REPORTABLE

IN THE SUPREME COURT OF IDNIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3510 - 3511 OF 2008

Tata Power Company Ltd. …. Appellant

Versus

Reliance Energy Limited and others … Respondents

WITH
CIVIL APPEAL NO. 4269 OF 2008

Tata Power Company Ltd. …. Appellant

Versus

Maharashtra Electricity Regulatory Commission
and others … Respondents

WITH
CIVIL APPEAL NO. 3593 OF 2008

Municipal Corporation of Greater Mumbai
BEST Undertaking …. Appellant

Versus

Reliance Energy Ltd. and others … Respondents

WITH

CIVIL APPEAL NO. 6098 OF 2008

Municipal Corporation of Greater Mumbai
BEST Undertaking .... Appellant

Versus

Maharashtra Electricity Regulatory Commission
and others ... Respondents

AND

CIVIL APPEAL NO. 6099 OF 2008

Municipal Corporation of Greater Mumbai
BEST Undertaking .... Appellant

Versus

Maharashtra Electricity Regulatory Commission
and others ... Respondents

J U D G M E N T

S.B. SINHA, J.

INTRODUCTION

These statutory appeals under Section 125 of the Electricity Act, 2003 (hereinafter called and referred to for the sake of brevity as 'the 2003 Act') are directed against a common judgment and order dated 6th May, 2008

passed by the Appellate Tribunal for Electricity, New Delhi in Appeal No.143 of 2007 and I.A. No.70 of 2008 whereby and whereunder a judgment and order dated 6th November, 2007 passed by the Maharashtra Electricity Regulatory Commission (MERC) was set aside.

THE PARTIES

Whereas Appellants, the Tata Power Company Ltd. (TPC) has two divisions – 'Generation' [TPC (G)] and 'Distribution' [TPC (D)]; the Brihan Mumbai Electricity and Transport Corporation (BEST) is a distribution company; Respondent - Reliance Energy Ltd. now named as Reliance Infrastructure Ltd. (RInfra) is a generating as well as a distributing company within the meaning and provisions of the 2003 Act.

All of them have been operating in the city of Mumbai including Suburban Mumbai of having approximately 384 sq. Km in area and the city of Mumbai having approximately 60 sq. Km in area.

We may place on record that the aggregate capacity to generate electricity of TPC is 1777 MW of power. The generation capacity of the respondent RInfra is 500 MW, but it uses its power, as per its license, only to serve its own consumers.

BACKGROUND FACTS

The following factual matrix relevant for proper appreciation of the legal issues arising in the present case may be noticed.

Indisputably TPC has been generating and supplying electricity to distribution licensees like RInfra and BEST for over a century. On or about 5th March, 1907 ; 3rd April, 1919 ; 15th November, 1921 and 19th November, 1953, the Bombay (Hydro-Electric) Licence ; the Andhra Valley (Hydro-Electric) Licence, the Nila Mula Valley (Hydro-Electric) Licence and Trombay Thermal Power Electric Licence respectively were granted to TPC to generate and supply power in terms thereof.

Since 1907 consumers of electricity in Mumbai were served by distribution lisensee, BEST (for the island city of Mumbai) and since 1926 onwards by RInfra (for suburban Mumbai). Indisputably demand of electricity earlier was relatively low as compared to the demand post 1990s. Nevertheless TPC progressively increased its capacity to meet the demand of both RInfra and BEST. Issues of wrongful inter se allocation between the various distribution licensee never really arose prior to the present scenario.

On or about 1st October, 1916 TPC and BEST (both Appellants herein) entered into an agreement in terms whereof the former agreed to

supply and later agreed to buy power in bulk. This agreement was renewed from time to time.

Subsequently a distribution licence was also issued to BSES, predecessor in interest of respondent RInfra to supply power to the consumers in the suburbs of Mumbai. Under the said license RInfra was authorized to purchase electricity from the bulk Licensees. Accordingly it began procuring bulk power from TPC generating stations according to its requirements from time to time, based on its consumer load (TPC had been the only bulk licensee for Mumbai). Indisputably, however, no agreement in writing had ever been entered into by and between TPC and RInfra. It must be noted in this regard that since its inception and till a very long time RInfra continued to buy its entire requirement of power from TPC.

However in 1978 RInfra's distribution license was amended to permit it to put up a generation station to supply power only to its own consumers. In or about 1995, RInfra commissioned its 500MW generating plant at Dahanu, pursuant whereto the quantum of power purchased by it from TPC was reduced by about 54%. Even then RInfra had been buying nearly 42% of the energy generated by TPC. It had continued to purchase its remaining requirements of power from TPC.

On or about 1998 a Committee on Review of Power demand in Mumbai area commonly known as the 'Kukde Committee' was constituted by the Government of Maharasthtra for the purpose of studying the techno commercial feasibility of new power generation projects at Bhivpuri (500 MW) and Palghar (495 MW) proposed to be set up by TPC and RInfra respectively.

It is accepted that before the said Committee, RInfra took the stand that it wanted to supply to its existing consumers with the power generation from its own proposed project instead of providing power from TPC. The committee submitted its report on or about 26th May, 1998. In its report it recommended for grant of approval for both the said projects. It was furthermore recommended that the additional power generated from RInfra's project be used only to meet the future growth in demand arising from the consumers of Mumbai. The Kukde Committee also recommended that first the then existing generation facility of TPC be fully utilized to meet the requirements of the current consumers of RInfra so as not to disturb the existing technical and commercial arrangement between TPC and RInfra.

Subsequent thereto a 'Principles of Agreement' (POA) was executed between TPC and RInfra on or about 31st January, 1998 inter alia providing that there be a minimum power purchase ('off-take') on the basis of 'pay or

take' in each financial year by RInfra on the basis of its consumer demand forecast. The POA also envisaged execution of a detailed Power Purchase Agreement by the parties. However, no such agreement ever fructified.

Thereafter in 2000 the Maharashtra State Electricity Board [MSEB] gave consent to the Saphale power project of RInfra. Approval however was not granted to the Bhivpur project of TPC. Against the said order granting approval in favour of RInfra, TPC filed a writ petition being No.916 of 2001 before the Bombay High Court on the premise that it had not approved TPC's proposal for the Bhivpuri power project despite it having been submitted at an earlier point of time. It was alleged in the said petition that the impugned decision of the MSEB was illegal and contrary to the 1948 Act, which forbade it from granting sanction to any other person to generate electricity if the existing bulk licensee was able and willing to supply power. A prayer inter alia was made therein that the recommendations of the Kukde Committee should not be implemented.

In response to the said petition MSEB withdrew its approval to RInfra's Power project on the ground that TPC being the bulk licensee was able and willing to supply power to it. On the withdrawal of the approval TPC too withdrew its petition filed before the High Court

Thereafter the 2003 Act came into force with effect from 26th May, 2003. Under the new Act the 'Generating Companies' have been given freedom of choice to sell power to any person or licensee. The Act also introduced the concept of 'open access' which allows the distribution licensee to source its power from any generating company. The distributors accordingly under the changed law do not have to depend upon state based generators to meet their needs.

PROCEEDING UNDER THE ACT

RInfra applied to Maharashtra Electricity Regulatory Commission [MERC] for grant of 'open access' to bring in power from sources, outside Mumbai, to supply electricity to its consumers.

On or about 11th June, 2004 TPC through its executive summary for Annual Revenue Requirement (ARRA) filed before the MERC for the year 2003-04 insisted on having a PPA with RInfra as a condition for supply of power to RInfra in the future. It, however, rejected the said demand on the ground that there was no 'legal justification' or 'tenable reason' for entering into such an agreement.

On or about 23rd August, 2005 the Commission made Regulations known as MERC (Terms and Conditions of Tariff) Regulations, 2005, Part-D whereof required all power purchase agreements/arrangements entered into by the Distribution Licensees to be approved by MERC. The regulation also provided that any amendment to such an agreement or arrangement would require prior permission of the MERC irrespective of whether such an agreement or arrangement was approved by the commission or not.

MERC, on an application, filed by RInfra for direction to TPC to provide additional outlets, agreed to the position that distribution licensees, such as RInfra, can procure their power from any generating company in India and because of the said flexibility in the 2003 Act also directed it to enter into a PPA with TPC.

On or about 18th January, 2006, BEST executed a PPA with TPC for purchase of 800 MW of power for a period of 10 years which was subsequently revised in terms of the MERC's order dated 7th July, 2006. The said PPA was submitted for approval of MERC on 27th December, 2006 which was registered as Petition No.87 of 2006.

On or about 12th July, 2006 a Minutes of the Meeting (MoM) was signed between TPC (G) and TPC (D) for allocation of power to TPC (D). TPC (D) indicated requirement of 500 MW power from TPC (G) in the said MoM. A minor modification in the MoM was directed by MERC, pursuant whereto, on or about 16th March, 2006, TPC (D) entered into a PPA with TPC (G) for 477 MW power which was submitted for approval of MERC on 27th December, 2006 being Petition No.87 of 2006.

RInfra filed an application for intervention before the commission in both the applications for approval of both the PPAs It subsequently also filed its objections in the said proceedings.

It appears from the record that in the meanwhile TPC proposed to enter into PPA with RInfra for its balance quantity after meeting the contractual requirement of BEST for 800 MW and of TPC (D) for 477 MW of electricity . The offer was made by TPC to RInfra for supply of 600 MW which was not accepted. The later instead insisted on obtaining a much higher quantum of power based on its consumer demand. TPC rejected the said demand keeping in view its continuing obligation to its own consumers and also those of BEST. No consensus was therefore reached with respect to the said PPA between TPC-G and RInfra.

On or about 2nd April, 2007 MERC passed generation tariff order for TPC (G) for the period 2006-2007. Commission, however, took the view that since PPAs had not been approved, by way of an interim arrangement, it would allocate available energy from TPC (G) on the basis of coincident peak demand of the distribution licensees.

Aggrieved by and dissatisfied therewith BEST preferred an appeal before the Electricity Appellate Tribunal on 26th April, 2007 which was marked as Appeal No.41 of 2007. Similar appeal was filed by TPC against the tariff order dated 2nd April, 2007 providing for allocation of TPC (G) capacity on the basis of coincidence peak demand on 4th May, 2007, which was marked as Appeal No.51 of 2007.

By an order dated 17th May, 2007 the Appellate Tribunal in Appeal No.51 of 2007 filed by TPC directed MERC to decide BEST's and TPC's petitions for approval of PPA and recorded the undertaking of all parties that they would not claim equities on the basis of order of MERC dated 2nd April, 2007.

RInfra in the meantime initiated a proceeding under Section 86 of 2003 Act before MERC seeking direction against TPC (G) to allocate 762

MW to it and to enter into a PPA with RInfra on the said basis, which was marked as Case No. 30 of 2007.

By reason of a judgment and order dated 6th November, 2007 the Commission approved PPA between TPC (G) and BEST and the arrangement between TPC (G) and TPC (D) for supply of 800 MW and 477 MW of power respectively with effect from 1st April, 2008. In relation to its own jurisdiction it was, however, opined that it can issue direction upon the generating companies in terms of Section 23 of 2003 Act.

RInfra preferred an appeal thereagainst which was marked as Appeal No.143 of 2007.

Two separate appeals were preferred by BEST and TPC questioning the interpretation of Section 23 of 2003 Act by the Commission which were marked as Appeal No.159 of 2007 and Appeal No. 14 of 2008 respectively.

MERC while dealing with the application filed by RInfra for continuing the tariff for financial year 2007-2008 even beyond 31st March, 2008 till the tariff year 2008-2009, by an order dated 1st April, 2008 clearly indicated that for the purpose of fixing the distribution tariff of all the three distribution licensees namely, BEST, TPC (D) and RInfra, based on the share of generation capacity of TPC (G), it will be proceeding in the manner

as directed by the Commission in its order dated 6th November, 2007 approving the PPA entered into by and between TPC (G) and BEST and TPC (G) and TPC (D).

Appellate Tribunal thereafter passed the impugned judgment on 7th April, 2008 in Appeal No.51 of 2007 filed by TPC against the tariff order dated 2nd April, 2007 on the submission of appellant-TPC that it was not pressing for the adjustment of any amount that may be payable by RInfra to TPC for the period 2007-2008 in terms of the interim order of the Appelalte Tribunal dated 17th May, 2007.

RInfra filed petition marked as Case No.6 of 2008 before MERC on 17th April, 2008 seeking equitable allocation of power generation from TPC (G)'s generation facility under Section 23 of 2003 Act.

ORDER OF THE COMMISSION

The Commission passed a fairly detailed order. It took into consideration the factual matrix ; the nature of agreements ; submissions of BEST; its earlier orders ; contentions raised by BEST in its original application as also revised petitions ; firm capacity and other details.

It noticed that a Technical Validation Session in case No. 87 of 2006 was held on 18th April, 2007 including justification for entering into a long

term contract for ten years taking into account the demand forecast during peak and off-peak hours and analysis of other sources of power and availability of transmission capacity in future. It also took into account the basis for arriving at 10 paise/kwh surcharge payable by TPC (G) to BEST in case the availability of generating stations of TPC (G) falls below 85% alongwith supporting computations. It also noticed the mechanism for assessing the amount of compensation payable in case of termination due to events of default may be incorporated in the PPA. It furthermore noticed that before it a public hearing was held on 17th July, 2007 wherein points were raised by the participants and BEST's response thereto.

We may also place on record that that RInfra did not make submissions in the technical session but did so only at the public hearing.

The Commission took up Case No.88 of 2007 and noticed the details of Technical Validation Session in regard to internal capacity allocation from the generation division of TPC to its own distribution division including RInfra's intervention application. It also noticed the details in regard to the public hearing in the aforementioned case which was held on 29th August, 2007. Similarly the application filed by RInfra which was marked as Case No.30 of 2007 was considered in great details.

Submissions of learned counsel appearing for the parties were noticed. Part IV of its judgment contains 'the decision with reasons'. It took into consideration the relevant provisions of law. It noticed its functions under Section 86 of the 2003 Act as also various Regulations framed thereunder. It placed on record that it had issued certain directives to the distribution licensees from time to time. It opined that submission of Power Purchase Agreements (PPA) for approval are imperative as the objective thereof is to remove any uncertainty that may be faced by the consumers of a distribution licensee who does not have any written terms and conditions. It opined that RInfra's recalcitrant attitude in seeking approval of the terms and conditions of its power procurement deserved to be deprecated, whereupon a warning was administered.

Submissions of BEST before the Commission were :-

(i) Ambit of approval process under Section 81(1)(b) of 2003 Act was required to be restricted to the price and the Commission had no power to reduce the quantum agreed by distribution licensee and the generating company under the PPA submitted for approval.

(ii) Insertion of the word "including" before the words "the price" makes the intention of the legislature clear that the scope of the power to regulate is extensive.

(iii) Power of a Regulatory Body is extensive under Section 86(1)(b) of the 2003 Act. Even the generator can be subject to Regulations.

(iv) Section 86(1)(b) is required to be harmoniously read. For invoking the provisions of Section 60 of the Act, the following three situations must conclusively be shown to exist :

(a) any agreement has been entered into which is likely to cause or causes an adverse effect on competition in electricity industry; or

(b) dominant position has been abused which is likely to cause or causes an adverse effect on competition in electricity industry; or

(c) a combination has entered into which is likely to cause or causes an adverse effect on competition in electricity industry.

FINDINGS OF THE COMMISSION

The Commission discussed clause by clause of the PPAs entered into by and between TPC-D and BEST and TPC (G) and TPC (D) in terms of the MERC Regulations. It took into consideration each of the factors enumerated in those PPAs to hold that they were justified for meeting the requirements of BEST and TPC (D), stating :-

> "Based on the above analysis, the Commission is satisfied with the data and information submitted by BEST and TPC substantiating the requirements of Regulation 24 of the MERC (Terms and Conditions of Tariff) Regulations, 2005"

In conclusion the Commission held that Section 86 (1) (b) of the 2003 Act would be applicable only when the PPA is produced before it for its approval and not otherwise.

It also noted that it has the jurisdiction to go into the question with regard to the quantity of supply of electrical energy in terms of the PPAs. However, as the PPA took into consideration the demand of the licensee for the next 10 years, the stipulations contained therein were held to be fair and proper.

It was opined that the language of Section 60 of the Act being restrictive, no cause had been made out for issuance of any direction thereunder.

It furthermore noted that Section 23 of the 2003 Act brought within its fold a generating company but no case had been made for issuance of any direction thereunder while considering the question of grant of approval of a long term PPA.

On the aforementioned findings the Commission approved the PPA of BEST and TPC (D). It was directed :-

> "(C) REL-D is directed to file long-term Power Purchase Agreements for procurement of power from generating Companies and other sources at the earliest. Also, REL-D should submit Power Purchase Arrangement for procurement of power from its own generating unit REL-G, for the Commission's approval, within one month of the issue of this Order.
>
> (D) In the past, in view of the prevailing supply shortage situation, the Commission has invoked its powers under Section 23 of the EA 2003, and has directed the distribution licensees to share the available generation capacity in a particular ratio, based on the share of non-coincident peak demand for FY 2006-07, and subsequently based on the share of the coincident peak demand for FY 2007-08, since the coincident peak demand data was available by then. The situation in the previous years was compounded by the fact that there were no approved PPAs between the parties, and an important aspect like power procurement cannot operate in a vacuum. However, the Commission's powers to issue directions under Section 23 of the EA 2003 are wide and if necessary and found expedient, the Commission may issue such directions in future also, despite the existence of any or all the approved PPAs, in case of any

shortfall in contracted capacity, in order to protect interests of consumers. During the transition period, in case of shortage of supply of electricity in the city of Mumbai, the Commission will assess the situation at the time of conduct by the Commission of Annual Performance Review in terms of Regulation 17 of the MERC (Terms and Conditions of Tariff) Regulations, 2005 and assess whether any specific direction to the distribution licensees is required to be issued, to ensure that the consumers of all three distribution licensees in Mumbai city are treated equitably and for equitable distribution of electricity. It is clarified that the supply in the form of generation capacity does not necessarily have to be located within Mumbai or even within Maharashtra, and the supply availability referred to here is in the context of firm long-term power purchase agreements between the distribution licensees and power suppliers. With the above observations, the Commission disposes of Case No. 87 of 2006, Case No. 88 of 2006 and Case No. 30 of 2007."

APPELLATE TRIBUNAL

Four appeals were preferred by RInfra theregainst. Appellants also preferred appeals in regard to the interpretation of Section 23 of 2003 Act.

The Tribunal by reason of its impugned judgment dated 6th May, 2008 disposed of the said appeals.

Therein apart from the factual matrix involved in each case, statutory provisions and the submissions made by learned counsel for the parties were duly noticed. The tribunal also extracted in details the averments made by TPC in its writ petition before the High Court, which as noticed hereinbefore, had ultimately been withdrawn.

The Tribunal in paragraph 93 of the judgment formulated the questions for its consideration which read as under :-

> "93. The main question in the set of these appeals revolves around the approval of PPA between TPC(G) and BEST and arrangement between TPC(G) and TPC(D). These appeals raise the question whether the Commission has the power to disapprove the PPA and allocate the power of a generating company amongst the distribution licensees by regulating the supply in terms of Section 23 of the Act?"

The Appellate Tribunal did not disturb the findings of the Commission in regard to its interpretation of Section 60 as also Section 23 of the 2003 Act.

It, however, held that having regard to the purpose and object of the Act, the Commission should have taken into consideration the need of the first respondent in regard to the allocation of quantity of supply

Upon considering the provisions of the Act and the Regulations, the Tribunal held :

> "102. We note from the above regulations that the Commission itself recognizes an agreement or an arrangement for long-term power procurement by a Distribution Licensee. Regulations require prior approval of the Commission for any change to an existing arrangement or agreement for long term procurement. When an arrangement for power procurement between TPC and BEST as also between TPC and REL does exist, how the Commission failed to consider the claim of REL.
>
> 103. We conclude from the aforementioned that the Commission has wide powers to regulate the quantity of energy that may be supplied by a generating company to a distribution licensee when both are under the jurisdiction of the same Commission.
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> 104. It is not in dispute that the claims of REL have not been considered by the Commission while approving the PPA between the TPC(G) and BEST and arrangement between TPC(G) and TPC(D). It is also not in dispute that the approval of PPA and the arrangement has affected the allocation of power to REL. The interests of REL have been adversely affected by the Commission in violation of the principle of natural justice. The Commission ought to have considered the claim of REL for allocation of power while considering the approval of PPAs between TPC(G) and BEST and arrangement between TPC(G) and TPC(D).
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> 105. In the circumstances, appeal No. 143 of 2007 is allowed and order dated November 06, 2007 of the MERC approving the PPA of TPC and BEST and arrangement between TPC and TPC(D) with reference to allocation of power to BEST and

> TPC(D) is set aside. The Commission is directed to consider the question of approval of PPA and the arrangement afresh after taking into consideration the claims of BEST, REL and TPC(D). While considering the case of the parties the Commission shall have regard to the fact that the consumers of respective areas have been bearing the Depreciation and Interest on Loan elements of the Fixed Cost of tariff and also consider all other submissions of the parties which are permissible in the law."

The Tribunal set aside the approval of PPA's and remanded the matter to MERC for its reconsideration.

The Tribunal, furthermore, did not interfere with the tariff order dated 2nd April,2007 while disposing of Appeal No. 41 of 2007 filed by BEST, opining that the period for which allocation was made on the basis of consistence peak demand had already expired

Both TPC as also BEST are before us questioning the legality and/or validity of the final order passed by the Appellate Tribunal as also the orders disposing of the interim applications.

SUBMISSIONS OF THE COUNSEL

Mr. Jaideep Gupta and Mr. Rohington Nariman, learned senior counsel appearing on behalf of the appellants would submit :-

i) The Appellate Tribunal misdirected itself in passing the impugned judgment in so far as it failed to take into consideration that in terms of the provisions of the 2003 Act the Commission had no jurisdiction to interfere with the functions of the generating company and its jurisdiction was restricted to regulate the terms of the agreement between a generating company and a distribution company, particularly when no fault with the approval of the PPA entered into by and between TPC and BEST and TPC (G) and TPC (D) was found by it.

ii) RInfra also filed an application and the same having been considered in great details, it has incorrectly been held by the Appellate Tribunal that the principle of natural justice had not been complied with.

iii) Direction of the Tribunal to the Commission to take into consideration contribution towards depreciation and interest on loan elements of fixed costs of TPC generation capacity while considering the claim of RInfra is without any basis inasmuch as :-

(a) Such direction of the Appellate Tribunal has the effect of recognizing ownership of consumers over the generation

assets. The Act does not recognize any such right of ownership of consumers over the generating assets.

(b) RInfra consumers have only paid towards costs of the generation of the power consumed by them, which the developer is entitled to recover as reasonable cost of electricity and return of his investment.

If this argument is taken to its logical conclusion, every consumer of electricity, whether domestic, industrial or commercial, would claim ownership of generation plants for the purpose of supply of power to their respective areas.

iv) 2003 Act must be interpreted not only having regard to history of legislation but also the purpose and object it seeks to achieve wherefor the Commission and the Tribunal were not only required to consider the chapter headings but also the marginal notes.

v) Principles of harmonious construction of the provisions of the statutes having not been resorted to either by the Commission or by the Tribunal, they committed a serious error in opining that Section 23 not only controls distribution of power but also generation thereof.

Dr. A.M. Singhvi, learned senior counsel appearing on behalf of the respondent, on the other hand, urged :-

(i) The factual matrix involved herein would clearly demonstrate a long standing commercial relationship existing between TPC (G) and RInfra and/or its predecessor-in-interest in regard to supply of electrical energy for the consumers of suburb Mumbai (approximately 384 sq. kms. area) being twenty five lacs in number out of which eighteen lacs being small individual and relatively economically weaker sections consuming less than 300 units per month vis-à-vis the number of consumers BEST serves, all of being in the town of Mumbai being approximately of an area of 60 sq. kms. area who are higher paying consumers and those of TPC (D) having 23846 consumers, the Commission must be held to have its jurisdiction rightly to allocate supply of power to the licensees in greater public interest.

(ii) 2003 Act does not contemplate exclusion from the purview of the Commission's jurisdiction of all matters relating to generation but also covers regulation of several aspects thereof including tariff of generation companies, sale of electricity by

generators, maintaining efficient supply, securing the equitable distribution of electricity, promotion competition, preventing abuse of dominant position by generating companies, preventing advese effect on competition in electricity industry etc.

(iii) Regulation of tariff would bring within its fold inter alia the quantity that a generator supplies to a distribution licensee or a consumer and various interconnected and interrelated issues which have a bearing on generation of electricity.

(iv) It is not that the 2003 Act merely empowers the Commission to fix only the generating tariff and to otherwise adopt a hands off attitude towards the generation company on the alleged ground that the Commission did not have any other jurisdiction over the generating companies.

(v) The principle of 'purposive interpretation' should be resorted to for interpreting a statute regulating generation, distribution and supply of electrical energy which is in short supply in the country wherefor endeavour should be made to ascertain the object and purport not only by reading one of the provisions of the Act but the preamble thereof as also the other important

provisions, namely Sections 2(70) ; 7 ; 10 ; 11 ; 23 ; 60 ; 86(1)(b) and 86(1)(f) of the 2003 Act.

(vi) Only because the generation of electricity was taken outside the purview of the licensing regime, the same would not mean that a generator of an electrical energy would be entitled to free wheel its entire supply to any person it likes and in any quantity it likes.

(vii) The chapter heading and the marginal note of Section 23 of 2003 Act cannot be resorted to for its interpretation as it is well settled that marginal notes do not control the meaning of the section.

(viii) Chapter heading should not be treated to be containing provisions dealing with a particular subject matter as rigid compartment and it is not uncommon that a provision, rule or regulation relatable to one chapter is in fact interpreted, applied or related to other chapters of the same Act.

(ix) The term "supply" having been defined in Section 2(70) of the 2003 Act, in any event, the jurisdiction of the Commission would clearly cover a situation where the power of regulation in

relation to supply and ensuring efficient thereof are required to be regulated.

(x) Neither Section 23 nor Section 86(1)(b) of 2003 Act provides 'any context to the contrary' for the purpose of application/ interpretation of term "supply" as defined in Section 2(70). Context of Section 86(1)(b) read with Section 23 and Section 2(70) of the Act if construed with the preamble thereof, upon applying the principle of purposive interpretation, it would be evident that the said provisions constitute an invisible seamless web creating a context which, far from being to the contrary, mutually reinforces each other and points only in one direction, namely the necessity to regulate supply of electrical energy not only at the hands of the licensees but also the generating companies.

(xi) The basic and overriding purpose of 2003 Act being ensuring generation of electricity and efficient equitable distribution thereof with the interest of the consumers in mind the generating companies cannot be permitted to act outside the purview of Regulations of a Regulatory Commission and consequently it must be held that the Commission has full jurisdiction not only to regulate tariff and price issues but also

distribution of quantum of electricity and other necessary concomitance thereto.

(xii) The word "regulate" reflects a statutory mandate of all encompassing jurisdiction.

(xiii) TPC being in a public utility service, it is required to act fairly, equitably and not in an arbitrary fashion.

(xiv) The principle of harmonious construction may be resorted to only in a case where there exists any contradiction or overlapping as in this case the provisions of Sections 11 and 23 apply in different fields, there is absolutely no necessity to take recourse to the said principle.

(xv) As TPC (G)'s acts and omission, despite its status as commercial entity, constitutes an abuse of its dominant position, which cannot be permitted to take rccourse to "cherry picking" of RInfra's high end consumers.

ISSUES ARISING HEREIN

Although before us a large number of contentions had been raised, the core questions, which arise for our consideration, are :-

(A) Whether recourse to Section 23 of the Act can be taken for issuance of any direction to the generating company?

(B) Whether the Commission while applying the provisions of Section 86(1)(b) of the Act could also take recourse to Sections 23 and 60 thereof?

(C) Whether equitable allocation of power generated by a generating company is permissible?

LEGISLATIVE HISTORY

1910 ACT

The earliest statute relating to control of generation of supply, distribution of electrical energy which governed the field was Indian Electricity Act, 1910 (1910 Act). Part-II of the said Act provided for supply of energy. Section 3 thereof provided for grant of licence to any person to supply energy in any specified area and also to lay down or place electric supply-lines for the conveyance and transmission of energy.

However, after coming into force the 1948 Act, such licences could be granted only upon consulting the State Electricity Boards constituted and incorporated under Sections 5 and 12 thereof. Section 22-B in the 1910 Act,

which was inserted by Act 32 of 1959, provided for power to control the distribution and consumption of energy stating :-

> "Section 22B - Power to control the distribution and consumption of energy
>
> (1) If the State Government is of opinion that it is necessary or expedient so to do, for maintaining the supply and securing the equitable distribution of energy, it may by order provide for regulating the supply, distribution, consumption or use thereof.
>
> (2) Without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may direct the licensee not to comply, except with the permission of the State Government, with—
>
> (i) the provisions of any contract, agreement or requisition whether made before or after the commencement of the Indian Electricity (Amendment) Act, 1959, for the supply (other than the resumption of a supply) or an increase in the Supply of energy to any person, or
>
> (ii) any requisition for the resumption of supply of energy to a consumer after a period of six months, from the date of its discontinuance, or
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> (iii) any requisition for the resumption of supply of energy made within six months of its discontinuance, where the requisitioning consumer was not himself the consumer of the supply at the time of its discontinuance."

1948 ACT

The 1948 Act was enacted to provide for the rationalization of the production and supply of electricity and generally for taking measures conducive to electrical development. Section 43 conferred power on the Board to enter into arrangements for purchase or sale of electricity under certain conditions. Section 43-A provided for terms, conditions and tariff for the sale of electricity generated by it to any other person with the consent of the competent government or governments.

Section 44 of 1948 Act also placed restrictions on establishment of new generating stations or major additions or replacement of plant in generating stations except with the previous consent in writing of the Board, to establish or acquire a new generating station or to extend or replace any major unit of plant or works pertaining to the generation of electricity in a generating station.

1998 ACT

The Parliament enacted Electricity Regulatory Commissions Act, 1998 (for short, "the 1998 Act") to provide for the establishment of a Central Electricity Regulatory Commission and State Electricity Regulatory Commissions, rationalization of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and for matters connected therewith and incidental thereto.

In terms of the 1998 Act, the Regulatory Commission was conferred with the power to determine tariff for all sales by a generating company in terms of Section 22(1)(c) thereof. It further required in line with the provisions of the 1910 Act as also the 1948 Act, for the State Commission constituted thereunder to regulate investment approval for generation, transmission, distribution and supply of electricity to require the licensees to formulate prospective plans and schemes for the promotion of generation, transmission, distribution and supply of electricity and to devise proper power purchase and procurement process, and to regulate the assets and properties related to the electricity industry, etc. The 1998 Act did not envisage de-licensing of generating companies as in terms thereof the following requirements were to be complied with on the establishment and operations of a generating station:

(a) Setting up a generating station requires approval of a Board (u/s 44 of Electricity Supply Act, 1948)

(b) Sale of Power by a generating company of any person requires approval of the competent government (u/s 43A of Electricity Supply Act, 1948)

(c) Investment approval for generating was regulated by the ERCA.

(d) The tariff for all supply of power by a generating company was determined by the Regulatory Commission.

(e) The generating company was also regulated from the perspective of transmission grid stability and operation, which is necessary on the technical side.

Section 22(1)(c) of the 1998 Act reads :-

> "Section 22 - Functions of State Commission
>
> (1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely:--
>
> (c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;"

2003 ACT

The 2003 Act was enacted to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity.

Before noticing the relevant provisions of the 2003 Act, we may place on record the statement of objects and reasons for enactment thereof, the relevant portion whereof reads as under :-

"3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonizing and rationalizing the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self contained comprehensive legislation arose. Accordingly, it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The Bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalized after extensive discussions and consultations with the States and all other stake holders and experts.

4. The main features of the Bill are as follows:-

(i) Generation is being delicensed and captive generation is being freely permitted. Hydro projects would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilization of water resources.

(ii) There would be a Transmission Utility at the Central as well as State level, which would be a Government company and have the responsibility of ensuring that the transmission network is developed in a planned and coordinated manner to meet the requirements of the sector. The load dispatch function could be kept with the Transmission Utility or separated. In the case of separation the load dispatch function would have to remain with a State Government organization/company."

Section 2 is the interpretation section.

Section 2(4) defines "appropriate Commission" to mean the Central Regulatory Commission referred to in sub-section (1) of section 76 or the State Regulatory Commission referred to in section 82 or the Joint Commission referred to in section 83, as the case may be.

"Consumer" has been defined in section 2(15) to mean any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;

Section 2(17) defines “distribution licensee” to mean :-

(17) "distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;

(23) "electricity" means electrical energy--

(a) generated, transmitted, supplied or traded for any purpose; or

(b) used for any purpose except the transmission of a message;

(28) "generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station;

(38) "licence" means a licence granted under section 14;

(39) "licensee" means a person who has been granted a licence under section 14;

(50) "power system" means all aspects of generation, transmission, distribution and supply of electricity and includes one or more of the following, namely:--

(a) generating stations;

(b) transmission or main transmission lines;

(c) sub-stations;

(d) tie-lines;

(e) load despatch activities;

(f) mains or distribution mains;

(g) electric supply-lines;

(h) overhead lines;

(i) service lines;

(j) works;

(57) "regulations" means regulations made under this Act;

(71) "trading" means purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly

Section 3 provides for the National Electricity Policy and Plan enabling the Central Government to prepare the National Electrcity Policy and tariff policy, in consultation with the State Government and the Authority for development of the power system based on optimal utilization of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.

Part III of the Act provides for generation of electricity. Section 7 enables a generating company to establish, operate and maintain a generating station without obtaining a licence if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of Section 73.

Section 8, however, provides that a generating company intending to set up a hydro-generating station shall prepare and submit to the Authority for its concurrence, a scheme estimated to involve a capital expenditure exceeding such sum, as may be fixed by the Central Government from time to time by Notification.

Section 9 provides for captive generation. Section 10 lays down duties of generating companies, sub-sections (1) and 2 whereof reads as under :-

> "10 - Duties of generating companies
>
> (1) Subject to the provisions of this Act, the duties of generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder.
>
> (2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer."

The power to issue directions to the generating companies by the Appropriate Government and appropriate Commissions are laid down in sub-section (1) of Section 11 of the 2003 Act stating :-

"Section 11 - Directions to generating companies

(1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation:--For the purposes of this section, the expression "extraordinary circumstances" means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest."

Part IV of the 2003 Act provides for licensing.

Section 12 prohibits any person to transmit electricity, or distribute electricity; or undertake trading in electricity, unless authorized to do so by a licence issued under Section 14 or exempt under Section 13 of the 2003 Act. Section 14 provides for grant of licence by the Appropriate Commission to any person – (a) to transmit electricity as a transmission licensee ; or (b) to distribute electricity as a distribution licensee; or (c) to undertake trading in electricity as an electricity trader in any area as may be specified in the licence.

Section 15 of the 2003 Act provides for procedure for grant of licence. Section 16 provides for conditions of licence. Section 15 mandates the licensee not to do certain things. The provisions for amendment of licence is contained in Section 18 thereof. Section 19 provides for revocation of licence. Section 20 provides for sale of utilities of licensees. Section 21 provides for vesting of utility in purchaser.

Section 23, which is relevant for our purpose, reads as under :-

> "23 - Directions to licensees
>
> If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof."

Section 24 provides for suspension of distribution licence and sale of utility.

Part V deals with transmission of electricity.

Section 60 provides for market domination. It reads :-

> "The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or

abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry."

Section 86 provides for functions of State Commission, clauses (a), (b) and (f) of sub-section (1) whereof, read as under :-

"Section 86 - Functions of State Commission

(1) The State Commission shall discharge the following functions, namely:--

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

PROVIDED that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

.. … …

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

Section 181 of 2003 Act empowers the State Commissions to make regulations, consistent with the provisions of the Act and the rules generally to carry out the provisions of the Act.

Pursuant to or in furtherance of the aforementioned regulations making powers, the Commission has made regulations known as MERC (Terms and Conditions of Tariff) Regulations, 2005.

Regulation 7 deals with determination of generation tariff.

Regulation 22 provides for Power procurement guidelines to the following terms :

> "22.1 A Distribution Licensee shall follow the guidelines contained in this Part with respect to:
> (a) Procurement of power under any arrangement or agreement with a term or duration exceeding one year (i.e. long-term power procurement); and
> (b) Procurement of power under any arrangement or agreement with a term or duration less than or equal to one year (i.e. short-term power procurement)."

Regulation 23 mandates the distribution of licenses to prepare long term power procurement plan which should fulfill the requirements specified thereunder.

We may now notice that Regulation 24 provides for approval of power purchase agreement/arrangement.

PRELIMINARY OBSERVATIONS

Before adverting to the rival contentions of the parties we may observe :

The Tribunal committed a factual error in so far as it failed to notice that no long term PPA exists between TPC (G) and RInfra. It furthermore was not correct in opining that the Commission had not considered the claim of RInfra while approving the arrangements between TPC (G) and TPC (D), despite the fact that REL (RInfra) not only filed objections to the application for grant of approval of PPA filed by the parties herein, it also filed independent application; took part in the deliberations and all its contentions had been considered. On what basis the Tribunal opined that the decision of the Commission is in violation of the principle of natural justice is beyond anybody's comprehension. It furthermore took into consideration an irrelevant fact, namely that the Commission in determining the issue between the parties should have regard to the fact that the consumers of respective areas have been bearing the 'depreciation' and interest on loan

elements of the Fixed Cost of tariff. It furthermore without assigning any reason dismissed the appeals being Nos. 159 of 2007 and 14 of 2008.

INTERPRETATION OF THE STATUTORY PROVISIONS

A statute, as is well known, must be construed having regard to Parliamentary intent. For the said purpose it is open to a court not only to take into consideration the history of the legislation including the mischief sought to be remedied but also the objects and purpose it seeks to achieve.

The 1910 Act provided for licensing of all the operators who were engaged not only in transmission and distribution of electricity but also generation thereof. Indisputably 'electricity' comes within the purview of the public utility service. It, in the modern context, is a necessary item for the purpose of better living of the citizens. After India became independent and with the advent of industrialization as also for other reasons, the benefit of availing consumption of electrical energy not only remained with the urban areas but also extended to rural areas. With growth in industrialization as also trade and commerce in the country, its requirements increased many fold. With a view to provide for effective control and regulation of generation, distribution and supply of electrical energy each

State was separately required to set up Electricity Boards wherefor the Parliament enacted 1948 Act. For all intent and purport the Boards constituted under the 1948 Act were to exercise monopoly power. The 1910 Act also made provisions for purchase of electricity undertakings by the State.

Section 3 of 1910 Act, as amended in 1959, and Sections 43-A and 44 of 1948 Act clearly go to show that the private generating companies were brought under an extensive control as not only for extension of its existing plants but also for setting up or acquiring new plants, the previous consent of the concerned State and the Board became necessary.

The private generating companies, in terms of the provisions of the statutes governing the field were, thus, subjected to an extensive control by the States. As the years rolled by, the activities of the Boards grew by leaps and bounds. The Boards, for all intent and purpose, acquired monopoly status. In terms of Sections 46 and 49 of the 1948 Act, they were entitled to fix grid tariff and to make provisions for earning reasonable profits.

It was, however, noticed that in the absence of any competition from the private operators, the Boards were not in a position to provide for the desired optional results. It was in the aforementioned premise and

particularly having regard to the liberalized economic policy of the Central Government since 1991 necessities were felt for providing greater room for the private generating companies. For the aforementioned purposes, the Central Government as also the State Governments adopted liberalized polices. They invited private operators to generate electrical energy not only through conventional modes, namely, Hydro Electric Power and Thermal Power but also generation of power by using other raw-materials, for example gas, naptha etc.

The 1998 Act, as notice hereinbefore, did not envisage delicensing of generating companies. It provided for approval by the Board therefor. It provided for imposition of other conditions for generation of electricity.

The Parliament by making 2003 Act clearly acknowledged the necessity of providing a greater room for generation of electrical energy so as to enable the country to meet its requirements. It is only in that view of the matter, the liberalization policy of the State provided for de-licensing of the generating companies.

In terms of the said provision, the activities of the erstwhile licensees of power generation on the one hand and those of transmission and distribution in electricity on the other were separated. The concept of

trading was brought thereunder for the first time. Trading activities are permitted subject to grant of licenses. Distribution of electricity was defined as licensed activity in terms whereof a holder of a license can supply power to a person for his own use. A licensee for the activity of transmission could own the wires/transmission lines constituting the part of their grid but it could not engage itself in the activity of buying or selling the electrical energy.

The core question which, therefore, arises for consideration is as to whether despite the Parliamentary intent of giving a go-bye to its licensing policy to generating companies, whether through imposing stringent regulatory measures the same purpose should be allowed to be achieved?

The Act is a consolidating statute. It brings within its purview generation, transmission, distribution, trade and use of electricity. Whereas generation of electricity has been brought outside the purview of the licensing regime, the transmission, distribution and trading are subject to grant of licence are kept within the regulatory regime.

The statute provides for measures to be taken which would be conducive to development of electricity industry. Measures are also required to be taken for promoting competition which would also mean the

development of electricity industry. It, indisputably, provides for measures relating to the protection of interest of consumers and supply of electricity to all areas. The generating companies, however, despite de-licensing, do not enjoy the monopoly status. They are subject to rationalization of electricity tariff. The preamble envisages ensuring transparent policies, policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

Electricity is not an essential commodity within the meaning of the provisions of the Essential Commodities Act, 1955 or any other statute. It is, however, in short supply. As the number of consumers as also the nature of consumption have increased many fold, the necessity of more and more generation of electrical energy must be given due importance.

The preamble of the 2003 Act, although speaks of development of electricity industry and promotion of competition, it does not speak of equitable distribution of electrical energy. The statutes governing essential and other commodities in respect whereof the State intends to exercise complete control, provide for equitable distribution thereof amongst the consumers.

For the purpose of deciphering the object and purport of the Act, it is well known, the Court can look to the statement of objects and reasons thereof. One of the principal purposes which had been taken note of for enactment of 2003 Act by the Parliament is the poor performance of the State Electricity Boards. The Government intended to have an independent body for determining the tariff which was required to be carried on in a professional and independent manner. It was felt that cross-subsidies have reached to unsustainable levels. The enactment provides for establishment of the Electricity Regulatory Commissions.

Encouraging private sector participation, generation, transmission and the distribution of electricity became the statutory policy. The Parliament felt the need of harmonizing and rationalizing the provisions of the Act. De-licensing of generation as also grant of free permission of captive generation is one of the main features of the 2003 Act. It is clearly provided that only hydro-generating projects would need the approval of the State Commission and the Central Electricity Regulatory Authority. It recognized the need of prohibiting transmission licensees. It also for the first time provided for open access in transmission from the outset. It even provides where the distribution licensee proposes to undertake distribution of electricity for a

specified area within the area of supply through another person, that person shall not be required to obtain separate licence.

In terms of Section 7 of the 2003 Act, all persons are permitted to establish, operate and maintain a generating station. It can, in terms of Section 62(1)(a) of the 2003 Act, supply electricity to any licensee i.e. distribution licensee or trading licensee. The 2003 Act permits the generating company to supply the electricity directly to a trader or a consumer. In terms of Section 42(2) of the 2003 Act even for the said purpose no tariff is required to be determined.

The primary object, therefore, was to free the generating companies from the shackles of licensing regime. The 2003 Act encourages free generation and more and more competition amongst the generating companies and the other licensees so as to achieve customer satisfaction and equitable distribution of electricity.

The generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit; choice of counter-party buyer; freedom from tariff regulation when the generating company supplies to a trader or directly to the consumer.

If de-licensing of the generation is the prime object of the Act, the courts while interpreting the provisions of the statute must guard itself from doing so in such a manner which would defeat the purpose thereof. It must bear in mind that licensing provisions are not brought back through the side door of Regulations.

DIRECTION TO GENERATING COMPANIES

This brings us to the interpretation of Section 11 of the 2003 Act. In terms of 1910 Act the State Government was the licensing authority. It alone, therefore, in the said capacity was entitled to issue directions. Sub-section (1) of Section 11 of 2003 Act empowers the Appropriate Government to issue directions but such direction can be issued only in extraordinary circumstances as stated in the explanation appended thereto i.e. arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

Interpretation clause contained in Section 2 of the Act prefixes the words "unless the context otherwise requires". The word "supply" has separately been used even for generation and distribution. Thus, although a broad meaning may be assigned to the said term but the same must be held to be 'subject to the context'. The word "supply" used in Section 23 of 2003

Act for bringing in efficient supply would mean regulate and consequentially licensing in respect of the generating company.

For the aforementioned purpose it cannot be given a general or popular meaning denoting supplier and receiver. Once it is held that by reason thereof the Parliament aimed at ensuring the supply, the purported object it sought to achieve by enacting Section 7 would lose its purpose. It, however, does not mean that Section 23 itself becomes unworkable as it would not be possible to secure equitable distribution and supply. The agreement of distribution (PPA) being subject to approval, indisputably the Commission would have the public interest in mind. It has power to approve a MOU which subserves the public interest. It, while granting such approval may also take into consideration the question as to whether the terms to be agreed are fair and just.

SECTION 23 – DIRECTION BY THE COMMISSION

Could a generating company, despite Section 11 be subjected to any direction by the Commission in terms of Section 23 of the 2003 Act?

Whether chapter headings and marginal notes should be taken into consideration for the purpose of interpretation of the main provision are the questions?

Chapter headings and the marginal note are parts of the statute. They have also been enacted by the Parliament. There cannot, thus, be any doubt that it can be used in aid of the construction. It is, however, well settled that if the wordings of the statutory provision are clear and unambiguous, construction of the statute with the aid of 'chapter heading' and 'marginal note' may not arise. It may be that heading and marginal note, however, are of a very limited use in interpretation because of its necessarily brief and inaccurate nature. They are, however, not irrelevant. They certainly cannot be taken into consideration if they differ from the material they describe.

We may notice some authorities on the subject at the outset.

In Bennion on Statutory Interpretation, Fifth edition, Section 255, it is stated : "where general words are preceded by a heading indicating a narrower scope it is legitimate to treat the general words as cut down by the heading.",

Section 256 of the said treatise deals with "sidenote, heading or title", wherein it is stated :-

> "Use in interpretation – Like anything else in what Parliament puts out as its Acts, a sidenote or heading is part of the Act, despite dicta to the contrary. It may therefore be used by the

interpreter. 'No judge can be expected to treat something which is before his eyes as though it were not there. However, the sidenote or section heading is of very limited use in interpretation because of its necessarily brief and therefore possibly inaccurate nature."

It was commented :-

"If the sidenote contradicts the text this puts the interpreter on inquiry; but the answer may be that the drafter chose an inadequate signpost, or neglected to alter it to match an amendment made to the clause during the passage of the Bill. Such facts are outside the knowledge of the interpreter, who must therefore adopt a rule not depending on them.

… ….. …..

Modern judges believe it proper to consider sidenotes or headings to sections, and gather what guidance they can from them. Thus Vinelott J said that the sidenote to the Income and Corporation Taxes Act, 1970 s 488 (repealed) was a permissible and useful guide that threw a light on the mischief at which the section was aimed. Upjohn LJ gave a precisely accurate indication of the role of the sidenote when he said :

'While the marginal note to a section cannot control the language used in the section , it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed *with the note in mind*.'

The italicised words accurately show the relationship of this component to the informed interpretation rule. Earlier inconsistent dicta, a

> selection of which are now considered, must be treated as erroneous."

In Interpretation of Statutes, Fourth Edition, by Vepa P. Sarathi at page 347 it is stated :-

> 'The heading of a chapter may be referred to in order to determine the sense of any doubtful expression in a section ranged under it. But it cannot control unambiguous expressions.
>
> It is true that a heading cannot control the interpretation of a clause if its meaning is otherwise plain and unambiguous, but it can certainly be referred to as indicating the general drift of the clause and affording a key to a better understanding of its meaning."

Similarly in Principles of Statutory Interpretation by Justice G.P. Singh, upon noticing the conflicting opinion, the learned Author states:-

> " The view is now settled that the Headings or Titles prefixed to section or group of sections can be referred to in construing an Act of the Legislature."

Chapter heading, therefore, is a permitted tool of interpretation. It is considered to be a preamble of that section to which it pertains. It may be taken recourse to where an ambiguity exists. However, where there does not

exist any ambiguity, it cannot be resorted to. Chapter heading and marginal note, however, can be resorted to for the purpose of resolving the doubts.

It furthermore appears that there is a drift from the old value in recent times.

We may notice that the English decisions whereupon reliance had been placed by this Court in various judgments and in particular Chandler v. DPP, [(1962) All ER 142], str considered to be a no longer a good law in the country of origin, as stated in Bennion on Statutory Interpretation Fifth Edition at page 748 :-

> " Superseded dicta Phillimore LJ referred to a 'general rule of law' to the effect that marginal notes must be disregarded 'upon the principle that those notes are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons'. In fact, with occasional triffling exceptions, the marginal notes in an Act are not inserted by parliamentary clerks - or even drafters – but are contained either in the Bill as introduced or in new clauses added by amendment. Furthermore, the clerks are not 'irresponsible persons', but are subject to the authority of Parliament. Avory J. said that 'marginal notes form no part of a statute'. He added : 'They are not voted on or passed by Parliament, but are inserted after the Bill has become law'. This is not the case however. The entire Act is passed by Parliament and is entered, or deemed to be entered, in the Parliament Roll with all non-amendable components included. These components mostly

> remain unchanged throughout the passage of the Bill. They are certainly not inserted after the Bill has become law. Willes J. after asserting that the marginal notes and other 'appendages' are not part of an Act, said of any Act, passed after the practice of actually engrossing Acts on the Parliament Roll ceased in 1849: 'The Act, when passed, must be looked at just as if it were still entered upon a roll, which it may be again if Parliament should be pleased so to order; in which case it would be without these appendages…'"

It is, however, evident from the decision of this Court in Indian Aluminium Company v. Kerala State Electricity Board, [AIR 1975 SC 1967], that the modern trend is to take into consideration the marginal note. It could be used, as has been held, in R.S. Joshi, Sales Tax Officer, Gujarat and Ors. v. Ajit Mills Limited and Anr., [(1977) 4 SCC 98]. Relevance of marginal note was also taken note of in Ramesh Chand and Ors. v. State of U.P. and Ors., [(1979) 4 SCC 776].

In Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group and Ors., [(2006) 3 SCC 434], marginal note has been taken into consideration as an intrinsic part of the Section. In Deewan Singh and Ors. v. Rajendra Pd. Ardevi and Ors., [2007 (1) SCALE 32] it has been held that the marginal note may be taken into consideration for the purpose of proper construction of the provision although there is no ambiguity.

Sarabjit Rick Singh v. Union of India (UOI), [(2008) 2 SCC 417] follows Deewan Singh (supra).

SUPPLY – CONTEXTUAL MEANING

It was submitted by the respondents that in any event the word 'supply' as used in Section 23 should be given the same meaning as is given to it in Section 2(70) of the Act i.e. the sale of electricity to a licensee or consumer. Accordingly by its very nature, supply would have a supplier and a receiver and any direction which is aimed at ensuring or regulating supply by its very nature would have to be directed to both the supplier and the receiver.

However, when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context.

The legal principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clause which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have some what different meaning in different sections of the Act depending upon the subject or context. That is why all

definitions in statutes generally begin with the qualifying words 'unless there is anything repugnant to the subject or context'. [See Whirlpool Crporation v. Registrar of Trade Marks, Mumbai and others, { (1998) 8 SCC 1 ; Garhwal Mandal Vikas Nigam Ltd. v. Krishna Travel Agency,{ (2008) 6 SCC 732 } and National Insurance Co. Ltd. v. Deepa Devi, [(2008) 1 SCC 414 }].

Accordingly the word 'supply' cotnained in Section 23 refer to 'supply to consumers only' in the context of Section 23 and not to supply to licensees. On the other hand, in Section 86(1)(a) 'supply' refers to both consumers and licensees. In Section 10(2) the word 'supply' is used in two parts of the said Section to mean two different things. In the first part it means 'supply to a licensee only' and in the second part 'supply to a consumer only'. Further in first proviso to Section 14, the word 'supply' has been used specifically to mean 'distribution of electricity'. In Section 62(2) the word 'supply' has been used to refer to 'supply of electricity by a trader'.

To assign the same meaning to the word "supply" in Section 23 of the Act, as is assigned in the interpretation section, it is, in our opinion, necessary to take recourse to the doctrine of harmonious construction and read the statute as a whole. Interpretation of Section indisputably must be premised on the scheme of the statute. For the purpose of construction of a

statute and in particular for ascertaining the purpose thereof, the entire Act has to be read as a whole and then chapter by chapter, section by section and word by word.

{See Reserve Bank of India, v. Peerless General Finance and Investment Co. Ltd, [(1987) 1 SCC 424] ; Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India, [(1992) 2 SCC 343] and National Insurance Co. Ltd. v. Swaran Singh, [(2004) 3 SCC 297]. }

Thus, in a case where interpretation of a Section vis-à-vis the scheme of the Act, the purport and object of the legislation, particularly having regard o the mischief it seeks to remedy; the chapter heading as also the marginal note, in our opinion, are relevant.

PURPOSIVE CONSTRUCTION

Legislation has an aim, it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn like nitrogen, out of air ; it is evidenced in the language of the statute, as read in the light of other external manifestations of purpose. [See Justice Frankfurtir, Some Reflextions on the reading of Statutes, 47 Columbia LR 527, at page 538 (1947) ; Union of

India v. Ranbaxy Laboratories Ltd. and others ; { (2008) 7 SACC 502 }and D. Purushotam Reddy and another vs. K. Sateesh, {(2008) 11 SCALE 73}].

ANALYSIS

In this case the relevance of chapter heading is more for the purpose of arriving at a conclusion as to whether the arrangement and scheme of the statute is such it can be said be relatable to different types of licensees on the one hand and a generating company which does not require a licence on the other. If by reason of a provision of a statute the generating companies are excluded from the licensing provisions, one of the principal tool of interpretation is that the mischief which was sought to be remedied may not be brought back by a side door. It has to be borne in mind that if the licence raj is brought back through the side door or regulations seeking to achieve the same purpose which the Parliament intended to avoid, there would be a possibility of mis-interpretation and mis-application of statute.

For the said purpose even the history of the Act may be noticed. It is from this point of view that the ambiguity, if any, must be found out.

If the marginal note in this case is given effect to it would come within the scheme. If it is not given effect to and plain meaning is resorted

to it will produce anomaly with the purpose and object of the Act. Chapter IV in which Section 23 occurs deals with a particular category of licensees. Almost all the sections preceding Section 23 as also Section 24 refer to the licensees and the licensees alone. None of the sections in the said chapter refers to generating companies.

Furthermore in the scheme of the Act wherever regulation of generating companies is necessary the same has been provided for. Section 11 and Section 60 provide for adequate indication in this behalf. They deal with extra ordinary situations.

Transmission of electrical energy does not come within the purview of section 23. Trading therein also does not per say come within the purview thereof.

It has to be construed harmoniously with other powers. Had the power of the Commission to issue direction in regard to supply of electrical energy was so pervasive, Section 23 could have been appropriately worded.. It could have been placed in an appropriate chapter and not in the chapter dealing with licensing. There was also no necessity to bring out transmission of electricity from the purview thereof as the same would also come within the purview of supply of electricity. If transmission of

electricity can be kept outside the purview of direction by the Commission, there is no reason why generation thereof would not be.

We, therefore, of the opinion that Section 23 of the 2003 Act does not contemplate issuance of any direction by the Commission.

SECTION 86 – FUNCTION OF THE COMMISSION

Section 86 provides for the functions of the Sate Commission, clause (a) of sub-section (1) whereof empowers it to determine the tariff for generation, supply, transmission and wheeling of electricity. Clause (b) empowers it to regulate electricity purchase and procurement process of distribution licensees. Inevitably it speaks of PPA. PPA may provide for short term plan, a mid term plan or a long term plan. Depending upon the tenure of the plan, the requirement of the distribution licensee vis-à-vis its consumers ; the nature of supply and all other relevant considerations, approval thereof can be granted or refused.

While exercising the said function necessarily the provisions of Section 23 may not be brought within its purview. While even exercising the said power the State Commission must be aware of the limitations thereo as also the purport and object of the 2003 Act. It has to take into consideration that PPA will have to be dealt with only in the manner

provided therefor. The scheme of the Act, namely the generation of electricity is outside the licensing purview and subject to fulfillment of the conditions laid down under Section 42 of the Act a generating company may also supply directly to consumer wherefor no licence would be required, must be given due consideration. The said provision has to be read with Regulation 24. In regard to the grant of approval of PPA the procedures laid down in Regulation 24 are required to be followed. While exercising its power of 'Regulation' in relation to purchase of electricity and procurement process of distribution, it is not permissible for the Commission to direct allocation of electricity to different licensees keeping in view their own need. Section 86(1)(b) read with Section 23 if interpreted differently would empower the Commission to issue direction to the generating company to supply electricity to a licensee who had not entered into any PPA with it. We do not think that such a contingency was contemplated by the Parliament. A generating company, if the liberalization and privatization policy is to be given effect to, must be held to be free to enter into an agreement and in particular long term agreement with the distribution agency, terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price,

mode of supply the need of the distributing agency vis-à-vis the consumer, keeping in view its long term need are not found to be reasonable, approval may not be granted. A generating company has to make a huge investment and assurances given to it that subject to the provisions of the Act he would be free to generate electricity and supply the same to those who intend to enter into an agreement with it. Only in terms of the said statutory policy, he makes huge investment. If all his activities are subject to regulatory regime, he may not be interested in making investment. The business in regard to allocation of electricity at the hands of the generating company was the subject matter of the licensing regime. While interpreting the statute it must be borne in mind that such a mechanism should not come back.

That, however, would not mean that the generating company is absolutely free from all regulations. Such regulations are permissible under the 2003 Act ; , one of them being fair dealing with the distributor. Thus, other types of regulations should not be brought in which were not contemplated under the statutory scheme. If he is exercising his dominant position, Section 60 would come into play. It is only in a situation where a generator may abuse or misuse his position the Commission would be entitled to issue a direction. The regulatory regime of the Commission, thus, can be enforced against a generating company if the condition precedent therefor becomes applicable.

INTERRETATION OF SECTION 86

Section 86(1)(b) provides for regulation of electricity purchase and procurement process of distribution licensees. In respect of generation its function is to determine, the tariff for generation as also in relation to supply; transmission and wheeling of electricity. Clause (b) of sub-section (1) of Section 86 provides to regulate electricity purchase and procurement process of distribution licensees including the price at which the electricity shall be procured from the generating companies or licenses or from other sources through agreements. As a part of the regulation it can also adjudicate upon disputes between the licensees and generating companies in regard to the implementation, application or interpretation of the provisions of the said agreement.

There are some provisions which provide for regulation etc. of generation and/or generating companies, namely –

(i) Section 10(3)

(ii) Section 11(2)

(iii) Section 23

(iv) Section 33(2)

(v) Section 55(2) and (3)

(vi) Section 60

(vii) Section 62(1), (2) and (95)

(viii) Section 81(1)(a), (b), (e), (f) and sub-section (2)

(ix) Section 128(1), (6), (7) and (8)

(x) Section 129

(xi) Section 181

The Parliament thought it necessary to provide for specific provisions for the purpose of regulating the functions of the generating companies, those provisions are special provisions vis-à-vis the other general provisions which take within its abridge the function of the distributor, transmitter and trader.

In U.P. Power Corporation Ltd. v. NTPC and others, [2009 (3) SCALE 620] this Court opined :

> "There cannot be any doubt whatsoever that the word 'regulation' in some quarters is considered to the unruly horse."

[See also Bank of New South Wales v. Commonwealth {(1948) 76 CLR 1} and Prasar Bharti and others v. Amarjeet Singh and others, { 2007 (2) SCALE 486 }].

We may notice a comparative chart of the provisions of Section 22(1)(c) of 1998 Act and Section 86(1)(b) of the 2003 Act.

Section 22(1)(c) of the 1998 Act		Section 86(1)(b) of the 2003 Act
to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;		regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

A critical comparison of the said provisions would show that the agreements for purchase of power referred to therein is directly linked with the procurement process of distribution license either from the generating companies or licensees or from other sources. Regulation of transmission has been taken out of the regulatory provision. The words 'through agreements for purchase of power' inserted in Section 86(1)(b) of the 2003 Act bring about a significance distinction. It is neither irrelevant nor immaterial as contended by Dr. Singhvi.

A PPA may be a long term one or a short term one. Regulations have been made by the Commission by making MERC (Terms and Conditions of Tariff) Regulations, 2005.

Short term power procurement refers to an agreement for procurement of power for a period of less than one year. Regulation 23.1 requires the distribution licensee to prepare a five year plan inter alia upon taking into consideration the sources for procurement thereof. Regulation 24.1 mandates obtaining of prior approval of the Commission therefor. Approval by Commission is granted upon examining the process of procurement having regard to the factors specified in Regulation 24.2. It is in the aforementioned context grant of approval of the PPA by and between TPC (G) on the one hand and BEST and TPC (D), on the other hand, necessitated. The proposal of TPC (G) that RInfra should enter with it a long term agreement assumes significance.

RE: HARDSHIP OF RIinfra

For the purpose of interpretation and/or application of a statute, this Court cannot base its decision on any hypothesis. Construction of a statute, save and except some exceptional cases, cannot be premised on the hardship of a party which may be suffered by one of the licensees. Enabling provisions are made for entering into a free contract.

A company incorporated under the Companies Act being not a citizen of India does not have any fundamental right to carry on business in terms of

Article 19(1)(g) of the Constitution of India; its shareholders and directors have. Even otherwise in a free market economy right to enter into contract by and between two private parties are not to be discouraged in absence of any statute or statutory regulation. The intendment of Parliament in making statute is clear and unambiguous. Requirements of a licensee and/or sheer number of its consumers, in our opinion, would be wholly irrelevant for the purpose of the construction of a statute.

RELEVANCE OF SECTION 60

It is, in the facts and circumstances of this case, not necessary for us to consider an extraordinary situation where the Commission may exercise its jurisdiction both under Section 86(1)(b) and Section 60 simultaneously. We are also not concerned with any extra ordinary situation. Assuming that such a contingency may take place and having regard to Sections 23 & 60 of the Act while issuing direction to the licensee company the right of a generating company may also be affected., but we are not concerned with such a situation. The Commission which is an expert body has not found that any such case has been made out for exercise of its jurisdiction in that behalf.

The 2003 Act even permits the generating company to supply electricity to a consumer directly. For the said purpose what is necessary is to comply with the provisions of the Act , Rules and the Regulations.

Section 14 of the Act categorically provides for grant of licnece to any person who is transmitting electricity or distributing supply or undertaking trading therein, indisputably, however, the generator of an electrical energy, although is not subject to the grant of licence but while supplying electrical energy to a distributing agency, in turn would be subject to approval and directions of the Commission.

CONCLUSION

1) Activities of a generating company are beyond the purview of the licensing provisions.

2) The Parliament therefor did not think it necessary to provide for any regulation or issuance of directions except that which have expressly been stated in the Act.

3) Section 21 occurs in the chapter of "licensing" under which the generating companies would not be governed.

4) As almost all the sections preceding Section 23 as also Section 24 talk about licensee and licensee alone, the word "supply" if

given its statutorily defined meaning as contained in Section 2(70) of the Act would lead to an anomalous situation as by reason thereof supply of electrical energy by the generating company to the consumers directly in terms of Section 12(2) of the Act as also by the transmission companies to the consumers would also come within its purview.

5) In a case of this nature the principle of exclusion of the definition of Section by resorting to "unless the context otherwise requires" should be resorted to.

6) Section 86(1)(a) of the 2003 Act clearly shows the para meters of supply for the purpose of Regulation, viz. supply of electricity by the distribution company to the consumer.

7) If regulatory clause is sought to be applied in relation to allocation of power, the same would defeat the de-licensing provisions. Generating companies have the freedom to enter into contract and in particular long term contracts with a distribution company subject to the regulatory provisions contained in the 2003 Act. .

8) PPA for a long term is essential for increasing and decreasing the capacity of generation of electricity by the generating

company, which purpose by the 2003 Act must be allowed to be achieved.

9) Duration of the contract in regard to supply of electricity by and between TPC (G) and RInfra prior to coming into force of the contract is of no consequence, particularly when no written long term or short term contract had been entered into by and between them.

10) Fairness or otherwise of the supply of electricity to different distribution companies being outside the jurisdiction of the Commission, the same by itself cannot be a ground for bringing back the licence raj, which is not contemplated by the Act.

11) For true and correct construction of the Act, the principle of harmonious construction is required to be resorted to.

12) Recourse to the principle of purposive construction does not militate against the conclusion reached by us and as indicated hereinbefore in fact in terms of the said doctrine the purpose and object of the Parliament must prevail over a narrow and/or literal interpretation, which would defeat the purpose and object of the Act.

13) Section 86(1)(b) of the 2003 Act clearly shows that the generating company indirectly comes within the purview of regulatory jurisdiction as and when directions are issued to the distributing companies by the appropriate Commission but the same would not mean that while exercising the said jurisdiction, the Commission will bring within its umbrage the generating company also for the purpose of issuance separate direction.

For the aforementioned reasons, the impugned judgment of the Tribunal cannot be sustained. It is set aside accordingly. The appeals are allowed with costs. Counsel's fee Rs. 1,00,000/- (Rupees one lakh) in each appeal.

……J.
[S.B. Sinha]

……J.
[Dr. Mukundakam Sharma]

New Delhi
May 06, 2009