.10.2009 which we have earlier noticed. Accordingly, it was strenuously argued that the retrospective operation of the order dated 25.05.2010 was an utter illegality. The argument is no doubt charming and it may be appealable to reason but we are unable to accept the submission of the Appellant against the retrospectivity due to an important aspect of the matter which was not initially disclosed by the Appellant and it was the Board which produced a copy of the order of the Commission dated 31.01.2008 passed in Petition No. TP/35 of 2007 that makes the position clear. It is significant that barely a month after the original order dated 26.11.2007 was passed by the Commission revising the tariff of the categories including that of the Appellant the Appellant filed a tariff Petition being TP/35 of 2007 for determination of tariff of those consumers to

whom it was supplying electricity and there it was the pointed case of the Appellant that revision of tariff was necessary because the Commission has revised the Appellant's bulk tariff from 01.12.2007. It was argued before the Commission that power purchase cost of the licensee was increased with effect from 01.12.207 and the ARR was approved on 11.09.2007; and that is why the Appellant moved a Petition for revision of tariff on 12.12.2007 applicable for retail sale of electricity by the Appellant and the Commission accepted the reasoning of the Appellant. It was repeatedly argued before the Commission by the Appellant by filing the tariff revision petition on 12.12.2007 which was not even a month after the order dated 26.11.2007 was passed that the tariff applicable for the power purchase from the board has been changed with effect from 01.12.2007. On the one hand the Appellant challenged the order passed in review dated 15.02.2008, which was in fact a confirmation of the order dated 26.11.2007, challenging the inclusion of the Appellant in that order, while on the other hand it

pleaded before the Commission even before the Writ Petition was filed before the High court and even during the pendency of the Writ Petition and also the Appeal that the tariff for the retail supply of electricity to the consumers of the Appellant would require immediate revision because the bulk supply tariff of the Appellant has been increased by the Commission with effect from 01.12.2007. Therefore, consequent upon the order dated 26.11.2007 the Commission after a public hearing allowed tariff revision of the Appellant in respect of the retail sale of electricity to its own consumers by the order dated 31.01.2008. The observations of the Commission in the order dated 31.01.2008 is the following:

"In the present order the commission has weighted the factors such as balancing among different category of consumers minimum tariff increase for majority of consumers, reduction in cross subsidy among highly skewed category of consumers etc. This is apparent in the caser of LT and HT commercial category and the Commission wishes to

reduce the disparity between HT and LT commercial rates. Hence Commission seeks to reduce 20 ps per unit for LT VI –A and VII-B in the existing tariff and enhances 50 paise for HT III Category .”

20. The Commission gave effect to this order from 01.02.2008 instead of 01.12.2007. The approach of the Commission was quite logical and cannot be said to be arbitrary. Instead of making the order effective from 01.12.2007 in respect of the tariff revision of the Appellant’s consumers it made the order prospective and that too from 01.02.2008. It is admitted that there has not been any change in the tariff of the Appellant since November, 2002 and it was the last tariff revision order dated 01.11.2002 of the Commission in respect of the Appellant vis-a-vis the Board. It is the contention of the Board that the Power Purchase Agreement executed by the Appellant viz-a-viz Board was last executed on 01.01.1991 and even though the Commission directed the Appellant in an earlier proceedings to execute a

Power Purchase Agreement on or before 30th September, 2010 the Appellant did not do so. The tariff for retail consumers in Kerala was revised from 01.12.2007 and the impugned order does in no way cause prejudice or loss to the Appellant. The Appellant now has come up with a plea that even though the Commission revised the tariff in respect of the Appellant's consumers by the order dated 31.01.2008 which was made effective from 01.02.2008 it has not charged its consumers at the increased /revised tariff but has charged its consumers on the basis of the tariff which was prevalent since 01.11.2002. This is not an argument at all. Neither before the High Court nor before this Tribunal following High Court's order the Appellant at no point of time challenged the order dated 31.01.2008 passed in TP/35 of 2007 nor did it file any revision before the Commission on any ground whatsoever. A lawful order dated 31.01.2008 has been allowed to stand as it is, and if the Appellant now says that it has not burdened its consumers with the revised tariff from 01.02.2008 it is at

its own peril as nobody prevented the Appellant from charging its consumers in terms of the revised tariff which also had a normal impact. The other bulk consumers like the Appellant whose own consumption is less than 50% have been paying tariff in terms of the order dated 26.11.2007 with effect from 01.12.2007. The act of the Appellant is one of approbation and reprobation at one and the same time which we can hardly approve of. In these circumstances it is in the fitness of things that the Commission's impugned order which has been effective from 01.12.2007 is quite justified. While giving the impugned order effective from 01.12.2007 the Commission was quite conscious that it has revised tariff of the consumer of the Appellant as back as 31.12.2007 with effect from 01.02.2008. The revenue gap of two months (01.12.2007 to 31.01.2008) can be trued up by the Appellant who in fact is not at all injured by the tariff determination.

21. The Appellant has pointed out that by an order dated 11.08.2009 the Commission vide Petition No. TP/63 of 2009 determined the ARR & DRC for the years 2009-10 in which it considered the Power Purchase Cost at pre-revised rates (energy charges @ 2.15 KWH). Since the High court quashed the order dated 26.11.2007 and directed fresh tariff determination for the Appellant and since the Commission was yet to revise the tariff it determined the tariff by the order dated11.08.2009 at the pre-revised rate. Now, in view of the impugned order taking effect from 01.12.207 the ARR and ERC for the year 2007-2010 shall be trued up by the Commission. We direct accordingly.

22. Therefore, a summary of our findings are:-

(a) The Commission did not commit any error in doing away with the distinction between G-I and G-II as it is contrary to the law.

(b) There has been no irrationality in the approach of the Commission towards revision of tariff.

(c) With respect to the retrospectivity of the order we in the peculiar situation as narrated in the body of the judgment maintain it.

23. Resultantly, the Appeal is dismissed without costs subject to the direction contained in para 21 above.

(Justice P.S.Datta)
Judicial Member

(Mr. Rakesh Nath)
Technical member

Dated 28th January, 2011

Index: Reportable/Non-Reportable

PK/ZA